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National Reporter System—State Series

# THE SOUTHEASTERN REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 72  
PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE  
SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST VIRGINIA  
THE SUPREME COURTS OF NORTH CAROLINA AND SOUTH  
CAROLINA, AND THE SUPREME COURT AND  
COURT OF APPEALS OF GEORGIA

WITH TABLE OF SOUTHEASTERN CASES IN WHICH REHEARINGS  
HAVE BEEN DENIED

OCTOBER 7, 1911—JANUARY 6, 1912

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OF THE

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### WEST VIRGINIA—Supreme Court of Appeals.

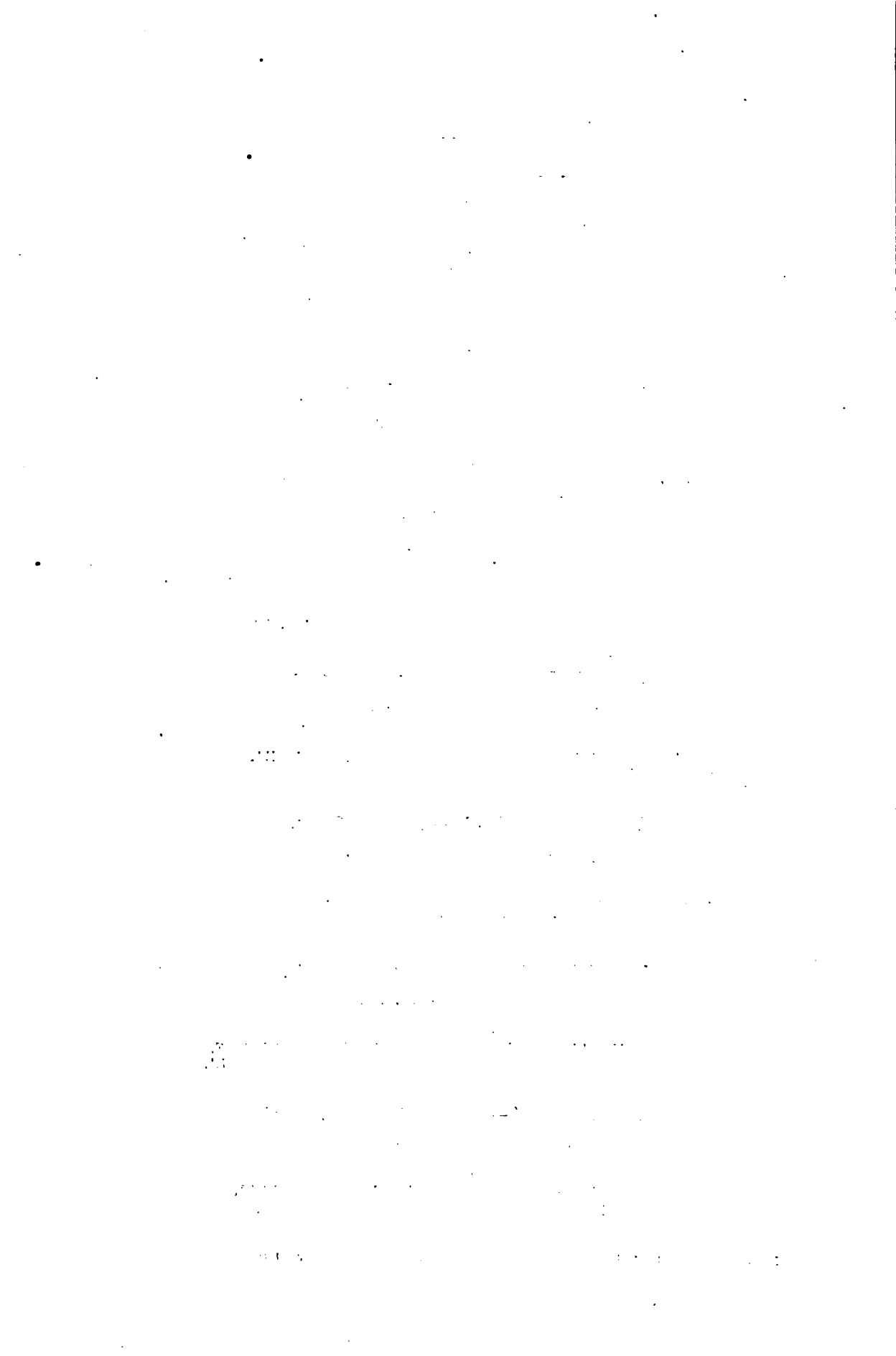
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JUDGES.

HENRY BRANNON. WILLIAM N. MILLER.  
GEORGE POFFENBARGER. IRA E. ROBINSON.

<sup>1</sup> Resigned October 20, 1911.

<sup>2</sup> Appointed October 20, 1911.



# COURT RULES

## SUPREME COURT OF APPEALS OF VIRGINIA

In the Supreme Court of Appeals, held at the Library Building in the City of Richmond on Wednesday, the 22d day of November, 1911:

"Ordered, that from and after this date the Virginia Reports preceding 75 Virginia shall be numbered in the following sequence, and they may be so cited in this and the other courts of the commonwealth:

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And the official reporter of the court is directed to publish this order on one of the fronting pages of the next two ensuing volumes of the Virginia Reports.





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# THE SOUTHEASTERN REPORTER VOLUME 72

(156 N. C. 1)

SWINDELL et al. v. SMAW.

(Supreme Court of North Carolina. Sept. 13, 1911.)

## 1. QUIETING TITLE (§ 23\*)—POSSESSION OF PLAINTIFF—STATUTORY PROVISIONS.

An action to quiet title brought under Revisal 1906, § 1589, may be brought by a plaintiff who is not in possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.\*]

## 2. WILLS (§ 614\*)—CONSTRUCTION—ESTATES DEvised—LIFE ESTATE OR FEE—"HEIRS."

Testatrix gave to her husband "all my possessions, land, stock, farming implements, household and kitchen furniture, him all I have, his life time (if I leave know heirs)," with the request that, if testatrix left no heirs, he would give all to persons named. *Held*, that the word "heirs" was to be construed as meaning "children," and that it was the intention of testatrix that the property should go to her husband for life, then to her children, should she leave any at her death, and then over to the persons named.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677-7678.]

## 3. QUIETING TITLE (§ 30\*)—PARTIES—REMAINDERMEN—HEIRS AND NEXT OF KIN.

In an action to quiet title brought by heirs at law of a testatrix against her surviving husband in possession of the property, as tenant for life with remainder over, the remaindermen should be made parties and also the other heirs and the next of kin of the testatrix.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 64-66; Dec. Dig. § 30.\*]

Appeal from Superior Court, Beaufort County; O. H. Allen, Judge.

Action by George L. Swindell and others against S. V. Smaw. Judgment for plaintiffs, and defendant appeals. Reversed.

Ward & Grimes, for appellant. Nicholson & Daniel, for appellees.

CLARK, C. J. Mollie F. Smaw died, leaving as her last will and testament the following paper writing: "I, Mollie S. Smaw, while in good health and right mind, give unto my husband, Samuel V. Smaw, all my possessions, land, stock, farming implements, household and kitchen furniture him all I have, his life time (if I leave know heirs) he must pay all my debts, if any, I leave him executor

to my will. I will make a request of him if I leave know heirs. I would like for him to give all to Earnest and Myrtle Swindell, Myrtle S.—my organ and watch and chain after his death. This is my only and last will as have settled all my father's debts and payed all the heirs I feel as I can do as I choose with what little I have. Signed this day, June 21st, 1899. Mollie S. Smaw. [Seal.] [Duly witnessed.]"

[1] This action is brought by certain of the heirs at law of the deceased against her husband who is in possession of the property to remove a cloud upon title under Revisal, § 1589, alleging that he is claiming the same in fee simple, whereas the alleged will is void for uncertainty, and the defendant is entitled only to a life estate as tenant by the curtesy, or, at most, under the will he has a life estate only. Such action can now be brought, though the plaintiff is not in possession. *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635; *McLean v. Shaw*, 125 N. C. 492, 34 S. E. 634.

[2] The will is very inartificially drawn, but we do not think it is so unmeaning as to be void. The devise to the husband is specifically for "his life time," and there is nothing in the will to extend it beyond that time. The request that, if she should leave no heirs, she wishes him to give all to Earnest and Myrtle Swindell, does not show that she intended for him to have more than a life estate, but the contrary. It is badly expressed, but the meaning is that they are to have all her property after her husband's death if she should die leaving no heirs. By the word "heirs" she evidently meant "children," which is not an unusual use of the word among those who do not know its technical meaning in the law. The testatrix intended by this will, as we understand it, that the property should go to her husband for life, then to her children should she leave any at her death, and, if none, then over to Earnest and Myrtle Swindell, with a special provision that Myrtle should have her organ and watch and chain.

In *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756, as to an item in a will very similar to

this, where there was a devise of property to A. for life, and, should A. die without leaving children, then over to the testator's heirs, the court held that A. held a life estate with a remainder to the children. This has been cited and approved in *Wilkinson v. Boyd*, 136 N. C. 47, 48 S. E. 516; *Anderson v. Wilkins*, 142 N. C. 161, 55 S. E. 272, 9 L. R. A. (N. S.) 1145; *Cox v. Jernigan*, 154 N. C. 584, 70 S. E. 949.

[3] Earnest and Myrtle Swindell should have been made parties to this proceeding. But, as the decision is in their favor, we do not hold the case up till they are made parties. When the case goes back for final judgment below, upon the facts agreed, it will be well to have them made parties, also any other heirs and next of kin of the testatrix, if any, who are not already parties to this action.

Reversed.

(156 N. C. 10)

#### ELLIS v. TRUSTEES OF GRADED SCHOOL OF OXFORD.

(Supreme Court of North Carolina. Sept. 13, 1911.)

##### 1. SCHOOLS AND SCHOOL DISTRICTS (§ 90\*)—AUTHORITY TO CREATE.

While the Legislature may create special public quasi corporations such as graded school districts and give them power to contract debts, levy taxes, etc., the constitutional restrictions as to municipal indebtedness and as to exercise of the powers granted must be observed.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 90.\*]

##### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 97\*)—INDEBTEDNESS—CONSTITUTIONAL LIMITATIONS—"NECESSARY EXPENSE"—"MUNICIPAL CORPORATION."

Graded school districts are public quasi corporations within the term "municipal corporation," as used in Const. art. 7, § 7, prohibiting any city, town, or other municipal corporation from contracting debts except for necessary expenses, unless by vote of the qualified voters; so that a graded school district could not issue bonds to erect a school building unless their issue was approved by a majority of the qualified voters; the erection of a school building not being a "necessary expense" within section 7.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 97.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4620-4627; vol. 8, p. 7726; vol. 5, pp. 4715-4716.]

##### 3. SCHOOLS AND SCHOOL DISTRICTS (§ 108\*)—MUNICIPAL INDEBTEDNESS—PAYMENT—TAXATION.

The payment of bonds issued by a graded school district of a town for erecting a school building may be enforced by appropriate taxation, whether they expressly provide for that means of payment or not, and irrespective of whether they are secured by a mortgage on the school building.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 108.\*]

Appeal from Superior Court, Granville County; O. H. Allen, Judge.

Suit by S. V. Ellis against the Trustees of the Graded School of Oxford, N. C. From a judgment dissolving a temporary injunction restraining the issuance and sale of bonds, plaintiff appeals. Reversed.

Defendants, the Trustees of the Graded School of the Town of Oxford, N. C., Incorporated, having determined to issue bonds to the amount of \$20,000 as a debt of said Graded School District, Incorporated, and having advertised same for sale, the plaintiff, a citizen and taxpayer of the town, instituted the present action to restrain the said bond issue, claiming that said proposed action was unlawful because the proposition had not been approved by the vote of the people. The court, being of opinion that the board on the facts presented had the power to issue and sell the bonds, gave judgment that the preliminary restraining order be dissolved, and that the trustees be allowed to proceed, whereupon plaintiff excepted and appealed to the Supreme Court.

Graham & Devin, for appellees.

HOKE, J. On the hearing it was made to appear that the General Assembly by chapter 333, Laws 1903, had incorporated the graded school district of the town of Oxford, conferring upon the board of trustees the power of general supervision and control of school matters within said district, and among other things making provision as follows: "The said Board of Graded School Trustees hereby created shall be a body politic and corporate, by the name and style of the Board of Graded School Trustees of the Town of Oxford, and by that name shall be capable of receiving gifts and grants, purchasing and holding real and personal property, selling, mortgaging and transferring the same for school purposes, and of prosecuting and defending suits for or against the corporation hereby created. Conveyances to said board shall be to it and its successors in office, and all deeds, mortgages and other agreements affecting real estate and personal property shall be deemed sufficiently executed when signed by the chairman of said Board of Graded School Trustees and attested by the secretary." Section 6. The act conferring power also to levy a tax not exceeding 30 cents on the hundred dollars valuation of property and 90 cents on the polls for the support of the graded schools of the district had been duly submitted and approved by a vote of the people of the district as directed by the statute itself, and in accord with constitutional requirement. In the case agreed the facts pertinent to the inquiry are further stated as follows: (4) "That by chapter 108, Pr. Laws 1911, legislative authority was granted to defendant board to issue bonds for the erection of a graded school building in said town for school

purposes, said act of 1911 setting out the manner thereof, with authority to execute deed of trust on said property to secure same. This act of 1911 does not provide for any tax levy in addition to that provided by the act of 1903. \* \* \* It is agreed that the act of 1911 may be read in full as if inserted here. \* \* \* (5) That no election was provided or held under said act of 1911. (6) That the defendant board has advertised for sale, and is now offering for sale, \$20,000 in bonds executed by said board, and, unless restrained, will issue said bonds as the obligation of said board." On these facts the court is of opinion that the bonds in question would not be valid obligations of the school district, and that their issue in the form as now proposed should be permanently enjoined.

[1] While it is now well established with us that the "Legislature may create special public quasi corporations for governmental purposes in designated portions of the state territory," and "confer upon them power to contract debts, levy taxes," etc. (*Trustees of Youngsville Township v. Webb*, 155 N. C. 379, 71 S. E. 520), it is also as fully recognized that, when in the exercise of such power a given district has been created, the restrictions and limitations provided by the Constitution in reference to municipal indebtedness and as to the methods and powers of taxation of such corporations must be observed (*Smith v. School Trustees*, 141 N. C. 143, 53 S. E. 524). In article 7, § 7, Const., this being the section more directly relevant to this inquiry, it is provided "that no county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or contracted by any officers of the same, except for the necessary expenses thereof unless by a vote of the majority of the qualified voters therein."

[2] And the doctrine as above stated in reference to this and other restrictive provisions of the Constitution which are applicable will be found very well stated in the third and fourth headnotes of *Smith v. School Trustees*, supra, as follows: "(3) The Legislature can create a specific school district within the precincts of a county, incorporate its controlling authorities, confer upon them certain governmental powers, and, when accepted and sanctioned by a vote of the qualified electors within the prescribed territory as required by our Constitution (article 7, § 7), may delegate to such authorities power to levy a tax and issue bonds in furtherance of the corporate purpose. (4) School districts are public quasi corporations, included in the term 'municipal corporations' as used in article 7, § 7, of our Constitution, and so come within the express provisions of section 7, that 'no county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, etc.; nor shall any tax be levied, etc., unless

by a vote of the majority of the qualified voters therein.' And the principle of uniformity is established and required by section 9 of this article."

Again, in *Hollowell v. Borden*, 148 N. C. 255, 61 S. E. 638, it was held: "(1) A legally qualified board of trustees of the graded schools of a town is a municipal corporation within the meaning and purport of article 7, § 7, of the State Constitution. (2) The expense of a public school system of a town is not a necessary municipal expense, and a bond issue to pay a debt contracted for that purpose, to be constitutional, must be submitted to a vote of the qualified voters of the township." The erection of this school building, therefore, not being a necessary expense within the meaning of the constitutional provision, it follows from these and other decisions of similar import that the proposed indebtedness could not be lawfully incurred "unless approved by a majority of the qualified voters of the school district." It is insisted for defendants that, although no election has been had and none provided for under the statute of 1911, the power was conferred by the former statute, to wit, chapter 333, Laws 1903, which was submitted to and approved by the voters, and this by virtue of that clause in the act by which trustees were authorized to "purchase and hold real and personal property and to sell, mortgage and transfer the same for school purposes," but the position in our opinion cannot be sustained. It may be that, if the proposition now presented was to issue these bonds, secure the same by a mortgage on the building, and with the stipulation that the owner could in no event hold the municipality for any sum greater than could be realized by foreclosure sale under the mortgage, the authority to mortgage contained in the act of 1903 would suffice; but such is not the proposition embodied in the case agreed. There is no allegation that this indebtedness shall be restricted to the proceeds of the mortgage. We do not find it stated that a mortgage is even intended.

[3] On the contrary, these bonds, to the amount of \$20,000, whether secured by a mortgage on the building or not, are to constitute a valid municipal indebtedness, and, where this is true, it is very generally held that payment may be enforced by appropriate taxation, and this whether provision is expressly made for such taxation or not. *City of Charlotte v. Shepard*, 122 N. C. 602, 29 S. E. 842; 1 *Abbott on Municipal Corporations*, p. 360. In the last citation the general principle is expressed as follows: "Corporate indebtedness legally incurred for a public purpose by the corporation in its capacity as a public or governmental agent is generally paid through the imposition and collection of taxes, and, as will be noted in a succeeding section (310), the payment of a valid indebtedness is considered a public purpose, and one authorizing such action. In

the absence of a constitutional or statutory limitation upon the power to tax, the granting of the authority to incur an indebtedness impliedly authorizes the levy of taxes sufficient to pay the debt and the interest as it becomes due (311). Though some few cases hold to the contrary, the weight of authority is sustained by the better reason." A statute conferring power to create a debt to be secured by mortgage on a specific piece of property in its ordinary management is a very different proposition from the power to contract for a large municipal indebtedness, enforceable by taxation on all the property in a given district. A voter might very well be disposed to approve the one, and be entirely opposed to the other. We are of opinion, therefore, that the proposed bond issue comes directly within the provisions of article 7, § 7, of the Constitution, that no vote of the people has been had thereon, and that the issue in the form as now proposed should be permanently enjoined.

There is error, and this will be certified that judgment shall be entered according to this opinion.

Reversed.

(186 N. C. 3.)

#### SUTTON v. LYONS et al.

(Supreme Court of North Carolina. Sept. 13, 1911.)

#### 1. MASTER AND SERVANT (§ 284\*)—ACTION FOR INJURIES—QUESTION FOR JURY.

On the evidence in an action for personal injuries the question as to whether defendant owned and operated the mill in which plaintiff was injured while at work *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 284.\*]

#### 2. PROPERTY (§ 9\*)—EVIDENCE AS TO TITLE.

Evidence of the possession of personal property is evidence of title, in the absence of other proof.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9;\* Evidence, Cent. Dig. § 78.]

#### 3. MASTER AND SERVANT (§ 330\*)—ACTION FOR INJURIES—BURDEN OF PROOF—NEGLIGENCE.

Where plaintiff has suffered an injury from the negligent management of a vehicle such as a boat, car, or carriage, it is sufficient *prima facie* evidence that the negligence was imputable to the defendant, and showed that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

#### 4. PRINCIPAL AND AGENT (§ 22\*)—EVIDENCE OF AGENCY—DECLARATIONS OF AGENT.

In an action for injuries, the plaintiff, for the purpose of showing that the person who managed a mill situated on defendant's land was defendant's agent, offered defendant's tax list for a certain year signed by such manager as "agent." *Held*, that the tax list amounted to no more than a declaration, and that, as an agency must be proved aliunde, the declarations of the alleged agent both as to the establishment

of the agency and the nature and extent of his authority were inadmissible.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.\*]

#### 5. PRINCIPAL AND AGENT (§ 21\*)—EVIDENCE OF AGENCY—TESTIMONY OF AGENT UNDER OATH.

Agency may be shown by the testimony of the agent under oath.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 39; Dec. Dig. § 21.\*]

Appeal from Superior Court, Currituck County; Justice, Judge.

Action by H. V. Sutton against Hannah Lyons and others. Judgment for defendants, and plaintiff appeals. New trial.

The plaintiff alleges that he was injured by the negligence of the defendant on the 7th of August, 1906, while working at her mill, and that the negligence consisted in a defect in the machinery. The defendant denies negligence, and also denies that she was the owner of the mill, or that she operated it. The defendant admits in her answer that the mill is located on her land, and that it was engaged in sawing some of the timber on the land, but that it has not been in operation for 12 months. The defendant further alleges that the plaintiff was a trespasser in going upon said premises, and that he was there contrary to the express orders and directions of the defendant. It was in evidence that W. J. Tate managed the mill, and, for the purpose of showing that he was agent of the defendant Lyon, the plaintiff offered in evidence the tax list of the plaintiff for the year 1906, signed "W. J. Tate, agent," which was excluded, and the plaintiff excepted. There was some evidence of negligence, and that this was the cause of the plaintiff's injury, but his honor, being of opinion that there was no evidence that the defendant Lyon was the owner of the mill and operated it, entered a judgment of nonsuit, on motion of the defendant, and the plaintiff excepted and appealed.

W. M. Bond and Ward & Grimes, for appellant. J. C. B. Ehringhaus and E. F. Aydlett, for appellees.

ALLEN, J. (after stating the facts as above). [1] In our opinion there was evidence fit to be submitted to the jury. It is not conclusive in its nature, and may be weakened or strengthened, when all the facts are developed. The size of the mill, and whether easily moved from one place to another, would be material circumstances. The admission that she is the owner of the land on which the mill is located is some evidence that she is the owner of the mill.

[2] If affixed to the soil, it would be a part of the land, nothing else appearing, and, if not and it was personalty, the fact that it is on her land is evidence of possession, and evidence of the possession of personalty is evidence of title, in the absence of other



proof. There is also evidence that the defendant was exercising dominion over the property, as she says she had given direction for the plaintiff to stay off the premises. The circumstance that the mill "is situated" on the land, and "has not been in operation during the past twelve months," is entitled to some weight, as ordinarily valuable property, not in use, is not left so long on the land of another.

[3] If there is evidence that the defendant is the owner of the mill on her land, and sawing her timber, this could be considered by the jury on the question of the operation of the mill. "Where the plaintiff has suffered an injury from the negligent management of a vehicle, such as a boat, car, or carriage, it is sufficient prima facie evidence that the negligence was imputable to the defendant to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent contractor or other person, for whose negligence the owner would not be answerable. 1 Sherm. and Redf. Neg. 71. Any other rule, especially where persons are dealing with corporations which can act only through agents and servants, would render it almost impossible for a plaintiff to recover for injuries sustained by defective machinery or negligent use of machinery." *Midgette v. Manufacturing Co.*, 150 N. C. 341, 64 S. E. 8.

[4] The abstract of taxes was not admissible in evidence. It was offered to show that Tate was the agent of the defendant, but it amounted to no more than a declaration, and an agency cannot be proved in this way. "That an agency must be proved aliunde the declarations of the alleged agent is elementary law, and this is true both as to the establishment of the agency, and the nature and extent of the authority." *West v. Grocery Co.*, 138 N. C. 168, 50 S. E. 566.

[5] It may, however, be established by the testimony of the agent under oath. *Machine Co. v. Seago*, 128 N. C. 160, 38 S. E. 805.

The judgment of nonsuit is set aside, and a new trial ordered.

New trial.

(156 N. C. 19)

OWENS et ux. v. HORNTHAL et al.

(Supreme Court of North Carolina. Sept. 13, 1911.)

# 1. LIMITATION OF ACTIONS (§ 85\*)—STAY—ABSENCE OF MORTGAGEE FROM STATE.

While in ejectment the absence of the owner from the state does not suspend limitations where there is a tenant in possession against whom the action may be brought, ejectment being a possessory action, a suit to vacate a mort-

gage foreclosure sale for fraud is equitable, and the mortgagees making the sale, of whom an accounting for rents and profits is sought, are necessary parties, so that the absence of one of them from the state would stay limitations; Revisal 1905, § 391, subsec. 4, requiring an action for the redemption of a mortgage where the mortgagee has been in possession to be brought within 10 years, applying.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 449-455; Dec. Dig. § 85.\*]

## 2. MORTGAGES (§ 516\*)—FORECLOSURE—FRAUD—RELATIONSHIP OF PURCHASER.

No presumption of fraud arises because a purchaser at a mortgage foreclosure sale is the son of one and the nephew of another of the mortgagees.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 516.\*]

## 3. MORTGAGES (§ 529\*)—SALE UNDER FORECLOSURE—ANNULING—ACTIONS—SUFFICIENCY OF EVIDENCE—FRAUD.

In an action to set aside a mortgage foreclosure sale on the ground that the purchaser purchased for the mortgagees, evidence held to present a question for the jury as to whether the sale was fraudulent.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 529.\*]

## 4. MORTGAGES (§ 529\*)—SALE—VACATING—ADMISSION OF EVIDENCE.

In a suit to set aside a mortgage foreclosure sale for fraud and for an accounting for rents and profits, deeds for timber sold from the land by the purchaser were admissible on the issue of accounting as tending to show the amount received for the timber.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 529.\*]

## 5. MORTGAGES (§ 553\*)—SALE—VACATING—RELIEF—ACCOUNTING.

If a mortgage foreclosure sale was void for fraud, the relation of mortgagor and mortgagee continued, and the mortgagee who purchased from the purported purchaser must account for money received from timber sold from the land after the attempted foreclosure, though the timber had at that time greatly increased in value.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1518; Dec. Dig. § 553.\*]

## 6. MORTGAGES (§ 529\*)—SALE—VACATING—PROCEEDINGS—BURDEN OF PROOF.

In a suit by the mortgagor's heir to vacate a mortgage foreclosure sale for fraud, the burden of showing fraud was upon plaintiff.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 529.\*]

## 7. TRIAL (§ 296\*)—INSTRUCTIONS—CURE OF ERROR.

In an action in which the burden was upon plaintiff to prove an issue, error in a charge that "the whole evidence of the plaintiff makes out a prima facie case" was not prejudicial where the court further charged that plaintiff's evidence was to go to the jury for what it was worth, and it, with the evidence of the defendant, is left with the jury, the burden of proving the issue being on the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.\*]

Appeal from Superior Court, Washington County; Ward, Judge.

Action by L. L. Owens and wife against L. H. Hornthal and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Mrs. Caroline B. Hilliard was the owner of a half interest in the lands set out in complaint known as the "Polly Garrett lands." On February 13, 1885, Caroline B. Hilliard and her husband, J. P. Hilliard, executed a mortgage on said one-half interest to the defendant L. H. Hornthal and his copartner, L. Hornthal. The mortgage had the usual power of sale. L. H. Hornthal afterwards acquired the interest of his brother and comortgagee. After said mortgage was executed, the said Caroline B. Hilliard, the owner of the one-half interest, died, leaving four children, the feme plaintiff being one, and therefore the owner by descent of a one-eighth interest in said lands. On March 2, 1896, in default of payment, the mortgagees sold the land under the power contained in the mortgage at the courthouse, when L. P. Hornthal, son of L. H. and nephew of L. Hornthal, became the purchaser at \$1,000, the mortgagees executing a deed to him dated March 2, 1896. By deed dated March 27, 1896, for a recited consideration of \$1,000, L. P. Hornthal reconveyed the land to the two mortgagees, L. H. and L. Hornthal. The plaintiff brings this action to set aside the sale (claiming that it was fraudulent and void and that L. P. Hornthal purchased for the mortgagees), and for an accounting of rents and profits.

The court submitted these issues:

"(1) Does the defendant L. H. Hornthal hold one-eighth interest in the Polly Garrett tract of land mentioned in the pleadings as mortgagee for the plaintiff? Answer: Yes.

"(2) What is the amount now due on said one-eighth interest to the defendant on said mortgage? Answer: One-fourth of \$3,182.14—\$795.54.

"(3) What is the net aggregate rental on said one-eighth interest since March 2, 1896? Answer: \$505.

"(4) What is one-eighth value of timber sold by said defendant from said land? Answer: \$518.75.

"(5) Is said cause of action barred by the statute of limitation? Answer: No."

There was a motion for new trial, which was refused. From the judgment rendered, defendants appealed.

E. F. Aydlett, for appellants. W. M. Bond, W. M. Bond, Jr., and Ward & Grimes, for appellees.

**BROWN, J.** 1. It is contended by defendants that the cause of action is barred by the statute of limitations.

The undisputed evidence shows that on March 2, 1896, the date of the attempted foreclosure, the feme plaintiff, the owner of the one-eighth interest, was married and a minor, and continued under disability beyond 1898; that in 1897 or 1898 both mortgagees removed to Norfolk, and have never resided in this state since. The defendants'

evidence establishes that the mortgagees and those claiming under them have been in possession of the lands since the sale March 2, 1896.

[1] It is supposed that the absence of the defendant Hornthal from the state does not prevent the running of the statute. It is true that in an action of ejectment, where there is a tenant or person in possession, against whom action may be brought, the absence of the true owner from the state does not suspend the running of the statute. *McFarland v. Cornwell*, 151 N. C. 428, 66 S. E. 454. That is because ejectment is a possessory action and may be maintained against the person in possession. But this proceeding is essentially equitable in its nature, and the mortgagees who made the sale and who are asked to account for rents and profits are necessary parties. It is governed by Revisal 1905, § 391, subsec. 4. The point is expressly ruled in *McFarland v. Cornwell*, supra.

2. It is contended that his honor erred in denying the motion to nonsuit because there is no evidence that the mortgagees purchased the land at their own sale through L. P. Hornthal.

[2] Although he is the son of one and the nephew of the other mortgagee, no presumption of fraud arises because of such relationship. There are cases which support such presumption when a deed for his property is made by one in failing circumstances to a near relative. *Lee v. Pearce*, 68 N. C. 76; *Smith v. Moore*, 149 N. C. 198, 62 S. E. 892.

But no such presumption arises because of the sole fact that a son of full age buys under a mortgage sale made by his father, the mortgagee. We do not understand his honor to have held to the contrary.

[3] But there is evidence in this record which justified his honor in submitting to the jury the question of the validity and bona fides of the sale of March 2, 1896. While in this case no presumption of fraud arises from it, near relationship to the mortgagees is a circumstance in evidence. It is not sufficient of itself to warrant a verdict, but in this case it is supported by other evidence of a pregnant character. The plaintiff's evidence tends to prove that L. P. Hornthal was insolvent and in debt; that he was a very young man, dependent on his father; that the consideration recited in the reconveyance made shortly after the sale was exactly the sum bid for the land; that there was no advertisement of the land, and that it was bid off by the son for a third or half of its actual value. It is true this evidence is controverted, but it is of such probative force that his honor was justified in submitting the issue to the jury.

[4] 3. The timber deeds from the Hornthals were competent evidence tending to show what they had received for timber sold off this land. So long as the statute does not bar it is immaterial that the timber was sold

by Hornthal long after the attempted foreclosure.

[8] If that was a nullity, the relation of mortgagor and mortgagee continues, and Hornthal must account for whatever he received for the timber at the time he sold it. The fact that gum timber had increased immensely in value between 1896 and 1909 cannot change a well-settled rule of law. It is unfortunate for the defendant Hornthal that he did not proceed to foreclosure in a manner more impregnable than the method pursued.

[6, 7] 4. In concluding his charge, his Honor said to the jury "that the whole evidence of the plaintiff makes out a prima facie case to go to you for what it is worth, and it, with the evidence of the defendant, is left with you to say, the burden of proving the issue being on the plaintiff, to say how you will answer the issue. It is evidence from which you may or may not answer the issue 'Yes.'" We think his honor was inadvertent in using the words "prima facie case," and, if he had gone no further, we would be compelled to award a new trial. But the remainder of the sentence, as well as the entire preceding charge, indicates clearly that the burden of establishing the issue was placed on the plaintiff where it properly belonged. While the use of the words "prima facie case" was erroneous, it was evidently an inadvertence, which, taking the charge as a whole, could not have misled the jury.

We have considered the remaining assignments of error, and find them to be without merit.

No error.

(156 N. C. 596)

#### STATE v. DAVENPORT et al.

(Supreme Court of North Carolina. Sept. 13, 1911.)

#### 1. INDICTMENT AND INFORMATION (§ 132\*)—ALLEGATIONS OF GROUNDS.

The court need not require the solicitor to elect upon which counts of the indictment he will stand until the evidence is in.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 427; Dec. Dig. § 132.\*]

#### 2. TRESPASS (§ 88\*)—CRIMINAL RESPONSIBILITY—FORCIBLE TRESPASS—ADMISSION OF EVIDENCE.

In a prosecution for forcible trespass in going upon land in the possession of prosecutor's agents with force and tearing down lumber camps, evidence as to how far the boundary of the land was from the Virginia state line, offered to show that prosecutor's agents had come onto the land from Virginia and squatted thereon, and avoided a restraining order by recrossing the state line, was not admissible; the only question being whether prosecutor's agents were in possession of the land trespassed upon, and whether defendants attempted to forcibly oust them, the question of title being immaterial.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 88.\*]

#### 3. TRESPASS (§ 82\*)—CRIMINAL RESPONSIBILITY—"FORCIBLE TRESPASS"—NATURE OF OFFENSE.

"Forcible trespass" is the invasion of another's actual possession, done in his presence and under such circumstances as endangers the public peace, being an offense against possession and not against title, so that the question of whether title is in prosecutor or defendant is immaterial.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 172; Dec. Dig. § 82.\*]

#### 4. TRESPASS (§ 82\*)—CRIMINAL RESPONSIBILITY—"FORCIBLE TRESPASS"—DEFINITION.

"Forcible trespass" is the entering upon land in another's actual possession with such force or violence as is calculated to intimidate or alarm the possessor or tending to breach the peace; the amount of force necessary being such as to raise a reasonable apprehension in the mind of the possessor that he must give way to avoid a breach of the peace.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 172; Dec. Dig. § 82.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2877, 2878.]

#### 5. TRESPASS (§ 82\*)—CRIMINAL RESPONSIBILITY—FORCIBLE TRESPASS.

Defendant, with 80 or 40 armed men in the employ of a lumber company, went upon land in the possession of prosecutor's agents, and commanded them to vacate huts thereon used as a lumber camp, and, after they were vacated, burned them. Defendants were prepared to enforce their demands by force of arms had they been opposed. *Held*, that defendants were guilty of forcible trespass, in addition to that of riot and unlawful assembly.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 172; Dec. Dig. § 82.\*]

#### 6. ASSAULT AND BATTERY (§ 52\*)—ASSAULT.

Defendants in going upon land in the possession of another with arms and demanding those in possession to vacate, and burning houses in which they were, were guilty of assault, irrespective of who had title to the land.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 72; Dec. Dig. § 52.\*]

#### 7. TRESPASS (§ 88\*)—CRIMINAL RESPONSIBILITY—FORCIBLE TRESPASS—ADMISSION OF EVIDENCE.

In a prosecution for forcible trespass by going upon land with arms and ousting prosecutor's agents in possession, evidence by defendants to show their constructive possession of the part of the land trespassed upon by the possession of another part under color of title was properly excluded as irrelevant.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 182; Dec. Dig. § 88.\*]

#### 8. CRIMINAL LAW (§ 730\*)—TRIAL—ARGUMENT OF COUNSEL.

In a prosecution for forcible trespass by going with force upon land in the possession of prosecutor's agents, and driving them off, the prosecuting attorney's statements in his argument that defendants should be found guilty as their fines would be paid by the foreign corporation which employed them, whose officers sat in their home office "with slippers on feet and direct this thing to be done." *Held*, that the judge's charge to the jury, which was his only notice of the improper argument, to disregard it, and confine their inquiry to the single question of whether there was a forcible entry, sufficiently obviated the prejudicial effect of the argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1696; Dec. Dig. § 730.\*]

### 9. CRIMINAL LAW (§ 825\*)—TRIAL—INSTRUCTIONS—REQUESTS.

If the court's charge requiring the jury to ignore improper argument was insufficient to remove its prejudicial effect, accused should have requested a further instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

### 10. CRIMINAL LAW (§ 730\*)—TRIAL—IMPROPER ARGUMENT—DUTY OF COURT.

The trial court should promptly rebuke improper argument calculated to prejudice the jury and give such instructions as will remove the prejudice; the time when he should act being largely within his discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.\*]

### 11. CRIMINAL LAW (§ 824\*)—TRIAL—IMPROPER ARGUMENT.

It is better for the trial court to rebuke improper argument of counsel even without the request of the other party.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 824.\*]

### 12. CRIMINAL LAW (§ 1171\*)—APPEAL—HARMLESS ERROR—IMPROPER ARGUMENT.

Where accused was guilty on the admitted facts, any improper argument could not have been prejudicial, requiring reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

### 13. CRIMINAL LAW (§ 59\*)—PRINCIPAL AND ACCESSORIES—ACCESSORIES.

In misdemeanor cases, such as forcible trespass, there can be no accessories.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71-74, 76-81; Dec. Dig. § 59.\*]

### 14. CRIMINAL LAW (§ 59\*)—PARTIES—"AIDERS AND ABETTORS."

One aids and abets in the commission of an offense where he has such a connection with it as at common law would make him guilty as principal in the second degree, which consists of being present and doing some act to aid the actual perpetrator though without taking a direct part in its commission; an aider generally being one who gives aid and comfort, or commands, advises, or encourages another to commit a crime, and persons who were in the employ of accused's employer, and with accused as leader went armed upon land in another's possession, and by force compelled the possessors to vacate and destroyed property thereon, were aiders and abettors in the offense of forcible trespass.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71-74, 76-81; Dec. Dig. § 59.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 291-294.]

Appeal from Superior Court, Gates County; O. H. Allen, Judge.

T. S. Davenport and others were convicted of forcible trespass, and they appeal. Affirmed.

Aycock & Winston, Ward & Grimes, and Chas. Whedbee, for appellants. Attorney General Bickett and G. L. Jones, for the State.

WALKER, J. The defendant Davenport and 17 others were indicted and convicted in the court below of forcible trespass in tearing down three shacks, which had been erect-

ed in a lumber or logging camp, and which were each about 10 feet long and 7 feet wide, made of poles and covered with tar paper, and had been built upon the land two or three days before the alleged trespass. The defendants have appealed to this court, and now allege that the learned judge who presided at the trial committed 34 errors in his several rulings during the hearing of the cause.

The case had its origin in a dispute between the Roper Lumber Company and the Richmond Cedar Works over the title to a certain tract of land lying in that portion of the Dismal Swamp known as the "Allen Swamp," which has as its northern boundary the dividing line between this state and Virginia, along which there is a canal running east and west with the said line. A careful perusal of the evidence taken in the case convinces us that the prosecutor, representing the Roper Lumber Company, and the defendants, representing the Richmond Cedar Works, were at the time of the alleged trespass vying with each other in an effort to gain the actual possession of the premises, in order to gain some advantage in defending the title to the land. The Roper Lumber Company, by its servants and agents, had actual possession of the land known as Allen Swamp at the place where the huts had been constructed. The defendants, representing the Richmond Cedar Works, entered upon this part of Allen Swamp while the prosecutor was in actual and peaceable possession thereof, and ordered its servants and agents, who were then in charge of the same, to quit the premises. There were about 40 members of the invading force, some of whom carried axes and others guns, and, when compliance with their demand was refused, they proceeded to demolish the huts and then to burn them. There was no physical resistance made by those in actual possession of the locus in quo, who held the possession until the cabins began to fall, and then abandoned the premises to the defendants. An extract from the testimony of the principal defendant, T. S. Davenport, will suffice to show the essential facts of the case, upon which our conclusion as to the law will be based: "Ours (camps) were built eight days before the Roper Company's. The camps of the Richmond Cedar Works had been occupied all the time during those eight days and all full of men. I think there was close between 30 and 40 men who had stayed in those camps in the Allen Swamp—the camps of the Richmond Cedar Works. These camps were all close as a half a mile to the ones the Roper Company put up. When I found they were there, I took my men and went there. First went to Hawks' camp, and said, 'Hawks, I have come here to take possession of this camp. The Richmond Cedar Works sent me here to hold possession of these

woods, and I am going to take possession of this camp and cut it down and burn it.' He says: 'My things are all in there.' And I said: 'I will take care of the things; get them out.' And he and Sanders got them out. They came out of the camp, and I cut the camp down and threw it on the fire. That was the end of that camp. Then I took my men and went out on down the ditch where they had just built three camps down there. That was on Wednesday. We went on to the Mathias camp. They were all standing outside of the camp, and I said, 'Mr. Mathias, are you in charge of these woods now?' He said, 'Yes.' I said, 'I am going to take possession of the camps, cut them down, and burn them up.' I told him my reason, that the Cedar Works sent me there to hold possession, and I was going to do it. He is the only man I parted my lips to. I then told him I was going to cut the camps up. He said, 'You may cut the others down, but you won't cut this one down.' I said, 'This is the best looking camp. This is the one I am going to take first.' He says: 'I'll be damned if you cut this one down.' I said: 'Boys, fall in on this camp.' Before that he leaves his door and goes back in the camp, and, as they had then commenced to tear the roof up, he said, 'Let me get my bed and things out, and then I will get out.' I said, 'All right.' Then I said, 'Boys, get in there and help him get his bed out and other things.' He had some peas on the fire, and I had the boys take those out, and I told them to take all out and take his bed and lay it out there somewhere, and then go ahead and cut the camp down."

The contention of the defendants seems to be that they should have been allowed to show that they had constructive possession of the place where the trespass is alleged to have been committed by reason of the fact that they were in actual occupation of the remainder of Allen Swamp; that the prosecutor, by its servants and agents, had unlawfully entered upon the land, which was the property of the Richmond Cedar Works, and had wrongfully withheld the same, and that, when they demanded possession of the land, they were merely asserting the right and title of the Richmond Cedar Works to the same, and had no unfriendly feeling toward the parties in possession, and did not intend to injure them.

Before entering upon a discussion of the main question involved in the case, we will refer to one technical objection made during the course of the trial by the defendants. When the solicitor had read the three indictments, the defendants moved that he be required to elect upon which count in each of the bills he would rely. The court overruled this motion, and held that it would not require the election until the evidence had been heard. The motion was not renewed at the close of the evidence. It appears that the solicitor abandoned all the charges except

the one for forcible trespass, and did not prosecute for malicious injury to property, and the judge so stated in the charge to the jury.

[1] It cannot be doubted now that the solicitor was not put to his election until the close of the evidence, or at least that the judge was not required to restrict the trial to any special count until he could intelligently do so by knowing what the evidence in the case would be. This was decided in *State v. Parish*, 104 N. C. 679, 10 S. E. 457, where it was said: "This court has repeatedly held that the presiding judge may in his discretion hear the evidence on a number of counts in a single indictment charging felony, or 'on a number of distinct bills, treating each as a count of the same bill,' and refuse to require the solicitor to elect till the close of the evidence for the state." It may be well doubted whether the solicitor could be required to elect in this case, as the charges all grew out of the same transaction. "The common-law rule is that, if an indictment contains charges distinct in themselves and growing out of separate transactions, the prosecutor may be made to elect or the court may quash. But where it appears that the several counts relate to one transaction, varied simply to meet the probable proof, the court will neither quash nor force an election." *State v. Morrison*, 85 N. C. 561. There was no error, therefore, in the ruling of the court upon the defendant's motion for an election by the solicitor.

[2] The defendants proposed to prove how far the line of the land was from the state line, with a view of showing that the prosecutor's servants and agents had come from Virginia and squatted on the land, and had then avoided the service of process and a restraining order by crossing the line again into Virginia. They further proposed to introduce in evidence a map of the premises for the use of one of the witnesses in explaining his testimony. The witness stated that he did not require it for that purpose, as he was familiar with the land, and, further, they offered deeds and other evidence for the purpose of showing the title to and possession of Allen Swamp outside of the locus in quo. All this evidence was excluded by the court, and we think properly. The facts intended to be established by the rejected evidence were not relevant to the case. It could make no difference whether the Richmond Cedar Works owned the land or not, or whether they failed to obtain service upon the prosecutor in the suit brought for the possession of the land and for an injunction. The only question in the case is whether the prosecutor's servants and agents were in possession of the particular land on which the trespass was committed, and whether the defendants attempted to oust them forcibly and violently.

[3] Forcible trespass is a crime against the possession, and not against the title.

*State v. Fender*, 125 N. C. 649, 34 S. E. 448. If the Richmond Cedar Works had a better title than the prosecutor to the premises, or a better right to the possession thereof, it should have been asserted by due process of law, and not by a violation of the criminal law of the state. *State v. Hovis*, 76 N. C. 118. The right or title to land cannot be vindicated with the bludgeon, but the party who claims the better title must, if it be denied or the actual possession of the land be refused, upon a lawful demand made for the same, resort to the peaceful methods and processes of the law for his redress and the recovery of his property. If, instead of pursuing this course, he elects to use violence, the law holds him criminally responsible for his act. *State v. Webster*, 121 N. C. 586, 28 S. E. 254, where it is said: "As forcible trespass is essentially an offense against the possession of another, and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offense." The principle governing such cases is clearly expressed by Judge Gaston in *State v. Bennett*, 20 N. C. 170: "We perfectly agree with the judge that the guilt or innocence of the persons charged with respect to the offense described in the indictment did not depend upon the question whether Curry had the right to the property, or the right to its possession, but whether he had, in fact, the possession thereof at the time when that possession was charged to have been invaded with such lawless violence." It has ever been the definition of forcible trespass in this state that it is the high-handed invasion of the actual possession of another, he being present and forbidding the same, and the title is not in question. It is sufficient to constitute the offense that the act complained of be done in the presence of the owner or person in possession (presenti domino), and must involve a breach of the peace or tend thereto. There must have been something done at the time of the entry to put the prosecutor in fear or incite him to force, either to prevent the wrongs or to protect his title to the property. Whether the title is in the prosecutor or the defendant is of no moment in forcible trespass. It is the invasion of the actual possession of another, and not his constructive possession done in his presence and under such circumstances as endangers the public peace, that makes the offense. This is stated to be the law by the younger Judge Ruffin (who displayed distinguished ability in this court, and a man who was eminent in his profession and at the bar as a criminal lawyer) in the case of *State v. Laney*, 87 N. C. 535, and it is sustained by numerous decisions of this court. *State v. McCauless*, 31 N. C. 375; *State v. Ross*, 49 N. C. 315, 69 Am. Dec. 751; *State v. Woodward*, 119 N. C. 838, 25 S. E. 868. In *State v. Covington*, 70 N. C. 71,

Judge Bynum says that, to constitute the offense of forcible trespass, there must be a demonstration of force, as with weapons or multitude of people, so as to make a breach of the peace or directly tend to it, or such as is calculated to intimidate or put in fear, citing *State v. Ray*, 32 N. C. 39.

[4] What is said by the present Chief Justice in *State v. Mills*, 104 N. C. 905, 10 S. E. 676, 17 Am. St. Rep. 706, covers this case more fully, perhaps, than any other expression to be found in the cases. In substance, it is this: The offense of forcible trespass consists in entering upon land in the actual possession of another with a strong hand. There must either be actual violence used or such demonstration of force as is calculated to intimidate, or alarm, or involve, or tend to a breach of the peace. The use of force must be such as to create a reasonable apprehension in the mind of the adversary that he must yield to the demand made upon him in order to avoid a breach of the peace—citing *State v. Covington*, supra; *State v. Pollok*, 28 N. C. 305, 42 Am. Dec. 140; *State v. Pearman*, 61 N. C. 371; *State v. Lloyd*, 85 N. C. 573. We are not called upon in this case to say whether or not it is necessary that the demonstration of force accompanying the act of invasion should consist either in a multitude of people or in the display of weapons in order to become such an entry with a strong hand as will constitute the offense. Whether the entry is sufficiently violent will depend to some extent upon the circumstances of each particular case. For example, in *State v. Hinson*, 83 N. C. 640, the act of a man riding into the yard or curtilage of a house occupied only by a woman, after being forbidden so to do, and remaining there cursing her, was held by this court to be such an act of force as was calculated to intimidate her or put her in fear, and therefore sufficient to constitute forcible trespass. The essential element of the offense is that the conduct of the defendant must be such as is calculated to intimidate the party in possession and to put him in fear, or to compel him, by threats of violence, which are sufficient to overawe a man of ordinary firmness, to abandon or surrender his right to the possession, or to desist from the assertion of the same.

The learned counsel for the defendant in the argument before us urged that at common law, if the party having the better right or title has lost his possession by the unlawful entry of another, he is entitled to regain it by the use of such force as is necessary for the purpose, provided it does not amount to an actual breach of the peace, whereas one not having a lawful right of entry is guilty of trespass if he goes upon the land with a strong hand, under circumstances calculated to excite terror, although the force used does not amount to a breach of the peace. This doctrine, if it ever had

any real existence at the common law, and this is extremely doubtful when the authorities are carefully examined and considered, has long since been repudiated by the courts and abrogated by statute. They rely upon what is said by Judge Pearson in *State v. Ross*, 49 N. C. 315, 60 Am. Dec. 751, but the force of this expression was greatly weakened, if not entirely destroyed, by the decision in *State v. Shepherd*, 82 N. C. 614, where it will be found that Chief Justice Smith strongly intimates that the distinction thus made, if it ever existed, was swept away by our statutes. In 1 Hawkins' Pleas of the Crown, c. 28, p. 495, we find the law thus stated: "It seems that at common law a man disseised of any land (if he could not prevail by fair means) might lawfully regain the possession thereof by force. But this indulgence of the common law in suffering persons to regain the lands they were unlawfully deprived of having been found by experience to be very prejudicial to the public peace, it was thought necessary by many severe laws to restrain all persons from the use of such violent methods of doing themselves justice." Blackstone, whose book on the criminal law is of the highest authority, follows Hawkins, and in his fourth volume, at page 148, he says: "An eighth offense against the public peace is that of a forcible entry and detainer, which is committed by violently taking, or keeping possession of lands, with menace, force and arms, and without the authority of law. This was formerly allowable to every person disseised or turned out of possession, unless his entry was taken away or barred. But, this being found very prejudicial to the public peace, it was thought necessary, by several statutes, to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they had no justice in their claim." In *King v. Wilson*, 8th Term, 357, Lord Kenyon said that perhaps some doubt may hereafter arise respecting the statement of Mr. Serjeant Hawkins that "at common law the party may enter with force into that to which he has a legal title"; and the Court of King's Bench reversed its own opinion as to the correctness of this proposition. But, however that may be, it is very sure that the law has been changed by statute, both in England and in this country, so that now it is plain and unmistakable. This statute is the one referred to by both Hawkins and Blackstone. It was enacted in the fifth year of the reign of Richard II, and is known as chapter 7 in the compilation of the laws of England for that period, and is as follows: "And also the King defendeth, That none from thenceforth make any entry into any lands and tenements, but in case where entry is given by law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary,

and thereof be duly convict, he shall be punished by imprisonment of his body and thereof ransomed at the King's will." This statute was substantially adopted in this state, and will be found in the following revisions: Rev. Code, c. 49, § 1; Code, § 1028; Pell's Revision (1908) § 3670. Mr. Pell has appended a note to the section, containing a full collection of all the cases decided by this court upon the subject, and, with reference thereto, it is conclusively and uniformly held that, whatever may have been the common law in regard to this matter, it is now unlawful, even where the party is the real owner of the land, to enter thereon with strong hand or with multitude of people, when the law authorizes him to enter only in a peaceable and easy manner, and he who enters otherwise, or with strong hand, is guilty of a misdemeanor.

The case of *State v. Pollok*, 26 N. C. 305, 42 Am. Dec. 140, is a decisive one against the defendants. The only difference between the two cases is that the show of force in Pollok's Case was much less formidable and impressive than it was shown to be in this case. Judge Daniel there said it was unnecessary that the prosecutor's possession was held under title, if at the very time of the forcible entry it was peaceably held and enjoyed by him, and that personal violence is not an essential ingredient of the offense, but, if there is such a show of force as to create a reasonable apprehension in the mind of the party in actual possession that he must yield to avoid a breach of the peace, and he does yield, it would be a surrender upon compulsion or force, and such as would make it a forcible trespass at common law. Proceeding, he said: "The defendant contended that the offense was not complete until some actual breach of the peace had been committed. But the law is, where the party, either by his behaviour or speech, at the time of his entry, gives those who are in possession just cause to fear that he will do them some bodily harm, if they do not give way to him, his entry is esteemed forcible, whether he cause the terror by taking with him such an unusual number of servants, or by arming himself in such a manner as plainly to indicate a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who continue in possession, or by making use of expressions which plainly imply a purpose of using force against those who make resistance"—citing *Wilson's Case*, 8 Term Rep. 357; *Roscoe on Evidence*, 374-377; 1 Hawkins' Pleas of the Crown, c. 64, § 27. If the facts recited in that case constitute forcible trespass at common law, surely the facts of this case must receive a like construction, and, when the statute of Richard II is considered, there can be no doubt as to the criminality of the defendants' conduct. This statute has been adopted, we believe, in most of the states of the Union. Discussing its provisions, the

court, in *Scott v. Willis*, 122 Ind. 1, 22 N. E. 786, said: "The owner of land who is wrongfully held out of possession by one who has no legal or equitable right may embrace the opportunity and gain peaceable possession if he can; but, unless he can obtain possession without force or show of violence, his sole remedy is to invoke the aid of legal proceedings." In *Reeder v. Purdy*, 41 Ill. 285, it is held that the statute against unlawful entry on land by necessary implication, if not in terms, forbids a forcible entry, even by the owner, upon the actual possession of another. "It is urged," says the court, "that the owner of real estate has a right to enter upon and enjoy his own property. Undoubtedly, if he can do so without a forcible disturbance of the possession of another, but the peace and good order of society require that he shall not be permitted to enter against the will of the occupant, and hence the common-law right to use all necessary force has been taken away. He may be wrongfully kept out of possession, but he cannot be permitted to take the law into his own hands and redress his own wrongs. \* \* \* It has been constantly held that any entry is forcible within the meaning of this law which is made against the will of the occupant. The statutes of forcible entry and detainer should be construed as taking away the previous common-law right of forcible entry by the owner, and (as providing) that such entry must be therefore held illegal in all forms of action." This decision was approved in *Chicago v. Wright*, 69 Ill. 318. See, also, *Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; *Ives v. Ives*, 13 Johns. (N. Y.) 235.

[5] When the undisputed facts of this case are brought to the test of these principles, we find no difficulty in adjudging the defendants guilty upon their own best showing. The defendants formed themselves into a band of armed invaders to execute their will and assert their alleged claim to the land, without regard to consequences and in defiance of law and order. They advanced upon the unpretentious and crude huts set up by the prosecutors' servants for their temporary use and comfort, with all "the pomp and circumstances of war"—a small battalion armed and equipped to meet any emergency and to overcome all opposition. This doughty band of warriors went forth to battle, bent on conquest or annihilation, and, if they had not met with instant capitulation from a submissive enemy, there can be no doubt that there would have been a gory field of conflict. As said by the Attorney General, "the battle of the Dismal Swamp would have been on, and fought to the finish." They accomplished their unlawful purpose by expelling their adversary from the premises, and yet it is argued that, having the better title, they were in the exercise of their lawful right and within the pale of the law. We do not think so. The law of the mob is not a safe rule of conduct and is

not the law of the commonwealth, and the sooner this is realized by those who would essay to maintain their rights or redress their supposed grievances by becoming law-breakers themselves, the better it will be for them and the peace and good order of society. We cannot too emphatically condemn such conduct as subversive of all good government and of the cardinal principle upon which it is based. If the citizen defiantly takes the law into his own hands to assert his rights or to punish others for violating them, whatever the provocation, he will soon find that the hand of that same offended law will be laid heavily upon him as an usurper of its prerogative, and he should be made to feel its weight and its just retribution. Right does not always make might, nor does might make right, and the two united cannot be allowed to override the dignity and majesty of the law, to which law every good citizen should render willing submission and obedience. The doors to our courts are wide open, and any one may enter who feels aggrieved in respect of his person or his property, and he will find there a remedy for the full reparation of the wrong. If he will not do this, but will rather redress his wrong in his own way, he should not be surprised if he is made to pay the penalty of his own offense against the law.

The defendants' counsel cited *Walker v. Chanslor*, 153 Cal. 118, 94 Pac. 606, 17 L. R. A. (N. S.) 455, 126 Am. St. Rep. 61, and *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364, to support the position that one who has in law the title or right of possession may enter forcibly upon the land in the assertion of his right, but even a slight examination of those cases will disclose that they refer only to the civil liability of the owner for such an entry, and hold that he would not be liable in a civil action for the same; that is, in an action *quare clausum*, or trespass *vi et armis*, or for assault and battery, "even if the force used would subject the owner to an indictment at common law for a breach of the peace, or under the statute for forcible trespass or entry." They do not reach this case. The possession of the prosecutor by his servants and agents was sufficient in this case to sustain the charge of forcible trespass, the entry having been made violently and with a strong hand, and those in possession having been intimidated and put in fear.

[6] Such conduct on the part of the defendants was an assault, as it compelled the prosecutors to desist from doing what they had the lawful right to do, at least until the law had passed upon the disputed title. *State v. Daniel*, 136 N. C. 571, 48 S. E. 544, 103 Am. St. Rep. 970. In that case it is said: "The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one by the show of violence has the right to put another in



fear, and thereby force him to leave a place where he has the right to be. *State v. Hampton*, 63 N. C. 13; *State v. Church*, 63 N. C. 15; *State v. Rawles*, 65 N. C. 334; *State v. Shipman*, 81 N. C. 513; *State v. Martin*, 85 N. C. 508, 39 Am. Rep. 711; *State v. Jeffreys*, 117 N. C. 743, 23 S. E. 175. It is not always necessary to constitute an assault that the person whose conduct is in question should have the present capacity to inflict injury, for if by threats or a menace of violence which he attempts to execute, or by threats and a display of force, he causes another to reasonably apprehend imminent danger and thereby forces him to do otherwise than he would have done, or to abandon any lawful purpose or pursuit, he commits an assault. It is the apparently imminent danger that is threatened, rather than the present ability to inflict injury, which distinguishes violence menaced from an assault. *State v. Jeffreys* and *State v. Martin*, *supra*. It is sufficient if the aggressor by his conduct lead another to suppose that he will do that which he apparently attempts to do. 1 Archb. Cr. Fr., Pl. & Ev. (8th Ed. by Pomeroy), 907, 908." All of which brings us to the conclusion that there is no reason why we should halt between two opinions in passing upon the guilt of the defendants. The evidence is all one way, and so is the law. It would be a reproach to the administration of justice if the law were otherwise and we could decide the other way. If we may compare this transaction with a great historical event, when Lord George Gordon assembled his followers in St. George's Fields to march upon Parliament and present their petition against Popery, we find that, while they were engaged in the exercise of the lawful right of petition, one of the highest and most sacred constitutional rights of the subject, and while their leader was afterwards acquitted by the jury, influenced as they were by the great skill and eloquence of Erskine, and not because he was less a lawbreaker, the Court of King's Bench (Lord Mansfield presiding), before which he and his followers were tried, did not listen with much patience or consideration to the plea that the righteousness of the cause justified the offense, and many of his less fortunate adherents were convicted of treason and executed. Charles Dickens, in his graphic description of the Gordon riots in Barnaby Rudge, makes Simon Tapertit say: "What's the matter here? Do you call this order?" Well might he thus exclaim, for not even can the most sacred right be unlawfully and violently enforced, and so the court decided. 21 State Trials, 485 (563).

[7] All the testimony offered by the defendants to show a constructive possession—that is, a possession of some other part of the land under a deed or color of title—was irrelevant and properly excluded by the court.

[8, 9] There are one or two of the other exceptions which require some notice. In his address to the jury one of the prosecuting attorneys used this language: "The jury should find the defendants guilty, as their fines will be paid by the Richmond Cedar Works, a foreign corporation with headquarters in Virginia, a foreign state, where its officers sit back with slippers on their feet and direct this thing to be done." The defendants objected to these remarks at the time they were made, and the judge fully cautioned the jury, not at that time, but in his charge, to disregard them, and to confine their inquiry to the single question as to the forcible entry. We think the caution was sufficient, but, if not, the defendants should have requested the judge to make it so. This they did not do. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225. A request of this kind would have brought forth a proper response from the court. "If a party desires fuller or more specific instructions, he must ask for them, and not wait until the verdict has gone against him, and then, for the first time, complain of the charge." *Simmons v. Davenport*, *supra*. See, also, *Kendrick v. Dellinger*, 117 N. C. 491, 23 S. E. 438; *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513; *State v. Debnam*, 98 N. C. 712, 3 S. E. 742; *Clark's Code* (3d Ed.) pp. 535, 536; *Justice v. Gallert*, 181 N. C. 393, 42 S. E. 850; *State v. Groves*, 119 N. C. 822, 25 S. E. 819. Speaking to an objection of the same nature as this one, the court said in *State v. Tyson*, 133 N. C. 699, 45 S. E. 840: "A party will not be permitted to treat with indifference anything said or done during the trial that may injuriously affect his interests, thus taking the chance of a favorable verdict, and afterwards, when he has lost, assert for the first time that he has been prejudiced by what occurred. His silence will be taken as a tacit admission that at the time he thought he was suffering no harm, but was perhaps gaining an advantage, and consequently it will be regarded as a waiver of his right afterwards to object. Having been silent when he should have spoken, we will not permit him to speak when, by every consideration of fairness, he should be silent. We will not give him two chances. The law helps those who are vigilant—not those who sleep upon their rights. He who would save his rights must be prompt in asserting them."

[10, 11] But it must not be understood that we approve or commend the language of the attorney. It was a clear abuse of the privilege of counsel, as argued by defendants, to use such words in debate before the jury. The state does not ask for the conviction of a defendant except upon the facts and the law, stripped of all extraneous matter, the naked facts, and anything done which is calculated to prejudice the jury should be promptly rebuked by the presiding judge, and such instructions given to the jury as will

remove all prejudice and restore their minds to an equilibrium, readjusting the unsteady balance, so that justice may be administered fairly and impartially. This is an important matter, and judges cannot be too alert or too much "on their guard" to instantly correct such abuses occurring in the course of the trial. It is their highest duty to do so, and they should at all times be firm and prompt in its discharge. Sometimes, we are aware, learned counsel use intemperate speech in the heat and zeal of an argument which they themselves regret afterwards in their cooler and calmer moments, but, this being so, it is nevertheless the duty of the judge to see that the trial is conducted fairly, without regard to that fact. Again quoting from *State v. Tyson*, 133 N. C. 698, 45 S. E. 840: "We conclude, therefore, that the conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and direction of the presiding judge, who, to be sure, should be careful to see that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case, and, when counsel grossly abuse their privilege at any time in the course of the trial, the presiding judge should interfere at once, when objection is made at the time, and correct the abuse. If no objection is made, while it is still proper for the judge to interfere in order to preserve the due and orderly administration of justice and to prevent prejudice and to secure a fair and impartial trial of the facts, it is not his duty to do so, in the sense that his failure to act at the time or to caution the jury in his charge will entitle the party, who alleges that he has been injured, to a new trial. Before that result can follow the judge's inaction, the objection must be entered at least before 'verdict'—citing *Knight v. Houghtalling*, 85 N. C. 17. In the passage taken from *State v. Tyson* we did not intend to decide that a failure of the judge to act immediately would be ground for a reversal (unless the abuse of privilege is so great as to call for immediate action) but merely that it must be left to the sound discretion of the court as to when is the proper time to interfere, but he must correct the abuse at some time, if requested to do so, and it is better that he do so even without a request, for he is not a mere moderator, the chairman of a meeting, but the judge appointed by the law to so control the trial and direct the course of justice that no harm can come to either party, save in the judgment of the law, founded upon the facts, and not in the least upon passion or prejudice. Counsel should be properly curbed, if necessary, to accomplish this result—the end and purpose of all law being to do justice. Every defendant "should be made to feel that the prosecuting officer is not his enemy," but that he is being treated fairly and justly. *State v. Smith*, 125 N. C. 618, 34 S. E. 235. In *Jen-*

*kins v. Ore. Co.*, 65 N. C. 563, Justice Reade said: "Zealous advocates are apt to run into improprieties; and it must generally be left to the discretion of the judge whether it best comports with decency and order to correct the error at the time by stopping or reproving the counsel or wait until he can set the matter right in his charge. It must often happen that the judge cannot anticipate that the counsel is going to say anything improper, and it may be said before the judge can prevent it, as in this case. \* \* \* And the question was whether he was obliged to stop the counsel then and there and reprove him, or whether he would wait and correct that and all other errors when he came to charge the jury. Ordinarily this must be left to the discretion of the judge. But still it may be laid down as law, and not merely discretionary, that where the counsel grossly abuses his privilege, to the manifest prejudice of the opposite party, it is the duty of the judge to stop him then and there, and, if he fails to do so and the impropriety is gross, it is good ground for a new trial." In this case the judge responded fully and adequately in his charge to the objection, and the remarks of the counsel are therefore presumed to be harmless. They were not what may be called a "gross" breach of privilege. It must be assumed that the jurors were honest and intelligent enough to heed the warning of the court.

[12] Besides, the defendants are guilty on the admitted facts, and therefore in no degree have they been prejudiced.

[13, 14] The remaining objection to the conviction is that Davenport's associates were not aiders and abettors, or, at least, that the court erred in giving the following instruction: "If one party was committing the acts as charged, and others were present, either participating or ready and intending to aid or assist if it became necessary, all would be equally guilty." The defendant's counsel, in their excellent brief, criticize this part of the charge in the following language: "This is undoubtedly not the rule governing aiders and abettors. The rule as laid down by Ruffin, C. J., in *State v. Hildreth*, 31 N. C. 440, 51 Am. Dec. 369, is that 'the aider and abettor must either incite the principal to action, or else must deter others from interfering to prevent the criminal conduct of the principal.' The very limit of the rule is the aider and abettor would be guilty with the principal if he was present with knowledge of the principal, ready to aid or assist. The reason is that this knowledge on the part of the principal emboldens him because he has the assurance of assistance. 12 Cyc. 186." Even within this definition of the term, "aider and abettor," we find no difficulty in adjudging the other defendants guilty as principals, upon the facts of the case, for in misdemeanors there are no accessories. A person aids and abets when he has "that kind of connection with the commission of

a crime which, at common law, rendered the person guilty as a principal in the second degree. It consisted in being present at the time and place, and in doing some act to render aid to the actual perpetrator of the crime, though without taking a direct share in its commission." Black's Dict. p. 54, citing 4 Blackstone, 34. An abettor is one who gives "aid and comfort," or who either commands, advises, instigates, or encourages another to commit a crime—a person who, by being present, by words or conduct, assists or incites another to commit the criminal act (Black's Dict. p. 6); or one "who so far participates in the commission of the offense as to be present for the purpose of assisting, if necessary, and in such case he is liable as a principal." 1 McClain, Cr. Law, § 199. Within any well-recognized definition, the codefendants of Davenport were at least "aiders and abettors," if they were not principals. Rex v. Gordon, 21 State Trials, 485.

We have discussed this case at much greater length than we would otherwise have done, because the learned and able counsel for the defendants insisted most earnestly and zealously that no forcible trespass had been committed under the law as laid down by the standard authorities, and we therefore deemed it proper to review and restate the law in a matter so vital to the tranquility and welfare of the community, and to do so in no uncertain terms, so that it may be well understood that individuals cannot usurp the power of the law, and by their own procedure and in a violent manner either protect or assert their rights of property. Such conduct is "against the peace and dignity of the state, and contrary to the statute in such cases made and provided." Again, we say that the cry of the mob must not be mistaken for the voice of the law.

It may be added that the defendants could have been properly indicted and convicted either of a forcible trespass, a riot, or rout (State v. Hathcock, 29 N. C. 52; State v. York, 70 N. C. 66) or an unlawful assembly (2 McClain, Cr. Law, § 1003), all misdemeanors at common law, and the sentence pronounced in this case, by the able and humane judge, which was mild considering the aggravated circumstances, has therefore worked no legal injury to them.

There is no apparent error in the case, and it must be so certified.

No error.

(39 S. C. 439)

#### GADSDEN v. HOME FERTILIZER & CHEMICAL CO.

(Supreme Court of South Carolina. Sept. 11, 1911.)

#### 1. APPEAL AND ERROR (§ 222\*)—OBJECTIONS—PRESENTATION BELOW.

Appellee cannot object to the consideration on appeal of a motion for new trial on the

ground that the reasons stated in the motion were not stated in the written notice of the motion served, where objection was not made below where it could have been obviated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1156, 1333-1336; Dec. Dig. § 222.\*]

#### 2. APPEAL AND ERROR (§ 127\*)—JUDGMENTS—APPEALABLE—DEFAULT JUDGMENTS.

Ordinarily a default judgment is not appealable unless the default goes to the foundation of the cause of action or the court's jurisdiction, when it may be corrected by appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 885-891; Dec. Dig. § 127.\*]

#### 3. JUDGMENT (§ 112\*)—DEFAULT—EFFECT.

A default only admits things well pleaded, and only affects rights with respect to matters necessarily admitted by the default, so that, if the complaint does not state a cause of action, only a judgment of dismissal may be rendered; and, if it states facts entitling plaintiff only to a certain kind or extent of relief, a default judgment awarding a different kind or of greater relief is improper; and hence, under Code Civ. Proc. 1902, § 169, providing that defendant shall be deemed to have waived all objections to the complaint specified in section 165 as grounds of demurrer if not taken by demurrer or answer, except the objection that the complaint does not state a cause of action, a default judgment does not waive an objection that the complaint does not state a cause of action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 203-206; Dec. Dig. § 112.\*]

#### 4. SALES (§ 418\*)—SPECIAL DAMAGES—BREACH OF CONTRACT.

To recover special damages for breach of contract, it must appear that defendant knew when making the contract of the special circumstances from which the damages might reasonably be expected to result, so that, upon breach of defendant's contract to furnish plaintiff fertilizer, in reliance upon which plaintiff had prepared his land and arranged to plant certain crops, plaintiff could not recover damages from delay in planting and from being compelled to plant without fertilizer, where it is not shown that defendant knew when the contract was made of the special use to which plaintiff intended to put the fertilizer or of any scarcity in fertilizer which would prevent plaintiff from buying from others, if he failed to furnish it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

#### 5. NEW TRIAL (§ 74\*)—GROUNDS—INSUFFICIENCY OF PLEADINGS.

A motion for a new trial on the ground that the verdict was not supported by the evidence as to special damages awarded necessarily involved the sufficiency of the allegations of the complaint as to special damages as well as the proof thereof; it being competent to prove only that which is alleged.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 74.\*]

#### 6. DAMAGES (§ 208\*)—DIRECTION OF VERDICT—UNLIQUIDATED DAMAGES.

Under Code Civ. Proc. 1902, § 267, providing that, when the damages sought are unliquidated, the relief awarded on a default judgment shall be ascertained by a jury, the court cannot direct a verdict for plaintiff upon default in an action for unliquidated damages for breach of contract, though the evidence be undisputed.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 208.\*]

# 7. TRIAL (§ 171\*)—DIRECTION OF VERDICT—ON DEFAULT.

The court may direct a verdict on default upon the same grounds upon which it may direct a verdict where the issues are litigated.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 171.\*]

Appeal from Common Pleas Circuit Court of Sumter County; J. W. De Vore, Judge.

"To be officially reported."

Action by Emanuel J. Gadsden against the Home Fertilizer & Chemical Company. From a judgment for plaintiff, defendant appeals. Reversed unless a remittitur is filed, in which event judgment is affirmed.

Purdy & Bland, for appellant. Lee & Moise, for respondent.

**HYDRICK, J.** This is an action for damages for breach of contract. In substance, the complaint alleges: That on January 18, 1910, defendant sold plaintiff five tons of fertilizer at the price of \$144.60; that plaintiff paid \$68.69, part of the agreed price, and defendant agreed to deliver the fertilizer at Claremont, but failed, after demand, to do so; that, relying upon defendant's performance of the contract, plaintiff prepared his land and made the other arrangements necessary to plant his crops of corn and cotton; but, by reason of defendant's breach of the contract, he was delayed in planting, and compelled to plant his crops without fertilization, to his damage \$250; that defendant also refused, after demand, to return the money paid by plaintiff. The prayer is for judgment for \$318.69.

The defendant made default. The claim for damages being unliquidated, under section 267, Code Civ. Proc., the relief to be afforded had to be ascertained by the verdict of a jury. The plaintiff gave testimony in support of the allegations of his complaint. He testified that he planted about 16 acres of corn and about 32 of cotton, and that in his opinion he did not make more than half as much as he would have made if defendant had furnished him the fertilizer according to the contract; that he had some fertilizer, and, if he had gotten that which he contracted for, he could have made nearly ten bales of cotton, and might have made more, and he thought his damages amounted to \$250. That is the substance of the evidence as to damages. The court directed the jury to find a verdict for plaintiff for \$318.69—the sum demanded in the complaint. Some days after the rendition of the verdict, but during the term, and before judgment was entered upon it, the defendant served notice of a motion to set aside the service of the summons and complaint, and, falling in that, to set aside the verdict and for a new trial, on the ground that it had never been served with process and had had no notice of the action until after the verdict. The

motion was supported by an affidavit of the treasurer of the defendant company to the effect that Mr. T. S. Sumter, upon whom the summons and complaint was served as the agent of the defendant, which is a foreign corporation, was not, in fact, its agent. At the hearing of the motion, defendant's attorney stated that, if his motion to set aside the service was refused, he would move on the minutes to set aside the verdict, on the ground that there was no evidence to support the verdict for damages, and on the further ground that the court erred in directing the verdict, instead of leaving it to the jury to find the amount of damages. The defendant undertook to prove by Mr. Sumter that he was not its agent, but Mr. Sumter testified to the contrary—that he was defendant's agent, and that, when the summons and complaint were served on him, he mailed them to defendant. There was other evidence tending to prove that he was defendant's agent, and that defendant had held him out as such. There was no error, therefore, in refusing to vacate the service.

Upon the motion to set aside the verdict on the grounds stated, the court ruled that plaintiff having proved all the allegations of his complaint, and his testimony being undisputed, there was no error in directing the verdict, and refused the motion.

[1] Before discussing the appeal from this ruling, it is necessary to dispose of an objection to its consideration by this court, which has been interposed by respondent, to wit, that the grounds stated were not mentioned in the written notice of the motion served upon him. This objection comes too late. These grounds were presented to and considered by the circuit court without objection. If the objection made here had been made there, it might have been obviated. Hence the ruling is properly before this court.

The defendant appeals both from the order refusing its motion and also from the judgment.

[2] Ordinarily no appeal lies from a judgment by default. *Odom v. Burch*, 52 S. C. 305, 29 S. E. 726. But where the defect in the judgment is radical—that is, one which goes to the foundation of plaintiff's cause of action, or to the authority of the court to render the judgment—it may be remedied by appeal. In *McMahon v. Pugh*, 62 S. C. 506, 40 S. E. 961, it was held that in a default case the court can render any judgment to which the plaintiff is entitled under the facts alleged in his complaint, not inconsistent with the prayer thereof, and, if there be error in granting relief beyond the scope of the allegations of the complaint, the remedy is by appeal. At page 510 the court quotes with approval the following from *Pomeroy*: "If every fact necessary to the action is stated, the plaintiff may, even when no an-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

swer is put in, have any relief to which the facts entitle him, consistent with that demanded in the complaint."

[3] The authorities, with practical unanimity, agree that a default admits only what has been well pleaded, and that it does not forfeit or affect the rights of a defendant, except as to matters necessarily admitted by the default. 23 Cyc. 751. Therefore, if the complaint fails to state facts sufficient to constitute a cause of action, any judgment thereon, except one of dismissal, goes beyond the allegations of the complaint; and so, if the complaint states facts which entitle plaintiff only to a certain kind of relief, or to relief only to a certain extent, a judgment by default which gives a different kind of relief, or relief to a greater extent, is without authority of law and cannot be sustained. In *Gillian v. Gillian*, 65 S. C. 129, 43 S. E. 386, Mr. Justice Gary, speaking for the court, quotes with approval from 6 Enc. Pl. & Pr. 115, as follows: "The defendant, by waiving a contest and suffering a default to be taken against him, admits the truth of the allegations set out in the plaintiff's declaration or complaint; and the same rule applies to a judgment final after overruling a demurrer. Hence the default authorizes the entry of any judgment warranted by the facts alleged. And, where the facts pleaded constitute a cause of action, the effect of the default is to establish it definitely. But the default does not admit that the facts pleaded are sufficient to constitute a cause of action, as the effect of the confession is limited to the material issuable facts well pleaded in the declaration or complaint. Nor does it admit an allegation which constitutes a mere conclusion of law. The facts pleaded must accordingly be sufficient to form a legal basis for the judgment taken by default, or it will be reversed on appeal or set aside on proper application." To the same effect, see 23 Cyc. 740, 752, 764. This doctrine is in conformity with section 169 of the Code, which provides that the defendant shall be deemed to have waived all the objections to the complaint which are specified in section 165 as grounds of demurrer, if the same are not taken either by demurrer or answer, except the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. If the last-named ground of objection is not waived by a failure to raise it either by demurrer or answer, it necessarily follows that it is not waived by a default, which is merely a failure to demur or answer. The complaint in this case fails to state the facts necessary to entitle plaintiff to recover the special damages which were awarded by the verdict.

[4] In an action to recover damages for breach of contract, when the damages sought to be recovered are special, it is necessary to allege and prove that defendant had notice at

the time of making the contract of the special circumstances from which such damages might reasonably be expected to result. *Towles v. Railroad Co.*, 83 S. C. 501, 65 S. E. 638. The complaint in this case contains no allegation, nor is there any evidence that defendant knew, when the contract was made, of the special use which plaintiff intended to make of the fertilizer, or of any scarcity of fertilizer which would prevent plaintiff from buying what he needed from other dealers, if defendant failed to furnish it. *Matheson v. Railway*, 79 S. C. 157, 60 S. E. 437. Therefore the contention of appellant that as to the damages recovered the verdict is wholly unsupported by evidence must be sustained.

[5] While the motion on circuit was not based on the ground that the complaint does not state facts sufficient to constitute a cause of action for the special damages found by the verdict, nevertheless the ground taken that the verdict, as to the damages found, is without the support of any competent evidence, necessarily involves the insufficiency of the allegations of the complaint, because it is competent to prove only what is alleged, and, as the allegations are insufficient, necessarily the proof is also. Upon the complaint in this case a judgment for special damages is without authority of law, and cannot be sustained.

[6] The court erred also in directing the verdict. The statute requires that, when the damages sought to be recovered are not liquidated, the relief to be afforded in default cases shall be ascertained by the verdict of a jury. Code, § 267. If the court may direct the verdict in such cases, why may it not ascertain the relief to be afforded without the aid of a jury? But clearly it has no authority to do so, because the statute forbids it. Hence the verdict is without authority of law, for it is no more than the finding of the court. From this it must not be inferred that the court has no right to direct the verdict in any default case.

[7] It may direct the verdict in such cases upon the same grounds upon which it may direct a verdict in litigated cases; but when the damages are not liquidated, and the evidence, though undisputed, is of such a nature that men might reasonably differ as to the amount of damages, the question of amount must be submitted to the jury.

The judgment of this court is that the judgment of the circuit court be reversed, unless plaintiff shall, within 20 days after notice of the filing of the remittitur in that court, remit all of the judgment in excess of the sum of \$68.69, with interest thereon from January 18, 1910, and upon his doing so, the judgment of this court is that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and WOODS, J., concur.

(89 S. C. 472)

**ATLANTIC COAST LINE R. CO. v. CAUGHMAN et al., Railroad Commission of South Carolina.**

(Supreme Court of South Carolina. Sept. 11, 1911.)

**1. RAILROADS (§ 89\*)—RIGHT TO CROSS OTHER ROADS—GRADE CROSSING—CONSTITUTIONAL AND STATUTORY PROVISIONS.**

Const. art. 9, § 6, providing that any railroad shall have the right to intersect with or cross any other road, is not violated by Civ. Code 1902, § 2179, denying the right to cross at grade except by consent of the Railroad Commission and this only in the manner prescribed, since the constitutional right to cross does not necessarily imply the right to cross at grade.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 234-239; Dec. Dig. § 89.\*]

**2. RAILROADS (§ 91\*)—CROSSING OTHER RAILROAD—CONDITIONS PRECEDENT.**

Where a railroad obtains an order from the Railroad Commission authorizing it to cross the right of way of another company, provided that such crossing be protected with an interlocking switch, and that the crossing and switch be subject to the approval of the commission, and by another order the commission imposes conditions as to furnishing preliminary plans and as to the method of construction and operation, the railroad then has no absolute right to make a crossing or to institute condemnation proceedings to acquire a right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 249-259; Dec. Dig. § 91.\*]

**3. RAILROADS (§ 91\*)—SUPERVISION BY RAILROAD COMMISSION—REVOCATION OF ORDERS.**

Under Civ. Code 1902, § 2179, which gives the Railroad Commission certain powers as to grades and crossings, no restrictions are imposed on the commission as to the terms and conditions upon which it will consent to such crossings, and it has the power to withhold its consent altogether or to grant it on such terms and conditions as it may see fit, and so long as it acts within the law and a reasonable discretion, it is subject to no control save that of the Legislature, and its requirements that a railroad petitioning for a right to a grade crossing furnish the commission with preliminary plans for an interlocking switch, that all necessary material be assembled before the work is begun, and that no engine or train be operated over such tracks until inspected by the commission are within its authority and discretion.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 249-259; Dec. Dig. § 91.\*]

**4. CONSTITUTIONAL LAW (§ 101\*)—VESTED RIGHTS—REGULATION OF RAILROADS.**

Where a railroad commission made orders granting the petition of a road for the right to cross another road at grade with certain condition as to plans and methods of construction and operation to be approved by the commission, the orders were not final, but under the express provisions of Civ. Code 1902, § 2179, were provisional, and before the approval of the commission gave the road no vested rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 209-211; Dec. Dig. § 101.\*]

**5. CONSTITUTIONAL LAW (§ 81\*)—POLICE POWER.**

The state cannot by contract barter away or divest itself of the police power, since the public safety is paramount to any vested rights of its citizens.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.\*]

**6. CONSTITUTIONAL LAW (§ 818\*)—DUE PROCESS OF LAW—ADMINISTRATIVE PROCEEDINGS—HEARINGS BEFORE BOARDS AND COMMISSIONS.**

The Railroad Commission on the petition of a road made conditional orders granting it the right to a grade crossing over another road, provided that such crossing was protected with an interlocking switch, and that the plans for it and for its construction and operation be approved by the commission, and on a subsequent meeting to receive the report of its engineer as to the plans submitted by the petitioner, and having before it the full evidence taken at former hearings, the commission extended its inquiry beyond a consideration of the plans, and, over the petitioner's objection, ruled that its consent was still an open matter and withheld consent upon consideration of the crossing's danger to the public, and the petitioner did not make the point that it was taken by surprise or was unprepared, but without asking for a further hearing relied upon the commission's previous orders as having expressed its final consent. Held that, to meet the requirements of due process of law, it is not necessary that hearings by boards and commissions shall be conducted with the same formalities as proceedings in courts, and that the petitioner was not deprived of a right to a hearing on the commission's revocation or refusal of consent.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 818.\*]

**7. MANDAMUS (§ 7\*)—NATURE AND SCOPE OF REMEDY.**

The issuance of a writ of mandamus is not a matter of strict legal right, but rests in the sound discretion of the court.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 5; Dec. Dig. § 7.\*]

**8. MANDAMUS (§ 73\*)—ACTS OF BOARDS AND OFFICERS—MINISTERIAL ACTS.**

Where a state railroad commission grants a petitioning railroad the right to a grade crossing upon condition that plans be submitted to the commission for its approval, mandamus will lie to compel its consideration of the plans submitted.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 144-149; Dec. Dig. § 73.\*]

**9. MANDAMUS (§ 73\*)—ACTS OF PUBLIC BOARDS AND COMMISSIONS—MATTERS OF DISCRETION.**

Mandamus will not issue to control the discretion or judgment vested by law in public commissions, unless the action of the commission with respect to the matter before it is so clearly arbitrary and capricious as not to admit of two reasonable opinions; and, where a railroad commission after granting a right to a grade crossing subject to its approval has found that the proposed crossing is unsafe, and that no other plans can be devised for a grade crossing at that place, and that the proposed plan should not be consented to, and there is evidence to support such conclusion, the court has no authority to substitute its judgment for that of the commission, and a writ of mandamus will not issue.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 144-149; Dec. Dig. § 73.\*]

"To be officially reported."

Petition by the Atlantic Coast Line Railroad Company for a writ of mandamus against B. L. Caughman and others, constituting the Railroad Commission of the State of South Carolina. Petition dismissed.

P. A. Wilcox and W. P. Pollock, for petitioner. Lyles & Lyles and Attorney General Lyon, for respondents.

HYDRICK, J. The petitioner prays for a writ of mandamus, directed to the Railroad Commission, requiring it to consider and approve its plans for a grade crossing of the tracks of the Seaboard Air Line Railway at Front street in the town of Cheraw. The efforts of the petitioner to make this crossing have resulted in considerable litigation. 88 S. C. 464, 477, 480, 71 S. E. 34, 39, 40. For the sake of brevity, the two companies will be referred to as the "A. C. L." and the "S. A. L."

Section 2179, Civ. Code 1902, reads: "No railroad shall be constructed to cross another railroad at the same level therewith, or across navigable or tide waters, without the consent, in writing, of the railroad commissioners, and in such manner as they shall prescribe. It shall be unlawful for any corporation proceeding to construct a branch or extension, or otherwise to take any proceedings contemplating a new crossing of one railroad with another, at the same level therewith, unless such crossing shall first have been approved, in writing, by the railroad commissioners, and the preliminary approval of any plan for such crossing shall always be made subject to revision by the commissioners. And the court of common pleas shall have full equity jurisdiction, on information filed by the Attorney General, in case of any violation of the provisions of this section."

Upon the petition of the A. C. L., after notice to the S. A. L., and a hearing had, on September 14, 1910, the commission gave its consent to the crossing in the following order, dated September 22, 1910: "After due consideration, the consent of this commission is hereby given to the Atlantic Coast Line Railroad Company to cross the main line track of the Seaboard Air Line Railway on Front street in the town of Cheraw, S. C., with its track at grade: Provided, that said crossing be protected with an interlocking switch, and crossing to be subject to the approval of the commission: And provided, further, that all expenses incurred by said crossing be paid by the Atlantic Coast Line Railroad Company." It appears from the record that, when this consent was given, none of the commissioners had personally examined the place of the proposed crossing. But thereafter, on December 28th, they held a meeting in Cheraw, in connection with this controversy, and while there the S. A. L. petitioned for a rehearing on the matter of the commission giving its consent to the crossing, which was refused in the following order: "(1) The petition of the Seaboard Air Line Company for a rehearing in this matter is dismissed. (2) The permission of the Atlantic Coast Line railroad company to cross track of the Seaboard Air Line Company on September 22, 1910, contemplated the furnishing to this commission of preliminary plans for an interlocking switch and crossing and the proper erection of the same, subject to the approval

of this commission. (3) That all material necessary to the completion of the interlocking switch and crossing, as ordered, be assembled before any work on the same is begun, and that the work of erection be carried on to completion simultaneously. (4) That no engine or train be operated over said crossing until the same has been inspected by the official engineer of this commission and accepted by the commission." From this order, one of the commissioners dissented, on the ground that his examination of the place that day had satisfied him that the crossing at Front street was and always would be too dangerous to the traveling public, and would interfere too much with the use by the S. A. L. of its main line, which objections could be materially lessened by a grade crossing at Second street, one block from Front street, or by an overhead crossing at Front street. On December 30th the A. C. L. notified the commission that it had assembled at Cheraw all the materials necessary to the completion of the interlocking plant and crossing, as authorized by the order of September 22d, and requested that the commission send its engineer to supervise its immediate placing. Accordingly the commission sent an engineer, who made an examination of the materials assembled for the purpose of putting in the crossing, and a meeting of the commission was held on January 2d for the purpose of hearing his report, and also for the purpose of considering the plans and ascertaining whether they came up to the standard which should be required for safety. Both roads were notified of the meeting, and both were represented by their engineers and attorneys. In the meantime the personnel of the commission had been changed. The term of office of one of the commissioners who had favored giving consent to the crossing, had expired, and his successor had qualified and taken his place on the commission. This fact is mentioned merely to explain a change in the attitude of the commission with respect to the matter. At this hearing, on January 2d, a great deal of testimony was heard and discussion had as to whether the plans proposed made the crossing safe. The petitioner contended that the commission had given its consent to the crossing in its order of September 22d, and that that consent was final and irrevocable, and that all the commission could do at that time was to consider and approve or disapprove of the plans proposed by it. A majority of the commission, consisting of the new member and the member who dissented from the order of December 28th, overruled this contention, and held that the matter of consent was still open, and that the commission still had the right to inquire into the safety of the proposed crossing, and to withhold their consent, if they concluded that it would be unsafe. The new commissioner announced that he had not seen the place of the pro-

posed crossing, and that, until he had, he could not intelligently decide whether the commission should consent to a grade crossing at that place, or whether the plans of the crossing proposed should be approved or disapproved. After having heard the evidence and arguments as to the sufficiency of the plans proposed, and after having inspected the place, he agreed with the commissioner who dissented from the order of December 28th, and they, being a majority of the commission, passed the following order, dated January 6, 1911: "(1) That this commission should not consent to the present plan of the crossing by the Atlantic Coast Line of the Seaboard Air Line on Front street, as the same is dangerous to the traveling public and detrimental to the public at large. (2) That this commission should consent to a crossing of the Seaboard Air Line railway by the Atlantic Coast Line railway at Second street, under such plans as this commission will approve, and in the event that the Seaboard Air Line carries out the offer hereinbefore stated. (3) That in the event the said Atlantic Coast Line Railroad Company shall not accept of said offer, but still insists on crossing the Seaboard Air Line at Front street, then that this commission shall not consent to any grade crossing, but require the said Atlantic Coast Line to cross the same on an overhead bridge, which the ground will admit of in a practical way, the plans of such overhead bridge to be approved by this commission." From this order the other commissioner dissented, sustaining the position taken by petitioner, as above stated. Thereafter, on May 24, 1911, the petitioner herein filed a petition with the commission, requesting the commission to consider and approve the plans proposed by it, taking the position that the commission had not at the hearing on January 2d, or at any time, considered and approved or disapproved its proposed plans for the crossing. The commission dismissed the petition, and this proceeding was commenced to compel the commission to consider and approve the plans proposed by petitioner.

[1] The first contention of the petitioner is that under the Constitution and statute the commission has no power to deny one railroad the right to cross another at grade, where the fulfillment of its duty to the public by the road seeking to cross requires it; and that in such cases the power of the commission is limited to an approval of the manner of crossing. This contention is based upon section 6 of article 9 of the Constitution, which reads: "Any railroad \* \* \* organized under the laws of this state, shall have the right \* \* \* to intersect with or cross any other railroad," etc. There are several sections of the Code which in similar terms give railroads the right to cross each other. But neither the section of the Constitution above quoted nor any statute gives

one railroad the right in so many words to cross another at grade, and the right to cross does not necessarily imply the right to cross at grade. On the contrary, section 2179 denies that right, except by consent of the commission, and then only in such manner as it shall prescribe; and there is nothing in the provisions of that section in conflict with the section of the Constitution above cited. Notwithstanding that section of the Constitution, it would be perfectly competent for the Legislature, in the exercise of the police power of the state, to prohibit grade crossings altogether, and require all existing grade crossing to be changed, and put above or below grade. *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *Chicago, etc., R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948; *Chicago, etc., R. Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596.

[2] The next position taken by the petitioner is that the order of January 6th is void, first, because the order of September 22d, being a judgment or quasi judgment, was final and irrevocable; and, second, because the order of January 6th was made without giving the petitioner a hearing, after the petitioner had acquired vested rights, in reliance upon the order of September 22d, and it therefore operates to deprive petitioner of its property without due process of law. The fundamental error in this contention is in assuming that the commission ever gave its consent to the crossing. In *A. C. L. v. S. A. L.*, 88 S. C. 464, 71 S. E. 34, the court held that the orders of September 22d and December 28th gave only "the preliminary approval of the commission to a crossing by the Coast Line at this point, under very minute and substantial conditions, to wit, that the crossing was to be protected by an interlocking switch, and that all preliminary plans for the crossing and interlocking switch were to be submitted before the work was attempted." And it was distinctly held in that case that those orders gave petitioner "no absolute right to make the crossing." Under the terms of the statute, the petitioner's right to proceed was conditioned upon the consent of the commission. Until that consent was obtained, it was unlawful for petitioner to institute condemnation proceedings for the purpose of acquiring rights of way, or to take any other step contemplating the making of such crossing. The law not only did not give the petitioner the right to make the crossing, without the consent of the commission, but positively forbade it. Therefore neither the petitioner nor any others interested in the matter, had any right to take any steps in reliance upon the orders of September and December, because upon their face they were conditional, and it was not known whether the petitioner would be able to comply with the condition.

[3] Moreover, by the terms of the statute, even "the preliminary approval of any plans



for such crossing shall always be made subject to revision by the commissioners." The Legislature has imposed no restrictions upon the commission as to the terms and conditions upon which it will consent to such crossings. Therefore it has the power to refuse its consent altogether, or to grant it upon such terms and conditions as it may see fit. And, so long as it acts within the law and a reasonable discretion, it is subject to no control save that of the Legislature. The condition upon which the consent of September 22d and December 28th was given was clearly within the law and the discretion of the commission, and it was a condition precedent, and no rights could vest or attach under the consent, until the condition had been fully complied with.

[4] In *A. C. L. v. S. A. L.*, supra, the court said: "No plans of an interlocking switch crossing were ever submitted to the Railroad Commission until January 2, 1911. Hence any attempt to put in the crossing previous to January 2, 1911, was a violation of the orders of the commission, and, inasmuch as the commission did not approve the plans submitted on January 2, 1911, but disapproved them, the attempt to put in the crossing thereafter was unauthorized by the commission." If the petitioner had no right to act upon the orders of September 22d and December 28th, and the court expressly decided that it had not, it necessarily follows that its contention that it acquired vested rights in reliance upon those orders, cannot be sustained. But the truth is, and the record shows it, that petitioner acquired all the necessary rights of way, except across the S. A. L. tracks, before it ever applied for the consent of the commission to make the crossing, and, if it has acquired any rights subsequent to the date of the orders giving a conditional consent to the crossing, the record fails to show what they are and when they were acquired.

[5] But even if it be assumed that, acting in reliance upon those orders, the petitioner did acquire vested rights, it does not follow that the commission could not withdraw its consent to the crossing. The public safety is paramount to the vested rights of the citizen. The police power cannot be bartered away. In *Chicago, etc., R. C. v. Nebraska*, supra, Mr. Justice Shiras, speaking for the court, said: "Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things with which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract

is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the Legislature when exercised to protect the public safety, health, and morals, and that clause of the federal Constitution protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the Legislature." But, as we have seen, the petitioner knew by the terms of the consent and by the terms of the statute, which provides that "the preliminary approval of any plans for such crossing shall always be made subject to revision by the commissioners," that it had no right to assume and act upon the assumption that consent would finally be given.

[6] The petitioner's next contention is that it has never had a hearing upon the right of the commission to revoke the consent given by the orders of September 22d and December 28th. It has been shown that no consent was given, and therefore there was no revocation, but merely a refusal to consent. But, waiving that, the record shows that at the meeting held on January 2d, which had been called to receive the report of the commission's engineer upon the plans proposed by the petitioner, a majority of the commission ruled against the objection of the petitioner, and after repeated and extended arguments that the question of the consent of the commission to the crossing was still an open matter, and that it had not been finally determined. The inquiry at that hearing was therefore not restricted to a consideration of the fitness of the proposed plans, but took the broader scope whether the commission should consent to a grade crossing at Front street at all, on account of the danger to the traveling public resulting from the peculiar physical conditions at that point, on account of the grade and curvature of the S. A. L. track. While petitioner strenuously objected to the consideration of that question, it did not make the point that it was taken by surprise, or was unprepared to meet that issue. Nor did it ask for further time to meet it, but it chose rather to rely upon its legal position that the orders of September 22d and December 28th giving consent were final. Nor has it been suggested that petitioner could or would have made any different showing, if the meeting had been called specifically for the purpose of considering the question of consent. Moreover, it will be noticed that petitioner has never asked the commission for a hearing upon that point. Nor has it asked this court to compel the commission to give it such a hearing, but it has at all times since the order of September 22d strenuously objected to any such hear-

ing. Certainly, under such circumstances, it will not be heard to say that it has been deprived of its vested rights without a hearing. But the truth is the hearing on January 2d was quite as full on the question whether the commission should give its consent to the crossing, so far as the element of danger is concerned, and that is the only ground upon which consent was refused, as was the hearing which resulted in the order of September 22d. Besides, the record shows that the new commissioner and the others had before them the evidence taken at the first hearing, which, as also appears from the record, was taken by one of the commissioners, in the absence of the others, and reported to the full body. To meet the requirement of due process of law, it is not necessary that hearings before boards and commissions shall be conducted with the same formalities that characterize proceedings in courts.

The next question is, Has the commission considered the plans of the crossing proposed by the petitioner? The record shows that the hearing of January 2d was devoted almost exclusively to the consideration of these plans, in connection with the question whether any plans could be devised which would afford adequate protection to the public for a grade crossing at Front street, and the decision of the commission shows they were considered and disapproved.

[7] The issuance of the writ of mandamus is not a matter of strict legal right, but it rests in the sound discretion of the court. Nothing is better settled than that mandamus will not be issued to control the discretion or judgment vested by law in public officers.

[8] If the commission had not already considered and rejected the plans proposed by the petitioner, the court could compel their consideration by the commission. *Abbeville v. McMillan*, 52 S. C. 60, 29 S. E. 540.

[9] But it could not direct the result of that consideration, unless the action of the commission with respect to the matter was so clearly arbitrary and capricious as not to admit of two reasonable opinions. *Mauldin v. Matthews*, 81 S. C. 414, 62 S. E. 695, 128 Am. St. Rep. 919. The commission is invested by law with the authority to decide the questions of fact in such cases, and it is a body peculiarly fitted to decide such questions. Therefore its decision of questions of fact, unless wholly without evidence, is final and conclusive. Now, in this case, the commission has found that the proposed crossing is unsafe, and that no plans can be devised for a grade crossing at Front street which will adequately protect the public. It has also found that a grade crossing may be made at Second street, which will be reasonably safe, and that an overhead crossing at Front street is feasible. It has also found that the

proposed plan of crossing at Front street is dangerous, and should not be consented to, and that conclusion is not without evidence to support it. Even if the court did not concur in the findings of the commission, nevertheless it has no authority or disposition to substitute its judgment and discretion for that of the commission.

Wherefore the petition is dismissed.

GARY, P. J., and WOODS, J., concur.

(136 Ga. 665)

W. J. DOWNING LUMBER CO. v. MEDLIN & SUNDY.

(Supreme Court of Georgia. Aug. 17, 1911.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 363\*)—AUTHORITY—SALES OF LAND.

An administrator cannot sell, at private sale, land the title to which is in the estate he represents, except "wild uncultivated" land.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1492; Dec. Dig. § 363.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 380\*)—AUTHORITY—QUESTION FOR JURY.

The evidence was not such as to require a finding that either of the tracts of land involved was not "wild, uncultivated" land at the time the administrators, respectively, made private sales thereof under orders granted by the court of ordinary; and the trial judge erred in directing a verdict for the defendants.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 380.\*]

Atkinson, J., dissenting.

Error from Superior Court, Charlton County; T. A. Parker, Judge.

Action by the W. J. Downing Lumber Company against Medlin & Sundy. From a judgment for defendants, plaintiff brings error. Reversed.

Wilson, Bennett & Lambdin, for plaintiff in error. Toomer & Reynolds, for defendants in error.

HOLDEN, J. The plaintiff in error filed its petition to have the defendants in error enjoined from cutting and removing timber from two described tracts of land, and from using the timber for turpentine purposes, or otherwise interfering with it. The plaintiff claimed title under deeds from the administrators, whose intestates had grants, respectively, to the two tracts of land from the state. Upon the conclusion of the evidence the court directed a verdict in favor of the defendants, and the plaintiff excepted.

[1] The administrators who made the deeds each obtained an order from the ordinary appointing him, authorizing him to sell the tract of land of his intestate as wild land at public or private sale. The administrators, respectively, made private sales of the two tracts of land, and deeded the same to the plaintiff. The bill of exceptions recites

that upon the conclusion of the evidence the court "directed a verdict for the defendants, in language following, namely: 'It appearing to the court that at the time the deeds were made to these lots of land Nos. 5 and 6 to the plaintiff in this suit that the defendants were in possession of lots in controversy, and that thereupon these deeds being made by the administratrix of the estates of Melton and Rogers, the plaintiff cannot recover in this suit, for the reason that, as stated in Code 1895, § 3457 (Code 1910, § 4033), an administrator cannot sell property held adversely to the estate by a third person. He must first recover possession. This having not been done by the administratrix aforesaid, a verdict is directed for the defendants. This verdict is directed solely and only upon this ground.'" The plaintiff excepted to the direction of a verdict, on the ground, among others, that the section of the Code referred to, providing that an administrator cannot sell lands held adversely to the estate, "is not applicable to a sale of wild lands." The plaintiff in error contends that the statute intended to give an administrator the right to sell wild land at private sale, though held at the time adversely to the estate. Under the common law, and under the statute of 32 Henry VIII, c. —, a deed to lands at the time in the adverse possession of others was void. The act of 1858 (Acts 1858, p. 56) gave ordinaries the right to pass orders authorizing an administrator to sell, at private sale, "wild and scattered lands lying and being in different counties in this state." This act is codified in Civil Code 1910, § 4024, which is as follows: "On application by the administrator and due notice advertised as hereinafter provided in case of land, the ordinary may grant an order authorizing the administrator to sell, at private sale, wild uncultivated lands lying in counties other than that of the administration: Provided, no objection is filed by any one interested in the estate, and the ordinary is satisfied that such sale is preferable." In 1859 (Acts 1859, p. 24) an act was passed which is codified in Civil Code 1910, § 4185, and which reads as follows: "A deed to lands, made while the same are held adversely to the maker of the deed, is not void."

Civil Code 1910, § 4033, which is the same as section 3457 of the Code of 1895, referred to by the court when he directed a verdict is as follows: "An administrator cannot sell property held adversely to the estate by a third person; he must first recover possession." Cultivated land in the adverse possession of any one would not be wild land, and could not be sold as such under Civil Code 1910, § 4024, above quoted. The provision of Civil Code 1910, § 4033, that "an administrator cannot sell property held adversely to the estate by a third person," is an exception to the general law in Civil Code 1910, § 4185, providing that "A deed to lands, made

while the same are held adversely to the maker of the deed, is not void," and the word "property" in the section first above quoted applies to sales of all kinds of property. Orders for the sale of wild lands must be granted upon written application therefor, after publication of notice in the same manner as in instances where orders for the sale of land other than wild land are granted; and an order for the sale of wild land may require it to be sold at public sale. It has been many times held that a public sale of land other than "wild land" by administrators, while in the adverse possession of others, and a deed in pursuance thereof, conveys no title. *Weitman v. Thiot*, 64 Ga. 11; *Coggins v. Griswold*, 64 Ga. 323; *Lowe v. Bivins*, 112 Ga. 341, 37 S. E. 374; *Hanesley v. Bagley*, 109 Ga. 346, 348, 84 S. E. 584; *Hall v. Armor*, 68 Ga. 449; *Heard v. Phillips*, 101 Ga. 691, 31 S. E. 216, 44 L. R. A. 369; *Davitt v. So. Ry. Co.*, 108 Ga. 665, 84 S. E. 327. The main reason that such sales are made void is that property, though actually belonging to the estate, would not likely bring its full value when held adversely to the estate and the administrator could not give possession. Even if land in the adverse possession of any one can be said to be "wild land," the same reasons which would make unwise the sale of land other than wild land in the possession of another would apply to wild land in the adverse possession of another. However, we do not see how land in the adverse possession of any one can be said to be "wild land." It makes no difference whether the land be designated as "wild land," or by some other description. The fact that it is held adversely to the estate makes a sale of it by the administrator of the estate void. If the land is not "wild uncultivated land," under the statute the administrator has no right to sell it at private sale; nor would he have the right to sell it at public or private sale, if it was "wild, uncultivated land" and held adversely to the estate, even if land held adversely to the estate could in any case properly be denominated "wild land."

[2] 2. We do not think the evidence such as warranted the court in directing a verdict for the defendants on the ground on which he directed it. Under the evidence the question as to whether the lands were "wild, uncultivated lands" when the private sales and deeds by the administrators were made to the plaintiff was one for the jury. There were in evidence grants from the state to the two lots. One grant was to Zackariah Melton and the other to Davis Rogers, each conveying one of the lots of land. The deed of the administrator of Rogers to the plaintiff was dated July 6, 1906, and was made under an order of the ordinary granted at the July term, 1906, of the court of ordinary. The deed of the administrator of Melton to the plaintiff, conveying the other lot of land, was

dated September 28, 1906, under an order of the ordinary granted at the September term, 1906, of the court of ordinary. There was in evidence a deed to the two lots of land from Sharpe to Lydia Stone, dated April 10, 1905, and a deed from the latter to the defendants, conveying the two lots of land, dated May 19, 1905. The only oral testimony upon the trial of the case was that of Gordon Stone, whose testimony in full was as follows:

"I am acquainted with lots Nos. 5 and 6 in the Second district of Charlton county. I know the defendants in this case. Medlin & Sundy [defendants] boxed and worked these lots for turpentine purposes. They boxed and worked them in 1906, and I believe they went right on until 1907. Either that, or they boxed them in 1905 and continued to work them until 1906. They worked these boxes until they were stopped from so doing by a bill of injunction. They worked the turpentine on these lots until they were stopped by an injunction. Medlin & Sundy cut the boxes and cornered them and chipped them and dipped them until they were stopped. This paper, purporting to be a deed from Lydia A. Stone to Medlin & Sundy, is the deed under which Medlin & Sundy claim these lots. I suppose that on the two lots Medlin & Sundy had cut 6,000 or 8,000 boxes. They did not box all of either lot, but boxed about one-half of the timber on each lot, or rather between one-third and one-half of the timber. Most of the timber that they boxed was on the west side of the lot. This did not adjoin their other turpentine operations. It was about a mile from their other turpentine operations, which were over towards Mr. Mose Crews. There were no swamps dividing the lots, but these lots lie in the Little Okefenokee Swamp. The reason why they did not box the other was because the swamp was too bad. Medlin & Sundy cut and worked about 5,000 or 6,000 boxes. Lydia A. Stone, referred to in this deed, is my wife. Medlin & Sundy commenced boxing lots 5 and 6 in the Second district of Charlton county under this deed, dated May 19, 1905, either in the year 1905 or 1906. I do not know definitely when they began their operation, as I was not interested in that business. They did not box the timber in 1906 though, for they worked it in 1906. They were not back-boxing timber but were cutting round timber. Some of the timber had been boxed before this round timber that they boxed. I will not be positive as to the date as to when they commenced working these lots, but I am certain that they worked the turpentine in 1906. They cut something like 6,000 or 8,000 boxes on lot No. 5. I do not know how much on each they cut, but the two lots lay broadside of one another. There were two islands that they boxed. They boxed Gallberry Island, but the rest

of the swamp was so bad that they could not get to work it. They boxed and worked about one-third or one-half of each lot. They just worked the new boxes in 1906 that they had already cut. It might have been that they had some more boxes that they worked lower down, but I do not know about that. I do not know exactly when in 1906 they started to work the new boxes. I do know, however, that they worked them in 1906. Replying to your question as to how continuously they worked them, I will say that they worked them regularly. They chipped them once a week, and dipped them regularly. This work was done around the swamp or bay or on the islands. I know the lines of these lots, for I helped Mr. Cooper run them out. Replying to your question as to how I know that they worked these boxes in 1906, I will say that I was not there when they commenced working them, but I was there during the season, and they worked them pretty regularly. I made several trips over there. The first time I went over there they were working them. They had the boxes cut when we ran the lines. I do not remember exactly when it was that we ran the lines, but Mr. Cooper can tell you the dates."

This testimony was not such as to require a finding that the defendants boxed or worked the trees for turpentine purposes until the year 1906, in which the plaintiff obtained the deeds of the administrators. The defendants boxed the trees for turpentine purposes "in 1905 or 1906," and "worked them for such purposes the year succeeding the one in which they boxed them." If they did not box the trees until 1906, as far as disclosed by the evidence, such boxing may have been done in that year after the deeds of the administrators were made to the plaintiff. The private sales of the land by the administrators were void if they were not "wild, uncultivated lands" at the time of the sale, as administrators have no right to sell at private sale any lands of the estate they represent except "wild, uncultivated lands." The lands would not be "wild, uncultivated lands" if they were in the adverse possession of the defendants. If, when the private sales of the administrators were made, the lands were in the adverse possession of the defendants, the sales would be void, as the land would not be "wild, uncultivated lands." The lands might not be in the adverse possession of the defendants, and yet not be "wild, uncultivated lands." If the lands at the time of the sale were not in the adverse possession of the defendants, the sales would be void if they were not "wild, uncultivated lands." As land in the adverse possession of any one cannot be wild land, the only question involved is whether or not, under the evidence, the lands were "wild, uncultivated lands" at the time of the private sales by the administrators. This

question was one for the jury, and the court erred in directing a verdict for the defendants.

Judgment reversed. All the Justices concur, except BECK, J., absent, and ATKINSON, J., dissenting.

(136 Ga. 639)

BOYETT v. BAINBRIDGE STATE BANK.  
(Supreme Court of Georgia. Aug. 18, 1911.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR (§ 724\*)—DISMISSAL—GROUNDS.**

There is no merit in the motion to dismiss the bill of exceptions for the want of sufficient assignment of error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 724.\*]

**2. NEW TRIAL (§ 111\*)—PROCEEDINGS TO PROCURE—DISMISSAL OF MOTION.**

Under the facts of the case, the judgment overruling the motion to dismiss the motion for a new trial will not be reversed.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 111.\*]

**3. APPEAL AND ERROR (§ 977\*)—REVIEW—QUESTIONS OF FACT—GRANT OF NEW TRIAL.**

The verdict was not demanded under the law and the evidence, and the first grant of a new trial will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

(Additional Syllabus by Editorial Staff.)

**4. APPEAL AND ERROR (§ 634\*)—RECORD—SUFFICIENCY.**

Under Civ. Code 1910, § 6183, providing that the Supreme Court shall not dismiss any case for want of technical conformity to the statute or rules governing the practice in carrying cases to that court where there is enough in the bill of exceptions or transcript or both together to enable the court to ascertain substantially the real questions involved, where it appears from a bill of exceptions that the cause was tried at a given term of a superior court, that a verdict was rendered for defendant, that at the same term a motion for a new trial was filed by one for the use of another, and that, when the motion came on for hearing, the defendant filed his motion to dismiss the motion for a new trial on the ground that no party to the cause had filed any motion for a new trial, and that the court denied the motion to dismiss and granted a new trial, a motion to dismiss the writ of error must be denied.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 634.\*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by the Bainbridge State Bank against Gordon L. Boyett. By amendment of petition Jessie R. Williams was made plaintiff for use of the Bainbridge State Bank. From an order granting a new trial after verdict for defendant, he brings error. Affirmed.

W. H. Krause, for plaintiff in error. Jno. R. Wilson and Hawes & Pottle, for defendant in error.

FISH, C. J. [1] 1. Under Civ. Code 1910, § 6183, the Supreme Court will not dismiss a writ of error, "where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided therein." Therefore a bill of exceptions contains enough to enable this court to ascertain the point adjudicated by the trial court and sought to be reviewed, where it appears from the bill of exceptions that "the cause of the Bainbridge State Bank against Gordon L. Boyett" was tried at a given term of a superior court; that a verdict was rendered there in favor of the defendant; that "at the same \* \* \* term of the court a motion for a new trial in said cause of the Bainbridge State Bank against Gordon L. Boyett was filed by one Jessie R. Williams for the use of said bank," and, when said motion came on for a hearing, "the respondent Gordon L. Boyett duly filed his motion to dismiss said motion for a new trial, upon the grounds that no party to the cause had filed any motion for a new trial in said cause, which motion to dismiss is specified as a part of the record, and which motion was by the court on said date overruled, to which ruling and judgment, which would be a final adjudication, said respondent excepted and now excepts and assigns same as error," and that "the court granted a new trial in the cause of the Bainbridge State Bank against Gordon L. Boyett, to which ruling and judgment of the court respondent excepted and now excepts and assigns same as error." The motion to dismiss the writ of error must therefore be denied. *Patterson v. Beck*, 133 Ga. 701, 66 S. E. 911.

[2] 2. In an equitable action brought by the Bainbridge State Bank against Gordon L. Boyett, the petition alleged: The plaintiff is the bona fide owner of a promissory note executed by the defendant and payable to the order of Jessie R. Williams. The note was given for part of the purchase money of described realty sold by Williams to the defendant, and for which Williams had given the defendant a bond for title. The note contained a waiver of homestead and exemption. The defendant had been adjudicated a bankrupt, and certain described property, including the realty for part of the purchase money of which the note was given, had been set apart as a homestead and exemption by the trustee in bankruptcy to the defendant, who is now in possession of the same. The note was not proved in the court of bankruptcy, nor did the plaintiff appear in the bankruptcy proceedings. The defendant has never been discharged in bankruptcy, and a judgment in rem is prayed against such exempted party. The petition was directed to the city court of Bainbridge, Decatur county, and was marked, "Filed in office April 20, 1909,"

signed by "C. W. Wimberly, Clerk." An amendment to the petition was marked, "Filed in office April 21, 1909," signed by "C. W. Wimberly, Clerk." The act creating the city court of Bainbridge provided that the clerk of the superior court of Decatur county should be ex officio clerk of the city court of Bainbridge. In the amendment to the petition the cause was stated as, "Jessie R. Williams for use of Bainbridge State Bank v. Gordon L. Boyett, Complainant. Superior Court Decatur County, May Term, 1909." The amendment sought to change the address of the petition from the city court of Bainbridge to the superior court of Decatur county. Process was issued from the superior court of Decatur county, and was served upon the defendant. On May 15, 1909, the defendant filed in the superior court of Decatur county a motion to dismiss the cause, upon the ground that the petition was addressed to the city court of Bainbridge, and that the superior court therefore had no jurisdiction of the cause. This motion was headed, "Georgia, Decatur County. Jessie R. Williams for use of Bainbridge State Bank v. Gordon L. Boyett. In Superior Court said county. May term, 1909. Bill in Equity." On the last-named date the defendant also filed in such superior court a plea in which the cause was stated as in his motion to dismiss. The amendment to the petition was allowed upon the trial at the November term, 1909, of the superior court. There was a verdict in favor of the defendant. A motion for a new trial was made in the name of "Jessie R. Williams for use of Bainbridge State Bank." Upon the hearing of the motion the respondent, Boyett, moved to dismiss the same, upon the ground that the action was brought by the Bainbridge State Bank, and no amendment had been allowed providing that the cause proceed in the name of Jessie R. Williams for the use of the Bainbridge State Bank, and therefore that no motion for a new trial had been made in the name of any party to the cause. The court overruled this motion, and Boyett excepted.

[4] Under the facts stated, we are of the opinion that the ruling of the court in refusing to dismiss the motion for a new trial should not be reversed. In the amendment to the petition, as well as in the defendant's motion to dismiss the case, and in his plea, the case was stated as in the name of Jessie R. Williams for the use of the Bainbridge State Bank against the defendant. Both parties in all the pleadings, except the original petition, having stated the cause as being in the name of Jessie R. Williams for the use of the Bainbridge State Bank, and it having been finally tried as a cause of that character, the defendant, after having obtained a verdict and judgment, should not be allowed to subsequently urge the point that Jessie R. Williams was not a party to the cause, es-

pecially in view of the fact that she was a mere nominal party, and that the Bainbridge State Bank in whose name the action was originally brought was the party at interest in the cause, and in the motion for a new trial made therein. In this connection, see *Anderson v. Foster*, 105 Ga. 563, 565, 32 S. E. 373; *Gate City Terminal Co. v. Thrower*, 136 Ga. 456, 71 S. E. 903.

[3] 3. Error is assigned in the bill of exceptions upon the grant of a new trial. From an examination of the record it appears that a verdict in favor of the defendant, Boyett, was not demanded under the law and the evidence. It follows that the discretion of the trial judge in granting the first new trial will not be disturbed.

Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 745)

RAY et al. v. UNION SAVINGS BANK & TRUST CO. et al.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

TRUSTS (§ 371\*) — ENFORCEMENT — ACTION — PETITION.

The petition did not set forth a cause of action for aiding and assisting a trustee, with knowledge of his misconduct, in the misapplication of trust property, and was properly dismissed on general demurrer.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 371.\*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Clifford E. Ray and others against the Union Savings Bank & Trust Company and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

Clifford E. Ray, Thomas J. Ray, and J. L. Watson, as guardian for Bolivar H. Ray, Jr., and Lucile, Ruth, Marvin, and George Ray, minors, filed their petition against the Union Savings Bank & Trust Company and Bolivar H. Ray, Sr. The substance of the petition as amended, and now material, was as follows: The minors, represented by Watson, and the other two plaintiffs, are all the children of Bolivar H. Ray, Sr., and his wife, Carrie I. Ray, who died in 1893. On August 1, 1893, the defendant Ray, as trustee for his wife and their minor children, bought from Mrs. Shellman a described house and lot at the price of \$5,400, all of which he paid except \$1,800. Mrs. Shellman subsequently sued Ray, as trustee, for the balance of the unpaid purchase money due for the property, obtained judgment, and had the property sold at sheriff's sale. Ray, as trustee, arranged with Plant that the latter should bid in the property at the sheriff's sale for the

benefit of Ray, as trustee; Plant agreeing to convey the property to Ray, as trustee, upon the payment by him to Plant of the amount of the latter's bid. On July 26, 1897, Plant conveyed the property by quitclaim deed to Ray, as trustee for his wife, and, at her death, then in trust for her children. In the language of this deed Ray, as such trustee, was given "full power and authority to sell, mortgage, or otherwise incur all or any part of said property at his discretion, either publicly or privately, and on such terms as the trustee may prefer, and without the necessity of any order of court therefor." In order to obtain the money with which to pay off Plant's bid for the property, Ray, as trustee, borrowed from Mrs. Roush \$2,400, and to secure the payment of this loan he, as trustee, on July 26, 1897, executed to Mrs. Roush a security deed to the property.

On April 22, 1898, Ray borrowed \$2,500 from the Union Savings Bank & Trust Company for the purpose of paying his individual indebtedness, and on the same date executed to this company a "second mortgage" on the property to secure the loan. The negotiation for this loan was had between Ray and Cabaniss, who was at the time president both of the Union Savings Bank & Trust Company and of the Exchange Bank of Macon; and it was then agreed between Cabaniss, as president of the Union Savings Bank & Trust Company, and Ray, as trustee, that the loan should be made by this company to Ray, as trustee, and that it should be secured by a mortgage upon the property in question, to be executed by Ray, as trustee, to the company, and that when the transaction should be completed Ray should deposit the money so loaned in the Exchange Bank of Macon to meet certain of his individual debts, with which the trust estate had no connection. In the language of the petition: "Both the Union Savings Bank & Trust Company and the Exchange Bank of Macon, Ga., had a business and financial interest in the individual obligation of said Ray which are herein referred to, and in the payment of said obligation \$1,050 of that sum was directly due by said Ray to the Exchange Bank of Macon, Ga., and the other sums, which along with the \$1,050 made up the total of \$2,500, were due and owing to certain regular customers of the Exchange Bank of Macon, Ga., and the Union Savings Bank & Trust Company. The said B. H. Ray was not, either individually or as trustee, permitted to handle the \$2,500 so borrowed; but the same was by the said J. W. Cabaniss applied to the individual obligation of B. H. Ray to said banks and to the customers of said banks. By reason whereof petitioners allege that the said J. W. Cabaniss, as president of the Union Savings Bank & Trust Company, did aid and assist the said B. H. Ray, as trustee aforesaid, with full knowledge of the misconduct of the said B. H. Ray, as trustee, etc., in misapplying the as-

sets of his trust estate, which was intended and should have been used for the benefit of petitioners."

On December 6, 1898, Mrs. Roush, by virtue of the power of sale contained in the security deed executed to her by Ray, as trustee, advertised and sold the property in question, and, in the language of the petition, "the said Union Savings Bank & Trust Company, by agreement with the said B. H. Ray, trustee, bid off said property at said sale for the benefit of the trust estate, taking thereto a deed from the said Kate M. Roush, paying her the sum of \$2,669.93, being the balance of the purchase money due and owing by the said trustee for said property." This agreement was in parol, and was made by the Union Savings Bank & Trust Company, through its president, Cabaniss; it being part of the agreement so made with such company to purchase the property for the protection of the trust estate, and that it might be redeemed within a reasonable time by the trustee for such estate. In the language of the petition: "By reason of the parol agreement \* \* \* the said Union Savings Bank & Trust Company had no competitors at said sale, and the said trustee did not make any effort to obtain competitive bids for said property, or to make said property bring at said sale its full value, which petitioners allege was, at all the times mentioned in the petition, worth \$5,000 or more, and would have brought the sum of \$5,000 at forced sale." It was further alleged that "by reason of the fact that Cabaniss, as president of the Union Savings Bank & Trust Company, had induced Ray, as trustee, to give that company the second mortgage on the trust property, the trustee was unable to arrange a sale of the property so as to realize a surplus above the amount due Mrs. Roush, or to borrow money with which to pay it."

On March 8, 1899, the Union Savings Bank & Trust Company and the defendant Ray, "conspiring together to defraud said trust estate, entered into an agreement by which the said Union Savings Bank & Trust Company was to take, hold, and use said trust property as its own, at and for the agreed price of \$5,000, the payment of which consisted in the Roush debt, including interest and expenses, the sum of \$2,759.65, leaving a balance of \$2,240.35, which was appropriated as a credit upon said debts held by the Union Savings Bank & Trust Company against said Ray as trustee, for the said sum of \$2,500, made on April 22, 1898, as hereinbefore described, and leaving a balance still outstanding upon said debt of \$468.56, for which amount the Exchange Bank of Macon took the individual note of the said B. H. Ray, on March 10, 1899, and thereupon canceled and surrendered the said note for \$2,500, dated April 22, 1898, payable to the said Union Savings Bank & Trust Company and signed by said B. H. Ray, trustee for his

wife and children." It was alleged that the Union Savings Bank & Trust Company, in order to further cover up the fraudulent scheme to deprive petitioners of their rights in the property in question, had sold and conveyed the same to an innocent purchaser; that at the date of filing the petition the eldest of the petitioners was 22 years old, and that the petitioners, "by the fraud of the defendants, and by reason of defendants' conduct as herein described, and by reason of their tender age, were prevented from knowing of their rights in the premises, and of the fraudulent conduct of the defendants, until at least one of them reached the age of maturity." There was a prayer for the recovery of the sum of \$2,240.35, which was alleged to be "a trust fund in the hands of the said Union Savings Bank & Trust Company, with full knowledge that the same belonged to petitioners, and which the said bank undertook to aid the said trustee in misappropriating, by using the same in the settlement of the individual debts of the said trustee, and thereby defeat the petitioner's rights to the same."

The petition was demurred to by the Union Savings Bank & Trust Company upon the following grounds: (1) Because it sets forth no cause of action against this defendant; (2) because the purpose of the petition is to ingraft upon the property described therein a trust in favor of the plaintiffs, and the allegations are not sufficient either to create an express trust or to raise an implied trust; (3) because the petition seeks to ingraft an express trust upon a written deed by parol, and there can be no parol trust in land, and no express trust can be created by parol; (4) that, from the allegations of the petition, the land therein described was not purchased with any money belonging to the petitioners, and it appears that they have parted with nothing which they ever possessed or owned; (5) that the agreement set forth in the petition concerned an interest in and the sale of land, and was within the statute of frauds, and should therefore have been in writing; (6) that the alleged verbal agreement having been made in the year 1899, and suit entered thereon in 1909, ten years thereafter, the trustee was barred, and the cestuis que trustent are also barred; (7) because under the allegations of the petition the right of action, if any exists, is in B. H. Ray, as trustee for his wife and children, and not the petitioners. The court sustained the general demurrer, and dismissed the case, to which ruling the plaintiffs excepted.

Hall & Hall and L. D. Moore, for plaintiffs in error. Lane & Park, for defendants in error.

FISH, C. J. (after stating the facts as above). "All persons aiding and assisting trustees of any character, with a knowledge of their misconduct, in misapplying assets, are directly accountable to the persons in-

jured." Civil Code 1895, § 3200 (Civil Code 1910, § 3784). "One who purchases from a trustee who has authority to sell acquires a title to the property sold; and the title thus acquired is not affected by the subsequent conduct of the purchaser in knowingly aiding the trustee in a misappropriation of the proceeds of the sale, unless such misappropriation be the result of an arrangement between the purchaser and the trustee before the sale is completed, or the purchaser know that the trustee is selling for the purpose of misappropriating the proceeds. A purchaser who buys in good faith from a trustee, and subsequently aids the trustee in misappropriating the purchase money, is liable to the persons injured by the misappropriation; but such conduct does not invalidate his title to the property acquired under the sale by the trustee." *Tapley v. Tapley*, 115 Ga. 109, 41 S. E. 235. It is contended for the beneficiaries under the trust deed from Plant to Ray, as trustee, whom we will designate as the plaintiffs, that, applying the provisions of the Code section above quoted and the ruling in the case cited to the facts alleged in the petition, a cause of action was set forth against both of the defendants. The trustee, under the power given him in the deed from Plant to sell or incur the trust property in his discretion without an order of court, was not authorized to execute the mortgage on the trust property to secure the payment of the loan made by the Union Savings Bank & Trust Company to the trustee in accordance with the agreement between the company and the trustee that the money so loaned should be deposited in another bank and paid out in the satisfaction of the individual indebtedness of Ray, who was trustee, due the bank last referred to and to other creditors of Ray, who were customers of such bank and the defendant company. See *Maynard v. Cleveland*, 76 Ga. 52 (4); *Cohen v. Parish*, 105 Ga. 339 (2) 345, 31 S. E. 205. The conduct of the Union Savings Bank & Trust Company in respect to this transaction was certainly an effort on its part to aid and assist the trustee in the misapplication of the trust property, not only with full knowledge of his misconduct, but in compliance with an express agreement with the trustee that the company should actually take part in the misapplication. Therefore, if the action of the company as to this matter eventuated in injury to the plaintiffs, the company is directly accountable to them for it.

We do not perceive, however, any resultant injury to the plaintiffs from this transaction alone. The possession and ownership of the note, given by the trustee to the company for the loan which was mutually agreed should be used in the payment of his individual indebtedness, and which was so applied, as well as that of the mortgage executed by the trustee to the company to secure the payment of such note, were retained by the



company, and no effort was ever made to subject the trust property to satisfy the same. The note and mortgage in the hands of the company were invalid as against the trust estate, and the mere giving of the same, in the circumstances, to the company by the trustee, without more, did not cause any injury to the plaintiffs. But it is alleged in the petition that "by reason of the fact that Cabaniss, as president of the Union Savings Bank & Trust Company, had induced Ray, as trustee, to give that company the second mortgage on the trust property, the trustee was unable to arrange a sale of the property so as to realize a surplus above the amount due Mrs. Roush, or to borrow money with which to pay it." In the absence of an averment that the trustee made an effort to sell the property, or to borrow money for such purpose, which was unavailing by reason of the fact that the mortgage had been given, the allegation quoted above amounts to no more than the conclusion of the pleader that the effect of the execution of the mortgage was necessarily to prevent the trustee from selling the property or borrowing money for the purpose indicated. We do not think that such result necessarily followed; but, even if it did, we do not perceive how the trust estate was injured merely because the trustee, by reason of the execution of the mortgage, was unable to arrange a sale of the property so as to realize a surplus above the Roush debt or to borrow money with which to pay it. If these were the only results of the giving of the mortgage, if the matter ended here, no damage to the trust estate appears. Ray's individual debts were paid with the money loaned him by the company for that purpose, and he, as trustee, gave the company a mortgage on the trust property to secure the loan; but by this transaction alone the company did not get any of the property belonging to the trust estate, nor was any of the trust property misapplied to the injury of the trust estate. The money so borrowed was Ray's individual money, and it was appropriated to the payment of his individual indebtedness.

Nor do we think that the defendant company was bound for aiding and assisting the trustee in the misapplication of the property of the trust estate, nor that it injured the plaintiffs, the beneficiaries of such estate, by purchasing the property at the sale made by Mrs. Roush, under the power given her in the security deed executed by the trustee. As one who purchases in good faith from a trustee who has authority to sell acquires the title to the property sold, it must follow that, where a trustee is authorized to incumber property by executing a deed thereto for the purpose of securing a loan with which to discharge a prior incumbrance on the property, a sale duly made by the grantee, upon whom such power was conferred in the security deed, was legal, and the purchaser under such sale acquired title to

the property sold, in the absence of fraud on his part. The defendant company was not charged with any fraud in purchasing the property under the Roush sale, it being merely alleged that under a parol agreement between the trustee and the company the latter purchased the property for the benefit of the trust estate—that is, that the company agreed in parol to purchase the property for the protection of the trust estate, and that it might be redeemed within a reasonable time by the trustee; that the company purchased the property at the sale for \$2,069.96, being the balance of the purchase money due Mrs. Roush for the property by the trustee, and took a deed from her to the property, which was then worth \$5,000. There is no allegation that this agreement between the trustee and the company was collusive, and made for the purpose of misapplying the property of the trust estate, or in any way injuring the cestuis que trustent. In fact there was no misapplication of the proceeds of the sale, for they went to pay the debt due by the trust estate to Mrs. Roush. There was no averment of any offer by the trustee to redeem, and, even if there had been, the company was not legally bound to comply with its oral agreement to allow the trustee to redeem the land, or to reconvey it to him upon the payment of the amount the company had paid for it at the sale, as the contract was for the sale of, or concerning, land. Civil Code 1895, § 2693 (4); Civil Code 1910, § 3222 (4); Lyons v. Bass, 108 Ga. 573, 34 S. E. 721. The defendant got a legal title to the land under the sale. The proceeds of the sale were not misapplied, and the company was not legally bound to reconvey the property to the trustee. This being true, we do not perceive how the company, in the absence of any fraud in the transaction, can be made liable, on the theory of aiding and assisting the trustee in the misapplication of trust funds, for the difference between the real value of the land at the time of the sale and the amount at which it was bid off.

Was a cause of action set forth by the allegations that, after the defendant company had purchased the land at the Roush sale in December, 1898, in March of the succeeding year the company and the trustee conspired together to defraud the trust estate, by entering into an agreement by which the company "was to take, hold, and use said trust property as its own, at and for the agreed price of \$5,000, the payment of which consisted in the Roush debt, including interest and expenses, the sum of \$2,759.65, leaving a balance of \$2,240.35, which was appropriated as a credit upon" the note of \$2,500, which had been given by Ray, as trustee, on April 22, 1898, for the loan with which to pay his individual debts, and the giving to the Exchange Bank of Macon, by Ray, the trustee, of his individual note for the balance, viz., \$468.50 which agreement was carried out, and a subsequent sale of

the property made by the company to an innocent purchaser? As we have seen, the bank had a legal title to the property, and therefore could dispose of it as it pleased. There was no allegation that the agreement last referred to constituted any part of the agreement between the trustee and the company that the latter should purchase the property at the Roush sale, nor is there anything in the petition tending to show that the trustee and the company intended, at the time of such sale, that this last agreement would be entered into. As we have said, the legal title to the property was in the company, and it could have sold and conveyed it to any one without allowing any credit on the note given by Ray, as trustee, for the loan with which to discharge his individual debts. The allowing of the credit on such note was, therefore, a mere gratuity on the part of the company.

Our conclusion is that there was nothing in this last transaction which constituted a misapplication by the bank of the trust property, nor anything showing that the company aided or assisted the trustee in the misapplication of trust funds or property. There was nothing in the petition going to show that the three transactions therein set forth, and which we have discussed, constituted a scheme between the trustee and the defendant company to defraud the trust estate; but it appeared, so far as the petition showed to the contrary, that such transactions were separate and distinct. Nor was the property of such estate thereby misapplied by the trustee, with the aid or assistance of the defendant company, and to the injury of the plaintiffs. It follows, therefore, that the petition did not set forth a cause of action and that it was properly dismissed on general demurrer.

Judgment affirmed.

BECK, J., absent. The other Justices concurred.

(136 Ga. 756)

PRUETT v. COWSART et al.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

1. WILLS (§ 88\*)—EVIDENCE (§§ 271, 353\*)—DEED DISTINGUISHED FROM WILL—DOCUMENTARY EVIDENCE—ADMISSIBILITY.

J. F. Pruett died on May 12, 1909, leaving a widow and several children by a former marriage. The widow sought to have dower assigned out of certain land, which the children resisted on the ground that the property had been conveyed to them by Pruett before his death. The instrument relied on as a conveyance of the property was dated August 21, 1908, but was not recorded until after the death of Pruett. It was in the form of a warranty deed, and recited, among other things, that the former wife of the grantor and the mother of the grantees in the deed in 1867 inherited from her father \$940, of which amount \$754 was in-

vested by the grantor, with the consent of his then wife, in the land described in the deed, such sum being the full purchase price of the land; that by oversight, neglect, or ignorance of the difference that would be made, title to the land was taken in the name of the grantor in the present deed, instead of the name of his then wife, thus placing the legal title in such grantor, but leaving the equitable title in his wife, which had remained in her ever since; that she died in April, 1902, intestate, and no administration has ever been had upon her estate; and that, as the grantor desired that the legal as well as the equitable title to the land should be placed in the heirs at law of his first wife, in order that full justice and equity should be done, "and in consideration of the facts herein set forth, as well as for the natural love and affection I hold for my said children hereinbefore named, and also for the consideration that I am to remain in possession of said lands and receive the benefits therefrom as long as I live," the grantor conveyed unto the grantees all interest in the land, including his own interest as an heir at law of his first wife. Upon the introduction of the instrument objection was urged to its admissibility on the grounds: "(a) Because the said deed appears to have been recorded since the death of the grantor; and, further, it is a testamentary paper purely and not a deed. (b) The recitals contained in said deed are not binding upon the widow, and should not be allowed to go to the jury for the purpose of defeating the widow in her dower rights, and as to her passed no title to the grantees. (c) Upon the further ground that the said deed, as insisted by the widow, is without consideration; the objectionable recitals being eliminated from the consideration of the court and jury. (d) Because it appears upon the face of said deed that the recitals in it contained is but an effort by the grantor to perpetuate his testimony as to his own knowledge as to whose property was sought to be conveyed, and to whom it had or should have belonged, and to whom it should go. (e) Because the recitals in said deed are self-serving declarations, made in contemplation of early death and possible or probable litigation afterwards, and therefore inadmissible." Held, the instrument conveyed an estate in praesenti, with possession postponed until after the death of the grantor, and was not testamentary in character. *Isler v. Griffin*, 134 Ga. 192, 67 S. E. 854. The other grounds of objection urged to its admissibility were without merit.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 88; Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. §§ 271, 353.\*]

2. SUFFICIENCY OF EVIDENCE—ASSIGNMENT OF DOWER.

The evidence introduced upon the trial was insufficient, under any view, to authorize a finding that the land was the property of J. F. Pruett at the time of his death, and there was no error in granting a verdict against the applicant for dower.

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by Mrs. M. E. Pruett against M. J. Cowsart and others. Judgment for defendants, and plaintiff brings error. Affirmed.

N. L. Hutchins and J. A. Perry, for plaintiff in error. O. A. Nix and I. L. Oakes, for defendants in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concurred.

(136 Ga. 740)

**SELPH et al. v. SELPH et al.**

(Supreme Court of Georgia. Aug. 22, 1911.)

*(Syllabus by the Court.)***1. EVIDENCE (§ 340\*)—DOCUMENTARY EVIDENCE—AUTHENTICATION.**

This case was here on a former occasion. *Selph v. Selph*, 133 Ga. 406, 65 S. E. 881. After the decision in the Supreme Court, and before the termination of the case in the superior court, the defendants filed an application to the court of ordinary to establish a copy of the lost original return of the appraisers setting apart the land to the defendants as a year's support. The petition to establish the lost paper was not served upon the plaintiffs in the pending suit, nor did they have notice of the application; but the ordinary, on the day the application was presented, entered an order ex parte establishing the copy in lieu of the lost original. On a subsequent trial of the case in the superior court, when the copy so established was offered in evidence, it was admitted over the objection, among others, that the order establishing the lost record was passed without any notice to the plaintiffs, as required by law. Under the rulings in the cases of *Cleghorn v. Johnson*, 69 Ga. 369, *Wimberly v. Mansfield*, 70 Ga. 783, *Cosnahan v. Rowland*, 89 Ga. 285, 25 S. E. 647, and *Allen v. Lindsey*, 113 Ga. 521, 38 S. E. 975, this was error.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 340.\*]

**2. SUFFICIENCY OF EVIDENCE—PRESCRIPTIVE TITLE.**

The case was submitted to the court without the intervention of a jury, and the defendants in error relied both upon record title and upon prescription. The evidence is not sufficient to require a finding in favor of the prescriptive title. Civil Code, 1910, § 3725.

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by G. W. Selph and others against S. A. Selph and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Jackson & Jackson and J. G. & J. F. McCall, for plaintiffs in error. Hendricks & Christian, for defendants in error.

ATKINSON, J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 772)

**APPLING v. CITY OF ABBEVILLE.**

(Supreme Court of Georgia. Aug. 22, 1911.)

*(Syllabus by the Court.)***MUNICIPAL CORPORATIONS (§ 868\*)—SCHOOL TAXES—LIMITATION OF AMOUNT.**

The act approved December 3, 1895 (Acts 1895, p. 117), establishing a system of public schools for the city of Abbeville, to be supported and maintained by funds derived from the levy of a municipal tax not to exceed one-half of 1 per cent., and from the town's proportionate share of the state public school fund, under the administration of a board of education, contemplates that all liabilities legally created by the board of education are payable exclusively from the designated funds. Where

the maximum tax in a given year was collected and paid over by the town authorities to the board of education, who had disbursed the same, the municipality was not liable to a school-teacher for the unpaid balance of his salary under a verbal contract made with the board for services rendered during the year.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 868.\*]

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action by R. Appling against the City of Abbeville. Judgment for defendant, and plaintiff brings error. Affirmed.

Hal Lawson, for plaintiff in error. M. B. Cannon, for defendant in error.

EVANS, P. J. The plaintiff sued the city of Abbeville on an account for services rendered as a school-teacher under a contract with the board of education, who were alleged to have authority to bind the city in making the contract. The defendant denied liability. The case was tried before the judge on an agreed statement of facts, the salient parts of which are as follows: The plaintiff made a verbal contract to teach school, during the year 1901, with the board of education, organized under the act of 1895, establishing a system of public schools in the city of Abbeville. He performed the services stipulated in the contract, for which he had been partially paid, leaving as due the amount sued for. At the time of making the contract the board of education had no funds on hand, and the money for the payment of plaintiff had to be derived from the funds to be paid over to the board of education by the mayor and council of Abbeville from taxes collected for the years 1901 and 1902. For these years the mayor and council had levied and collected a tax of one-half of 1 per cent. for school purposes, and had paid the same to the board of education, and the funds had been disbursed by the board prior to the filing of the plaintiff's suit, and the board had no funds on hand. The court adjudged that the plaintiff was not entitled to recover, and he excepts.

The act approved December 3, 1895 (Acts 1895, p. 117), provided for the establishment of a system of public schools for the city of Abbeville under the supervision of a board of education, consisting of five citizens elected by the mayor and council. The board of education was authorized to employ teachers and fix their compensation. The mayor and council were empowered to annually levy and collect such tax (not to exceed one-half of 1 per cent.) as would be sufficient, when added to the sums received from the public school fund of the state, to support and maintain the city schools for at least six scholastic months in each year, and they were directed to pay the fund raised by the tax to the board of education, to be disbursed by the board for the support and main-

tenance of the schools. The clear import of the act was that the expenses of maintaining the city schools were to be defrayed exclusively from a fund produced by revenue from two sources, viz., that accruing from the town's levy of a special tax, and the town's proportionate part of the state public school fund. The board of education had no authority to create any debt against the city. Their power to contract carried with it the limitation that the liabilities which they might create were payable only from the funds appropriated to the support of the schools. If the city failed to levy and pay the tax to the board, it could be compelled by mandamus so to do. *Dennington v. Roberts*, 130 Ga. 494, 61 S. E. 20. The city did collect and pay over the full tax authorized to be levied, and it is not liable to a school-teacher who failed to get his money from the board of education.

Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 766)

HUNT v. TRAVELERS' INS. CO. OF  
HARTFORD, CONN.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

NEW TRIAL (§ 154\*)—PROCEEDING TO PROCURE—MOTION TO DISMISS MOTION—RENEWAL.

Where the presiding judge passes an order overruling a motion to dismiss a motion for a new trial, made by the respondent at a time when the judge had jurisdiction to pass on such motion to dismiss, and providing that the movant have until a named date, which is the first day of the next term, to present for approval a brief of the evidence, and the movant duly files and presents for approval such brief on that day, while the order overruling the motion to dismiss stands unreversed, the judge during such term or thereafter is without authority to dismiss the motion for new trial on another motion of the respondent based on the same grounds on which the former motion was made; such grounds being that movant in the motion for new trial had not presented for approval a brief of the evidence within the time specified in orders of the judge passed before the order overruling the motion to dismiss.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 154.\*]

Error from Superior Court, Muscogee County; S. P. Gilbert, Judge.

Action by Mrs. S. B. Hunt against the Travelers' Insurance Company of Hartford, Conn. Judgment for defendant, and plaintiff brings error. Reversed.

Hatcher & Hatcher, for plaintiff in error.  
O. E. Battle and Howell Hollis, for defendant in error.

HOLDEN, J. The plaintiff in error sued the defendant in error, and during the May term, 1910, of the superior court a verdict

and judgment were rendered in favor of the defendant. During that term, and within 30 days from the rendition of the verdict, the plaintiff made a motion for a new trial, the grounds of which were approved; and during the same term, on May 23, 1910, an order was passed by the court, directing that the motion be heard on August 1, 1910. This order further provided that, if the motion was not heard on that date, it should be heard at such "time and place in vacation as counsel may agree upon, under approval of the court, and, upon failure to agree, then at such time and place as presiding judge may fix on the application of either party, upon five days' notice to the opposite party, and that "movant have until 23d of July, 1910, to prepare and present for approval and filing a brief of the evidence." On July 23, 1910, in vacation, the presiding judge passed an order providing "that the time for preparing and presenting to the court her [movant's] brief of the evidence for approval be extended until the 1st day of August, 1910, at which time the court will approve the brief of evidence, \* \* \* and the same may then be filed." On August 1, 1910, during the August term of the court, the presiding judge passed an order reciting "that the plaintiff's counsel are not guilty of laches" in failing to present for approval a brief of the evidence, and ordering that the hearing of the motion "be continued until the 29th of August, 1910, and that plaintiff have until the 26th day of August, 1910, to prepare and present to the court her brief of evidence in the case for approval and filing, at which time said motion for new trial is set for hearing at chambers in Muscogee county, Ga." On August 29, 1910, in vacation, the presiding judge granted an order providing that the hearing of the motion be continued until the 27th day of September, 1910, "and that movant have until said hearing to prepare and present to the court for his approval and filing a brief of the evidence in said cause." This order recited that it was granted "without prejudice to either party." On September 27, 1910, in vacation, the judge granted an order reciting that on August 29, 1910, the respondent made a motion to dismiss the motion for a new trial, "upon the ground that no brief of evidence had been presented for approval by the court, and other grounds, as will appear by motion of that date, this motion was overruled, and further time was granted movant to prepare and file his brief of evidence." This order further recited: "On the 27th day of September, 1910, on the call of said case, counsel for the defendant appeared and announced to the court that the appearance for defendant was subject to a prior motion to dismiss, and to offer a motion to dismiss the motion for a new trial. This motion was also overruled, and movant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

granted until the 7th day of November, 1910, to complete and present for approval her brief of evidence, on which date said motion shall be heard and determined." During the November term of the court, the plaintiff filed in the clerk's office, and presented to the judge for approval, on November 7, 1910, a brief of the evidence. The motion "stood on the motion docket of said court, until the regular call of the motion docket during said November term, 1910, of said court, when it was called in its regular order for trial on the 30th day of November, 1910," at which time the court approved and ordered filed the brief of evidence and an amendment to the motion for a new trial. On November 30, 1910, while the November term of the court was in session, the motion for a new trial was called in its regular order on the motion docket, and respondent orally moved to dismiss the same, "because the brief of the evidence had not been approved by the court in terms of the orders passed in the cause." The court reserved his decision until December 8, 1910, when he rendered a judgment dismissing the motion for a new trial, which judgment contained, among other recitals, the following: "While this court feels assured that no error of law was committed, and counsel for movant having several times, on the various hearings, admitted that the evidence was sufficient to authorize the verdict rendered, yet, because the reasons which prevented the completion and filing of the brief of evidence appealed strongly to the court and seemed sufficient to excuse the failure, this court felt anxious to have the Supreme Court pass upon the important issues of law involved. Since the entire record has been submitted, the court is now convinced that it was without jurisdiction to pass any of the orders subsequent to the order dated May 23, 1910. *Blackburn v. Alabama Midland Railroad Co.*, 118 Ga. 936, 43 S. E. 366. The motion is therefore necessarily, but regretfully, dismissed." To this judgment the movant excepted.

One of the exceptions to the order of the court dismissing the motion for a new trial is "because it appears from the order of the court, bearing date 27th September, 1910, and embodied herein, that the court had previously overruled motions of defendant's counsel to dismiss her motion, and that a new motion to dismiss upon the same grounds could not be entertained by the court on 30th November, 1910." The record discloses that on August 29th, the day on which the motion for a new trial was set to be heard by an order granted in term, the respondent made a motion to dismiss the motion for a new trial, "upon the ground that no brief of evidence had been presented for approval by the court." On September 27th another motion was made to dismiss the motion for a new trial. No brief of evidence had been presented for approval, though the original order granted during

the May term provided that the movant should present for approval and filing a brief of the evidence on July 23d, which was prior to the time at which, in the same order, the hearing of the motion for new trial was set, and the order granted August 1st, the time fixed in the original order, provided that the brief of evidence should be presented for approval and filing on August 28th, which was prior to the time fixed in this order of August 1st for the hearing on August 29th. The order of September 27th continued the hearing of the motion for new trial until November 7th, and stated that both of the motions to dismiss the motion for new trial were overruled. Therefore there appears a written order of the court overruling the motions to dismiss the motion for a new trial. During the November term of the court, which was the next term after the passage of the order refusing the motion to dismiss the motion for a new trial, the court was without authority to dismiss the motion for a new trial on the same grounds on which he had passed an order refusing to dismiss it in vacation on the 27th of September. This order of September 27th refusing to dismiss the motion for a new trial, was *res adjudicata*, and was binding on the court and the parties until set aside. A party "may waive or renounce what the law has established in his favor, when he does not thereby injure others or affect the public interest." Civil Code 1910, § 10. The failure to file a brief of evidence according to the terms of the order of the court was a matter which the respondent could waive; and if on the dates set for the hearing of the motion for a new trial the respondent had waived the right to take advantage of the effect of the failure of the movant to present for approval and filing a brief of the evidence according to the terms of the order, and a brief of evidence had been approved and filed by consent of the respondent, the latter could not afterwards complain that the brief of evidence had not been presented for approval and filing according to the terms of the previous orders. When the respondent made a motion to dismiss the motion for a new trial because of the failure of the movant to present for approval and filing a brief of the evidence according to the terms of the orders, and this motion was overruled, the failure of the respondent to except to the order overruling his motion to dismiss the motion for a new trial would be treated as an acquiescence in the ruling of the court and as a waiver of the right to insist on the effect of such failure on the part of the movant. *Obear v. Gray*, 73 Ga. 455; *Augusta Ry. Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203; *Associated Press v. United Press*, 104 Ga. 51, 53, 54, 29 S. E. 869; *Walker v. Nell*, 117 Ga. 733, 45 S. E. 387. Having passed an order overruling the respondent's motion to dismiss the mo-

tion for a new trial, the court could not, at a term of the court occurring thereafter, dismiss the motion on the same ground on which he had previously passed an order refusing to dismiss it, while such order was outstanding. See authorities cited *supra*; also *Hawkins v. Studdard*, 132 Ga. 265 (2), 63 S. E. 852, 131 Am. St. Rep. 190; *Sims v. Ga. Ry. & El. Co.*, 123 Ga. 643, 51 S. E. 573; *Middlebrooks v. Middlebrooks*, 57 Ga. 193.

Counsel for the respondent [defendant in error] state in their brief that respondent filed exceptions *pendente lite* to the refusal of the court to sustain their motion to dismiss the motion for a new trial; but the question whether or not the court erred in overruling the motion to dismiss the motion for a new trial is not brought to this court by the respondent by main or cross bill of exceptions, and the question is not before us for consideration. The court in its order dismissing the motion for a new trial states: "The court is now convinced that it was without jurisdiction to pass any of the orders subsequent to the order dated May 23, 1910." Under the record before us, when the court passed the order refusing to dismiss the motion for a new trial, it certainly had jurisdiction to pass on the motion to dismiss the motion for a new trial. *Edmonds v. State*, 122 Ga. 728, 50 S. E. 936; *McCord v. Harden*, 69 Ga. 747. On September 27, 1910, an order was passed granting *movant* until November 7, 1910, to complete and present for approval a brief of the evidence. The bill of exceptions recites that on that day *movant* filed a brief of evidence in the clerk's office and presented it to the presiding judge. This was during the November term of the court, which was then in session, and the motion stood on the motion docket until the regular call thereof during that term of the court, when it was called in its regular order for hearing on the 30th of November. The court therefore evidently did not dismiss the motion for a new trial because a brief of the evidence was not presented for approval on the 7th of November, but dismissed it because, in his opinion, the failure of the *movant* to present for approval a brief of the evidence in accordance with orders passed previous to the order of September 27th had deprived the court of jurisdiction to hear the motion for a new trial. Regardless of the question whether the failure of the *movant* to present for approval a brief of evidence as hereinbefore referred to made it, under the facts, the legal and absolute duty of the court to dismiss, or to refuse to dismiss, the motion for a new trial, or made it a matter of discretion in the court whether or not it would dismiss the motion for new trial, the court unquestionably had a right to pass on the motion to dismiss the

motion for a new trial at the time he passed the order refusing such motion to dismiss. Having jurisdiction to pass on the motion to dismiss the motion for a new trial, and having passed an order refusing such motion, the court was without authority, at a term subsequent to the passage of such order, to dismiss the motion for a new trial on the same grounds on which he had previously passed the order refusing such motion.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 733)

EDWARDS, Sheriff, v. BOYD OO.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES (§ 137\*)—LIABILITY—ACTION—PLEADING.

In an action on the case against a sheriff for damages resulting from a breach of duty on the part of his deputy by omitting to take the statutory bond in a bail trover suit, seize the property, or commit the defendant to jail, the petition in its declarative part did not expressly allege that plaintiff was the owner of the property involved in the trover suit, or that the property at the time of the institution of the trover suit, or subsequently, was in possession of the defendant; but a copy of the petition in the trover suit, together with the judgment in favor of the plaintiff therein, was attached as an exhibit and made a part of the petition in the suit for damages against the sheriff, and the petition so exhibited contained allegations to the effect that the property was that of the plaintiff, and that the defendant was in possession of it at the time of the institution of the suit. *Held* that, when taken in connection with the exhibit, the petition against the sheriff was not wanting as to such allegations of ownership by the plaintiff and possession by the defendant.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 137.\*]

2. SHERIFFS AND CONSTABLES (§ 121\*)—LIABILITY—ACTION—PLEADING.

The petition sufficiently alleged a breach of official duty and resulting damages to the plaintiff for which the sheriff would be liable, and was not subject to general demurrer.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 219-221; Dec. Dig. § 121.\*]

3. SHERIFFS AND CONSTABLES (§ 137\*)—LIABILITY—ACTION—PLEADING.

It was error to disallow the amendment to the plea, and thereafter to strike the plea of defendant.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 137.\*]

(Additional Syllabus by Editorial Staff.)

4. APPEAL AND ERROR (§ 195\*)—OBJECTIONS IN LOWER COURT—AMENDMENT OF PLEA.

Where no objection was made to the allowance of an amendment to a plea after the appearance term on the ground that there was no affidavit attached, as required by Civ. Code 1895, § 5057 (Civ. Code 1910, § 5640), as amended by Act Dec. 21, 1897 (Acts 1897, p. 35), the ruling of the trial court in disallow-

ing the amendment cannot be sustained on that ground by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1490; Dec. Dig. § 195; Pleading, Cent. Dig. §§ 1425-1427.]

Error from Superior Court, Dougherty County; Frank Park, Judge.

Action by the Boyd Company against F. G. Edwards, Sheriff. Judgment for plaintiff, and defendant brings error. Reversed.

The Boyd Company brought an action for damages against Felix G. Edwards, sheriff of the city court of Albany, on account of the failure of a deputy sheriff to properly execute a bail process which was taken out in connection with a trover suit to recover mules from George Hand Kidd. The defendant filed a demurrer, which was overruled, and he excepted. He also, among other things, set up the following defense: "For want of sufficient information he can neither admit nor deny the third paragraph of said petition; and this defendant says, if the facts were as set out therein, the failure on the part of the said deputy sheriff to seize the property therein mentioned, or arrest the defendant, resulted from the fact that said defendant in said action, to wit, George Hand Kidd, was not at the time of the filing of said suit, or subsequent thereto, in possession of the property sued for in said suit; all the property sued for in said suit having been live stock and having died previous to the filing of said suit. That, when said deputy sheriff served said bail and trover papers on said Kidd, he ascertained the fact that Kidd had possession of none of the property called for in said bail trover proceedings, and also ascertained the fact that the agent of the plaintiff in said bail and trover, a Mr. Bunch, who made the bail affidavit in said proceeding, had ascertained that the statement in said bail affidavit, that said property was in the possession of the defendant in said bail and trover proceedings, was untrue, and said Bunch desired to withdraw said affidavit, and that the same be not considered of force, for the reason that the same was a mistake; and by reason of said fact, and by reason of the acts of the plaintiff in said bail trover proceedings, and its agents and attorneys, the said deputy sheriff was led to believe and did believe that it was not his duty to arrest said defendant in said bail trover proceedings, and he did not arrest him at that time, but said defendant did, under the instructions of the judge of the court in which said bail trover proceedings were brought, give bond in the sum of \$600 for the personal appearance of said defendant in said bail trover proceedings, to answer said case. And this defendant says said plaintiff in this case was in no wise hurt or damaged by the failure on the part of said deputy sheriff to seize said property, or to arrest the defendant in said

bail trover proceeding; and this suit is an effort now to make this defendant, or the said deputy sheriff's estate, responsible for the failure on the part of said deputy sheriff to make said arrest or seize said property, where the plaintiff could not have possibly recovered effectually in the original suit."

The plaintiff filed demurrers on numerous grounds, covering each of the allegations in paragraph 3. Pending the argument on the demurrers, the defendant moved to amend by "striking out of the third paragraph all of the words following 'none of said property called for in said bail trover proceeding;' and before the words 'and this defendant says plaintiff was in no wise hurt,' and inserting in lieu thereof the following: 'And was then and there informed by the agent of the plaintiff in said bail trover proceedings, to wit, M. A. Bunch, who made the bail affidavit in said bail trover proceedings that he, the said Bunch, had ascertained that the statement in said bail affidavit, that said property was in possession of said Kidd, was not true, and he desired to withdraw said affidavit, and that the same be considered of no force, and said agent of the plaintiff then and there directed said deputy sheriff to take no further action under said affidavit; and therefore said sheriff did not arrest said Kidd, but did, under the direction of the judge of said court in which said trover proceedings were pending, take from said Kidd a bond as mentioned in plaintiff's petition, and security in the sum of \$600, conditioned for the appearance of said Kidd to answer the judgment of said court in said case, which said bond the said Kidd afterwards complied with, said Kidd having remained in said county for six months after said trover suit was disposed of, and said plaintiff having never attempted to have said Kidd arrested or placed in jail for failure to produce said property; and said defendant says that said Kidd was, at the time of the suing out of said bail trover proceedings, and has been ever since, insolvent, and unable to produce said property sued for therein, and would have been entitled to a discharge without giving bond, even if he had been arrested by said deputy sheriff, and therefore said plaintiff is not injured by said failure to arrest. The said Kidd would not have given bond for the eventual condemnation money, if he had been arrested.'"

The plaintiff objected to the allowance of this amendment, on the ground that the facts therein stated were irrelevant and constituted no element of any defense to the suit, because the judgment which had been rendered for the plaintiff in the trover suit against George Hand Kidd was conclusive upon the sheriff and his deputy, and also because the amendment introduced a new defense, and, further, because the amendment failed to allege the present whereabouts of

Kidd, or that he could then be reached by the process of the court. The judge refused to allow the amendment, sustained the demurrer to the third paragraph of the plea, and directed a verdict in favor of the plaintiff against the sheriff for the amount recovered against Kidd in the trover suit. To each of these rulings the sheriff excepted.

Pope & Bennet, for plaintiff in error. R. J. Bacon and Ben T. Burson, for defendant in error.

ATKINSON, J. [1] 1. The ruling in the first headnote sufficiently deals with the question there decided.

[2] 2. The controlling question on demurrer is as to the sheriff's liability in damages, under the allegations of the petition, on account of the failure on the part of the deputy to take the statutory bond, seize the property, or commit the defendant to jail. Under the provisions of Civil Code 1895, § 4605 (Code 1910, § 5151), the affidavit for bail trover having been appropriately made, it was the duty of the officer serving the petition and process "to take a recognizance payable to the plaintiff or complainant, with good security, in double the amount sworn to, for the forthcoming of such personal property to answer such judgment, execution, or decree as may be rendered in the case." The statute further provides that such security shall be bound for the "payment of the eventual condemnation money, for which judgment may be signed up against the defendant and said security, and execution had thereon without further proceeding." Under this law it was the duty of the officer to take a recognizance from the defendant in accordance with the statute, and his failure to require such recognizance was a breach of his official duty. This section of the Code is to be construed in connection with the two preceding sections; and under its provisions, if the defendant fails to give security, whether the affidavit be made at the commencement of the suit or pending the suit, it is the duty of the officer to seize the property sued for and deliver it to the plaintiff, his agent, or attorney, upon his entering into like recognizance with security; and if the property is not to be found and cannot be seized by the officer, he is required to commit the defendant to jail, to be kept in safe and close custody until the property be produced or until he so enters into bond with good security for the eventual condemnation money. A failure on the part of the officer to seize the property, or, if it cannot be seized, to commit the defendant to jail, is a breach of official duty. For the breach of any of these several duties the officer is liable to the plaintiff for any proximate resulting damage.

According to the allegations of the petition, though the defendant was in possession of the property, the sheriff did not take a recognizance for the eventual condemnation money, nor seize the property, nor com-

mit the defendant to jail, but in lieu thereof took a bond, which was not a statutory bond, for the eventual condemnation money; and though he served the defendant, so that a general judgment might be entered against him for the value of the property, he did not seize the property or arrest the defendant. The plaintiff was enabled to proceed to a verdict and judgment for the value of the property, but in addition to this the property should have been before the court, or a bond for the eventual condemnation money, upon which the plaintiff might summarily, upon obtaining judgment against the defendant, also have entered judgment against the principal and security for the amount of the recovery; and to the end that the property might have been surrendered, or the statutory bond given, it was the plaintiff's right to have had the defendant committed to jail. With regard to all of these matters it was alleged that the officer's delinquency in official duty had made it impossible for the plaintiff to do more than enter a general judgment against the defendant for money. Under these circumstances, nothing further appearing, it could not be said that the plaintiff had not sustained damages at the hands of the sheriff on account of the failure of official duty on the part of his deputy. What has been said follows from applying the statutes hereinbefore cited to the facts of this case, and is borne out by the reasoning in the case of *Snell v. Mayo*, 62 Ga. 743, and citations.

[3] 3. The statement of facts discloses that the defendant sought to avoid liability on account of the matters set up in the third paragraph of his plea, and more fully stated in an amendment which he offered to make at the trial term, but which was disallowed by the judge. The judge also sustained a demurrer interposed by the plaintiff to the several matters set up by the defendant in paragraph 3 of his plea as matters of defense, thus disposing of all of the defenses relied on. From what has been said in the second division, and the reasoning in *Snell v. Mayo*, supra, it is clear that there was no error in so ruling with reference to any of the several matters of defense, save only that which set up that Mr. Bunch, who is alleged to be the agent of the plaintiff, ascertained, after the trover suit was filed and the affidavit for bail had been made by him, that the mules which were the subject-matter of the trover suit were dead, and consequently not in possession of the defendant at the filing of the suit, and thereupon informed the deputy sheriff, when the latter went to serve the bail trover process, that the statement contained in the affidavit that the mules were in the possession of the defendant was a mistake, and that he did not desire the bail process executed, and thereby induced the deputy to believe that it was not his duty to attempt further execution of the process and to serve the defendant personally.



The affidavit for bail in the trover suit, which was attached as an exhibit to the petition in the action against the sheriff, stated in broad language that Bunch was the agent of the defendant corporation, and the plea interposed by the sheriff also stated in broad language that Bunch was the agent of the plaintiff corporation. While the grounds of demurrer filed by the plaintiff to the several portions of paragraph 3 were numerous, none of them called for more specific allegations as to the extent of the agency. It will be assumed that his authority was sufficiently broad to authorize him to give the sheriff direction touching the manner of executing the bail trover process. The plaintiff was a corporation, which could only act through an agent, and, according to the plea and the recitals of the affidavit for bail, he was the agent of the corporation. After the discovery of the mistake in the recital contained in the affidavit for bail, it was in the interest of the plaintiff, as well as due to the affiant and to the defendant and the officer, that the agent call attention to it in such manner as would prevent execution of the bail process. To say otherwise would be to hold that this harsh remedy should be enforced when in fact there was no ground upon which it could be invoked. The law is not to be so administered. According to the allegations of the plea as amended, the conduct of the agent was in effect a dismissal of the bail feature of the trover action, and the sheriff ought not to be held liable for damages resulting from failure to seize the property or to commit the defendant to jail in lieu of his giving bond for the eventual condemnation money. If the action of the agent was a dismissal, the officer was under no duty to render any service involved in the dismissed part of the action. It was entirely out of the case. In this connection see *Holcombe v. Dupree*, 50 Ga. 335; *Groover v. White*, 54 Ga. 601; 35 Cyc. 1616; *State v. Woods*, 7 Mo. 536; *Ross v. Cave*, 49 Mo. 129.

[4] What has been said deals with the original plea, together with the amendment which was proposed and disallowed. It was insisted in the brief of counsel for defendant in error that the amendment was properly disallowed, because it was offered after the appearance term, and there was no affidavit attached, as required by Civil Code 1895, § 5057 (Code 1910, § 5640), as amended by the act of December 21, 1897 (Acts 1897, p. 35); but no such objection was made to its allowance at the time it was offered, and it appears from the recitals in the bill of exceptions that the judge disallowed it, not because of a failure to attach the statutory affidavit, but upon the ground that the matter referred to did not constitute a valid defense to the action. Had the point been made at the trial, it could have been met, if need be, by making the affidavit. *Ward v.*

*Frick Co.*, 95 Ga. 804, 22 S. E. 899. At any rate, the defendant would have had an opportunity to do so. But, in view of the recitals in the bill of exceptions as to the ground on which this amendment was disallowed, it would be going too far to deprive a defendant of a substantial defense for the mere reason that no affidavit was attached, and the judge might not have exercised his discretion in allowing it to be filed without an affidavit, when it appears from the bill of exceptions that it was not disallowed on discretionary grounds. If the amendment was open to such objection, the plaintiff should have urged that with the other objections which were made; but he waived its form by objecting to its sufficiency in law without making the question as to its form. Moreover, when the original plea is considered in connection with what appeared in the affidavit for bail in the trover suit, attached as an exhibit to the petition in the action on the case, the matters set up in the amendment were merely enlargement upon the matters set up in the original plea, and did not set forth any new facts or defense so as to require an affidavit under the statutes above mentioned.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 758)

#### JOHNSON v. McDANIEL.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

#### FORMER DECISION CONTROLLING.

This case, upon its facts, is controlled by the decision in *Johnson v. De Laperriere*, 136 Ga. 554, 71 S. E. 874.

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action between W. C. Johnson, administrator, and J. A. McDaniel. From the judgment, Johnson brings error. Affirmed.

P. Cooley and Ray & Ray, for plaintiff in error. J. S. Ayers and J. A. B. Mahaffey, for defendant in error.

FISH, C. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 739)

#### KING LUMBER CO. v. COWART.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

#### 1. LOGS AND LOGGING (§ 3\*) — SALES OF STANDING TIMBER — DEFICIENCY IN ACREAGE.

Where a deed conveyed all the sawmill timber on certain named lots of land, "there being 400 acres, more or less," in a suit seeking to re-

cover for a deficiency in the acreage of the timbered land, it was necessary to allege actual fraud upon the part of the grantor. *Kendall v. Wells*, 123 Ga. 343, 55 S. E. 41; *Emlen v. Roper*, 133 Ga. 728, 66 S. E. 934; *Montgomery v. Robertson*, 134 Ga. 66, 67 S. E. 431; *Currie v. Collins*, 136 Ga. 473, 71 S. E. 798.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.\*]

## 2. LOGS AND LOGGING (§ 3\*) — SALES OF STANDING TIMBER—FRAUD.

Allegations that the vendor had owned the various lots of land on which the timber was situated for a number of years, said he knew there were 400 acres, and guaranteed it, and, if there were not 400 acres, he would make it good, and that the purchaser relied entirely upon the guaranty of the vendor as to the number of acres, and there was a deficiency, were not sufficient to show actual fraud upon the part of the vendor, authorizing a recovery for such deficiency.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.\*]

## 3. REFORMATION OF INSTRUMENTS (§ 36\*) — PLEADING—PETITION.

An amendment which alleged that the trade was based on the fact that there were 400 acres of timbered land, that the purchaser bought the timber at the rate of \$12 per acre, that the vendor prepared and executed a deed and placed it in a bank, with a draft attached to it for the purchase price, and wrote to the purchaser that he had made and forwarded a deed in accordance with the terms of their trade, and that the purchaser believed him to be a reliable man, and therefore did not examine the deed before paying the draft, and did not know that the deed read "400 acres, more or less," was not a sufficient allegation to furnish a basis for a prayer for reformation of the deed "by striking out the words 'more or less,' and [making it] speak the truth of the trade as made, to wit, 400 acres, at \$12 per acre"; it not appearing that there was any agreement as to what the deed should contain on this subject, or anything to prevent the purchaser from examining it before accepting it, or anything to show when he did discover its contents, or that he promptly repudiated it, or sought equitable relief upon the discovery. *Weaver v. Roberson*, 134 Ga. 149, 67 S. E. 662.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Dec. Dig. § 36.\*]

Error from Superior Court, Calhoun County; Frank Park, Judge.

Action by the King Lumber Company against J. S. Cowart. Judgment for defendant, and plaintiff brings error. Affirmed.

J. Y. Allen, for plaintiff in error. Calhoun & Rambo and Hawes & Pottle, for defendant in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 758)

## HOLMES v. HUGULEY.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

### 1. DISMISSAL AND NONSUIT (§ 43\*)—VOLUNTARY DISMISSAL—REINSTATEMENT.

Where a plaintiff institutes an action against three defendants, praying to recover

damages for trespassing on a described tract of land and to enjoin future trespasses, and subsequently amends his action by alleging that the three defendants are in possession of the land, to which he claims title, and praying for a recovery of the land and mesne profits, the suit is converted into an action to recover land and mesne profits; and where he dismisses the action, and brings another against one of the defendants to recover the same land and mesne profits, the second suit is to be treated as a renewal of the dismissed action.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Dec. Dig. § 43.\*]

### 2. DISMISSAL AND NONSUIT (§ 43\*)—VOLUNTARY DISMISSAL—REINSTATEMENT—PAYMENT OF COSTS.

Where a plaintiff dismisses his action, and a judgment for costs is entered, which includes the fees of witnesses, the action cannot be renewed without paying the costs embraced in the judgment (or filing an affidavit of inability to pay), so long as the judgment for costs is not reversed, set aside, or modified in some manner provided by law.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Dec. Dig. § 43.\*]

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action by G. P. Huguley against Luther Holmes. Judgment for plaintiff, and defendant brings error. Reversed.

R. T. Daniel and T. E. Patterson, for plaintiff in error. Philip H. Alston and C. J. Lester, for defendant in error.

EVANS, P. J. G. P. Huguley brought suit against Luther Holmes to recover a described tract of land and mesne profits. The defendant filed a plea in abatement, alleging that the action was in renewal of a former suit brought by the same plaintiff against Luther Holmes, Mrs. Anna Holmes, and W. A. Pough to recover the same land and mesne profits, which had been voluntarily dismissed by the plaintiff, and the renewed action was instituted without the payment of costs or the filing of an affidavit of the plaintiff's inability to pay costs. The issue formed on the plea in abatement was tried before the judge without a jury, who rendered a judgment dismissing the plea. The exception is to this judgment.

[1] 1. It is insisted that the two suits are not identical. There is no dispute that both suits were instituted by the same plaintiff and concern the same land. The first suit began as a suit to enjoin the three defendants from trespassing upon the land and to recover damages for trespasses already committed. Pending the suit an amendment was allowed, alleging that all three of the defendants were in possession of the land, and that the plaintiff claimed title thereto, and praying to recover the land and rents, issues, and profits from the defendants. This amendment converted the first suit into an action to recover the land and mesne profits from the three defendants. The only difference, therefore, between the present and the

former action, is that in the first there were three defendants, and in the present two of those defendants were dropped and the action was brought against only one of them. In order to make the second suit a renewal of the first, it must be for substantially the same cause of action, though it need not be a literal copy of the petition dismissed. *Hudgins v. Crow*, 82 Ga. 372. It must be by the same plaintiff or his legal representative. *Moody v. Threlkeld*, 18 Ga. 55 (5). And against all who are necessary parties defendant in the first suit. *Cox v. Strickland*, 120 Ga. 104, 47 S. E. 912. If the defendants in the first action sued as joint contractors, or entitled to rights one against another by way of contribution in the event the plaintiff recovers, then they or their personal representatives must be parties to the second suit. *Ford v. Clark*, 75 Ga. 612; *White v. Moss*, 92 Ga. 246, 18 S. E. 13. In ejectment, defendants have no right to demand contribution. They cannot defend unless they admit possession; and only such defendants as are in actual possession are necessary parties to the action. Therefore, if a suit be instituted against three defendants in possession, and pending that suit two of them abandon their possession, and the suit is voluntarily discontinued by the plaintiff and renewed, the only necessary defendant in the renewed suit would be the party who remained in possession. In *Cox v. Berry*, 13 Ga. 306, an action of ejectment was brought by A. against B. as tenant in possession. C., the landlord, was made a party defendant. Being unable to prove possession in B., the plaintiff dismissed after the bar of the statute attached. Within six months he brought a suit for the same land against D. as tenant in possession, to which C. was a party defendant. C. pleaded the statute of limitations. In answer to the proposition that the second suit was not a renewal of the first, because of a different tenant, the court said that it was certainly the same as far as the landlord, C., was concerned. "It is for the same land, in favor of the same plaintiff, and he was a party defendant to both" actions. We therefore hold that the second suit was a renewal of the first action.

[2] 2. The statute declares that when any suit is dismissed, and the plaintiff desires to recommence the suit, he may do so on the payment of costs, or filing with his petition an affidavit that owing to his poverty he is unable to pay the cost. Civil Code 1910, §§ 5625, 5626. The failure to pay the costs or file the statutory affidavit may be pleaded in abatement of the second action. *Wright v. Jett*, 120 Ga. 995, 48 S. E. 345. The question is whether or not, according to the facts appearing in the record, the plaintiff has brought himself within the statute as to renewing a suit voluntarily dismissed. It appears that the first suit resulted in a verdict finding for the plaintiff the premises in dispute, which verdict was set aside on mo-

tion for new trial. The plaintiff then voluntarily dismissed his case, whereupon the following judgment was rendered by the court: "The plaintiff having in open court by his attorney dismissed this case, it is ordered that Luther Holmes, for the use of the officers of court, do have and recover of and from the plaintiff, George P. Huguley, the sum of \$103.85, costs of court in this case." The clerk of the court testified that he rendered a bill of costs to the plaintiff's attorney (which bill of costs included the court costs and witness fees as taxed in the judgment), who paid to him \$40.15, the amount of the court costs, but did not pay any of the witness fees, and the same have not been paid. The subpoenas of the various witnesses, claimed in the itemized statement of costs, accompanied with an affidavit showing the number of days each attended court on the subpoena and the amount claimed by each, were introduced. These several amounts corresponded with the itemized statement of the bill of costs, which was introduced in evidence. "When a case is disposed of, the costs of the same, including fees of witnesses, shall be included in the judgment against the party dismissing, being nonsuited, or cast; and it shall be the duty of the clerk of any court in this state, and of any justice of the peace, or other officer who may issue an execution, to indorse on said execution, at the time it is issued, the date and amount of the judgment, the items of the bill of cost (written in words), and the amount of each item distinctly stated in figures; and no costs, or items of costs, shall in any case be demanded by any such officer, which are not itemized and indorsed as herein provided." Civil Code 1910, § 5992. It is true that the judgment was entered up in the name of only one of the defendants for the use of the officers of court; but we consider this a mere informality. If the judgment for costs passed on the order of dismissal be simply erroneous, and not void upon its face, the defendant is bound by it until it is reversed or set aside in some of the ways provided by law.

It is contended that the evidence fails to disclose that any witness demanded payment of his fees from the plaintiff or his attorney, and that it is not made affirmatively to appear that the witnesses were entitled to the fees included in the judgment. The Code provides that no party shall be liable for the costs of any witness of the adverse party, unless such witness was subpoenaed, sworn, and examined on the trial of the cause (where the case was tried), and no party shall be liable for the costs of more than two witnesses to the same point, unless the court shall certify that the question at issue was of such character as rendered a greater number of witnesses necessary to a single point. Civil Code 1910, § 5990. The reply to this contention is that it appears that the witnesses made affidavits upon their sub-

pœnas as to their service and the amounts to which they were entitled, and these amounts were included in the judgment for costs rendered by the court. It is to be presumed that in rendering the judgment the court adjudicated the costs to be proper charges, and that judgment is conclusive upon the parties until it is vacated and set aside, or modified, and is not subject to collateral attack.

It is also contended that the statute which authorizes a renewal of a dismissed action upon the payment of costs only contemplates the payment of court costs, and does not require the plaintiff to pay witness fees. The statute broadly states that the payment of costs is a condition precedent to the bringing of the action, and witness fees are a part of the costs. In renewing his action the plaintiff would not be required to pay costs of witnesses which have not been demanded of him, or which may not have been included in the judgment for costs. *Shippen L. Co. v. Gates*, 136 Ga. 38, 70 S. E. 672. But where the witnesses have filed their subpoenas with the clerk, with affidavits annexed as required by the statute, and such witness fees are included in the judgment for costs, the plaintiff must pay such fees, unless the judgment for costs is set aside, or modified, on motion to retax the costs. Under the facts appearing in the record, the plaintiff had paid only a part of the costs accrued before instituting the second suit, and therefore the plea in abatement should have been sustained.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 755)

**SMITH v. JOYNER.**

(Supreme Court of Georgia. Aug. 22, 1911.)

(*Syllabus by the Court.*)

**WILLS (§ 635\*)—CONSTRUCTION—SURVIVORSHIP.**

This case was before the Supreme Court upon a former occasion. 132 Ga. 779, 65 S. E. 68. After the return of the remittitur, the case was tried and a verdict directed in favor of the plaintiff upon uncontradicted evidence. The right of the plaintiff to a recovery was made to turn upon the construction of the twelfth item of a will which went into effect in 1863, as follows: "I give and bequeath to my daughter Mary Frances Hightower, for and during her natural life, and at her death to be equally divided between her children that may survive her, the following property, to wit," etc.; it being contended by the plaintiff that two children of the life tenant, Mary Frances Hightower, born after the will went into effect, and who were in life at the death of the life tenant, took in remainder under the terms of the will, and became tenants in common with two other children of the life tenant, who were in esse at the time the will went into effect and were in life at the death of the life tenant. *Held*, that the survivorship contemplated by

this will expressly refers to the death of the life tenant, and not to that of the testator, and that the children born after the will went into effect, and who were in life at the death of the life tenant, took under the will in common with the other two surviving children, who were in life at the time the will went into effect. *Cooper v. Mitchell Investment Co.*, 133 Ga. 769, 66 S. E. 1090, 29 L. R. A. (N. S.) 291, and citations.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1511-1513; Dec. Dig. § 635.\*]

Error from Superior Court, Houston County; W. H. Felton, Judge.

Action by W. R. Joyner against A. F. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

R. N. Holtzclaw and Guerry, Hall & Roberts, for plaintiff in error. H. A. Mathews, for defendant in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 754)

**BROOKS BROS. LUMBER CO. v. J. L. CASE THRESHING MACH. CO.**

(Supreme Court of Georgia. Aug. 22, 1911.)

(*Syllabus by the Court.*)

**1. SALES (§ 267\*)—WARRANTY—IMPLIED WARRANTY.**

Where there is a sale of personal property under an express warranty as to quality, there is no implied warranty. Civil Code 1910, § 4135; *Johnson v. Latimer*, 71 Ga. 470; *Malsby & Avery v. Young*, 104 Ga. 205, 30 S. E. 854; *Elgin Jewelry Co. v. Estes & Dozier*, 122 Ga. 809, 50 S. E. 939; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 760, 761; Dec. Dig. § 267.\*]

**2. SALES (§§ 285, 286\*)—WARRANTY—EXPRESS WARRANTY—CONSTRUCTION AND OPERATION.**

Where in a sale of machinery there is an express warranty as to quality, and by the terms of the warranty liability of the seller is predicated upon conditions which must be performed by the buyer before liability upon the part of the seller is to attach, such as that the buyer is to take the property on trial for a specified time, and, upon its failure to fulfill the warranty, give written notice at once to the seller at a designated place, and also to the agent of the seller through whom the property was received, stating in what parts and where in the property fails to fulfill the warranty, the seller will not be held liable on the warranty, unless the buyer complies with such conditions. *International Harvester Co. v. Dillon*, 126 Ga. 672, 55 S. E. 1034; *Beasley v. Huyett*, 92 Ga. 273 (2), 278, 18 S. E. 420; *McCormick Harvester Co. v. Allison*, 116 Ga. 445, 42 S. E. 778; *Mayes v. McCormick Machine Co.*, 110 Ga. 545, 35 S. E. 714; *Fay & Eagan Co. v. Dudley*, 129 Ga. 314 (2), 58 S. E. 826; *Walker & Rogers v. Malsby Co.*, 134 Ga. 399, 67 S. E. 1039; *Fahey v. Esterley Machine Co.*, 3 N. D. 220, 55 N. W. 580, 44 Am. St. Rep. 554. And where the warranty also contains the provision, "Any assistance rendered by the company, its agents, or servants, in operating said machinery, or in remedying any actual or alleged defect, either before or after the 10 days' trial, shall in no wise be deemed any waiver of or ex-

cuse for any failure of the purchaser to fully keep and perform the conditions of this warranty," it will not amount to a waiver of compliance of the conditions imposed upon the buyer if the seller, without the required notice, upon the request of the buyer, undertakes to assist the buyer in perfecting the property, to the end that it may come up to the standard of efficiency mentioned in the warranty. 30 Am. & Eng. Enc. Law (2d Ed.) 202.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 806-808; Dec. Dig. §§ 285, 286.\*]

### 3. PLEADING (§ 264\*)—AMENDMENT OF PLEA—EFFECT.

An amendment to the defendant's plea, introducing new matter of defense, opened the plea as amended to demurrer, although a former amendment, containing, in substance, a part of what was set out in the last amendment, had been allowed over plaintiff's oral objection.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 264.\*]

### 4. DISMISSAL OF PLEA—GENERAL DEMURRER.

Under the rulings announced in the preceding notes, there was no error in dismissing the plea as amended on general demurrer.

### 5. APPEAL AND ERROR (§ 695\*)—RECORD—MATTERS PRESENTED FOR REVIEW.

Where error is assigned upon the direction of a verdict, and the evidence is not contained in the record, this court cannot say that the verdict was improperly directed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 695.\*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by the J. I. Case Threshing Machine Company against the Brooks Bros. Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

L. D. Moore, for plaintiff in error. Ryals, Grace & Anderson, for defendant in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 754)

### FREEMAN v. YOUNG.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

### APPEAL AND ERROR (§ 1145\*)—DISPOSITION OF CAUSE—EFFECT IN TRIAL COURT.

Where at the term of court at which a verdict was rendered the adverse party moved for a new trial upon the ground that the verdict was void for indefiniteness, and also made a motion in arrest of judgment on the ground that the judgment did not follow the verdict, and the court overruled both motions, and where no exception was taken to the judgment overruling the motion in arrest, but a writ of error was sued out to the overruling of the motion for a new trial, and the bill of exceptions dismissed by the Supreme Court, thus leaving the judgment denying a new trial affirmed, the defendant was thereafter concluded from moving to set aside the judgment and verdict upon the same grounds urged in the motion for a new trial and the motion in arrest.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1145.\*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by D. S. Young against A. C. Freeman. Judgment for plaintiff, and defendant brings error. Affirmed.

R. D. Feagin and J. F. Urquehart, for plaintiff in error. Hardeman, Jones, Callaway & Johnston, for defendant in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 741)

### QUEEN INS. CO. v. VAN GIESEN.

(Supreme Court of Georgia. Aug. 22, 1911.)

(Syllabus by the Court.)

### 1. INSURANCE (§ 326\*)—FORFEITURES—KEEPING GASOLINE ON PREMISES.

Upon the trial of an action on a policy of fire insurance, covering a lot of furniture, bedding, etc., stored in a building used for storage, where the policy contained a stipulation that it should be void if gasoline were kept, used, or allowed on the premises, and where the only evidence as to gasoline being on the premises was testimony tending to show that an employé of the insured, about midnight, carried a can of gasoline into the storehouse, and shortly thereafter a fire was discovered in the building, which destroyed it, it was not error, as against the defendant company, for the court to instruct the jury as follows: "If you should find that the defendant has established to your satisfaction that there was kept, used, or allowed by the plaintiff, or with his knowledge, or through his complicity, direct or indirect, any gasoline upon the premises at the time of the operation of this policy, that also would make void the policy, and there could be no recovery." "If it is proved that it is of the value stated in the policy, and that it was destroyed without any complicity on his part, he would be entitled to recover up to the value stated in the policy." "Should you conclude that this property in question was insured by the plaintiff, that it was destroyed by fire at the place named in the insurance policy through no act upon his part, you should find a verdict in favor of the plaintiff, in which even your verdict would be, 'We, the jury, find for the plaintiff,' naming the sum." Such instructions did not, under the evidence submitted, place an unauthorized burden upon the defendant. If an employé of the plaintiff had carried a can of gasoline upon the premises for the purpose of burning the house containing the goods insured, and it was so used, then such act would not constitute keeping, using, or allowing gasoline on the premises by the plaintiff, if it was carried there without his knowledge or through his complicity, directly or indirectly.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 782-791; Dec. Dig. § 326.\*]

### 2. WITNESSES (§ 395\*)—CORROBORATION—ADMISSIBILITY OF EVIDENCE.

Where, for the purpose of impeaching a witness, an affidavit made by him prior to the trial, containing statements contradictory to the testimony given by him on the trial, was introduced in evidence, it was not error to reject an affidavit made by the witness prior to the affidavit introduced to impeach him, which first

affidavit was in accordance with his testimony before the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1260; Dec. Dig. § 395.\*]

### 3. INSURANCE (§ 648\*)—ACTION OF POLICY—ADMISSIBILITY OF EVIDENCE.

The court did not err in excluding evidence tending to show that, some five months prior to the burning of the goods covered by the policy sued on, the plaintiff had suffered another loss by fire, in no way connected with the loss which was the subject-matter of the action on trial, and had compromised with the insurance company which had issued a policy on the other goods.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 648.\*]

### 4. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.

The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by F. S. Van Giesen against the Queen Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lawton & Cunningham, for plaintiff in error. Osborne & Lawrence and E. H. Abrahams, for defendant in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(9 Ga. App. 656)

### JOSEY v. COCHRAN. (No. 2,969.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

### 1. MALICIOUS PROSECUTION (§ 35\*)—TERMINATION OF PROSECUTION—RIGHT OF ACTION.

In a suit for malicious prosecution, where it appears that on the 25th of September, 1908, the defendant caused a warrant to be sworn out against the plaintiff, and caused him to be arrested, and then offered to dismiss the warrant if the plaintiff would pay a sum of money, which the plaintiff refused to pay, and the defendant thereupon ordered the officer to release him, which was done, and that afterward, on the 7th of March, 1909, he again caused the plaintiff to be arrested on the same warrant, and caused him to be kept in jail for some eight or nine days, until the judge of the city court having jurisdiction to try the case ordered him released on his own recognizance, and that afterward, on the 26th of June, the judge of the city court, on the motion of the solicitor, ordered the warrant dismissed, and the suit was filed on the 9th of August following, it sufficiently appears that the prosecution had terminated before the beginning of the suit, in the absence of any showing that the defendant had otherwise attempted to renew the prosecution. *Hartshorn v. Smith*, 104 Ga. 235, 30 S. E. 666.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 71-77; Dec. Dig. § 35.\*]

### 2. PLEADING (§ 243\*)—AMENDMENT—SUBJECT-MATTER OF AMENDMENT.

Where a petition violates the rules of good pleading by setting up two different transactions in the same count or paragraph, it is

permissible for the plaintiff to amend by striking the allegations as to one of the transactions from the count or paragraph in which they are contained, and causing them to be added to the petition in separate counts or paragraphs. The petition as amended set forth a valid cause of action, and was not subject to the demurrers offered against it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 643-651, 820-822; Dec. Dig. § 243.\*]

Error from City Court of Americus; C. R. Crisp, Judge.

Action by G. W. Cochran against W. J. Josey. Judgment for plaintiff, and defendant brings error. Affirmed.

Allen Fort & Son and Shipp & Sheppard, for plaintiff in error. R. L. Maynard, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 656)

### AUGUST SCHMIDT & CO. v. MORRISON. (No. 2,951.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

### 1. APPEAL AND ERROR (§ 192\*)—PRESENTATION OF QUESTIONS IN LOWER COURT—PLEADING.

Amendable defects in pleadings, not objected to in the trial court, cannot be taken advantage of in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1221-1225; Dec. Dig. § 192.\*]

### 2. QUESTIONS OF FACT—SUBMISSION TO JURY.

The controlling issue in this case was one of fact, which was fairly submitted by the trial judge to the jury.

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action between August Schmidt & Co. and Duncan Morrison. From the judgment, August Schmidt & Co. bring error. Affirmed.

Jones & Sparks, A. C. Saffold, and Hines & Jordan, for plaintiffs in error. J. B. Gelger, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 669)

### ATKINSON v. SWORDS. (No. 3,118.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

### MASTER AND SERVANT (§ 256\*)—INJURIES TO SERVANT—ACTION—PLEADING.

The allegations of the petition, relating to some of the grounds of negligence, show a cause of action, and the petition was therefore sufficient to withstand a general demurrer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 256.\*]

Error from City Court of Fitzgerald; H. Wall, Judge.

Action by H. B. Swords, by next friend, against H. M. Atkinson, receiver. Judgment

for plaintiff, and defendant brings error. Affirmed.

Crovatt & Whitfield and Elkins & Wall, for plaintiff in error. L. Kennedy and McDonald & Grantham, for defendant in error.

HILL, C. J. As far as the allegations relate to negligence of the master in furnishing an engine with a pilot instead of an engine with a footboard, this was an assumed risk; but this allegation is pertinent, and proof of the fact would be relevant, as illustrative of another alleged ground of negligence, that the engineer, with knowledge of the increased danger in the use of the engine failed to keep a proper lookout, and because of this omission failed to promptly stop the engine when he saw, or by the exercise of due diligence should have seen, the plaintiff when he slipped off the pilot in attempting to make a coupling therefrom. The engineer, knowing that the switchman was in an unusually dangerous position, though as to that position the risk was assumed, should have taken precaution accordingly. On the acts of negligence charged against the engineer, the petition was sufficient to withstand a general demurrer; the employment being one as to which the defense of fellow service has been abolished by statute.

Judgment affirmed.

(9 Ga. App. 649)

**T. W. TEASLEY & CO. v. RAY.**  
(No. 2,938.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

*(Syllabus by the Court.)*

**PRINCIPAL AND SURETY (§ 10\*)—CREATION OF RELATION—REQUISITES OF CONTRACT.**

A contract of suretyship does not arise from a writing in which the signer merely expresses his willingness to stand security for another person, to whom credit is subsequently extended.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 26; Dec. Dig. § 10.\*]

Error from Superior Court, Hart County; D. W. Meadow, Judge.

Action by C. P. Ray against T. W. Teasley & Co. and another. Judgment for plaintiff, and defendants T. W. Teasley & Co. bring error. Reversed.

A. A. McCurry and A. S. Skelton, for plaintiffs in error. Jas. H. Skelton, for defendant in error.

RUSSELL, J. Ray sued Cheek and Teasley & Co. for the price of certain fertilizer. He showed that the fertilizer had been delivered to Cheek by him, and further testified that he delivered it upon the strength of the following letter: "To Whom It may Concern: Mr. I. W. Cheek wants about two and one-half tons of good guano. He was to get it from us, but we are out. He is all

right, and will pay for it, if anybody will let him have it at Airline, Ga. We would not hesitate, if so desired, to go his security for it, as we do not want him put to any more trouble in getting it than possible. [Signed] T. W. Teasley & Co." The court instructed the jury that, if Ray acted on faith of this letter, it was adequate to bind Teasley & Co. (which, by the way, was merely a trading name for T. W. Teasley, there being no other partner in the company) as security.

We think that the letter was no more than a written recommendation; but, even if the last sentence of the letter could be construed as more than a recommendation, we do not think that it is capable of being construed as more than an offer to stand security; that is, to be jointly liable with Cheek upon a contract afterward to be made. The language of the contract in the case cited in Brandt on Suretyship and Guaranty (3d Ed.) § 148, is even stronger than the language here expressed, yet in that case it was held that a contract of suretyship did not arise. As the matter is there stated: "A party wrote a letter introducing another, stating that he wanted to purchase a certain amount of goods, and concluding: 'I consider him perfectly good, and, if required, will indorse for him to that amount.' Held, he was not liable for goods sold on the strength of this letter, unless he had been requested to indorse, and had refused. The guaranty was conditional, to be created by indorsement, if required, and the protection of the party writing the letter may have depended upon the form of the security." (Italics ours.)

Judgment reversed.

(9 Ga. App. 640)

**ATLANTIC COAST LINE R. CO. v. BREMER.** (No. 2,851.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

*(Syllabus by the Court.)*

**REMOVAL OF CAUSES (§ 61\*)—CITIZENSHIP OF PARTIES—SEPARABLE CONTROVERSIES—DETERMINATION OF RIGHT TO REMOVAL.**

Where an action for damages is brought against two defendants, one of them resident and one of them nonresident, the question as to whether a separable controversy is presented, so as to authorize the nonresident defendant to remove the case to the United States court for trial, is to be determined solely by the allegations of the petition. Under the allegations of the present petition, no separable controversy was presented, and the court did not err in refusing the application for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. § 61.\*]

Error from City Court of Waycross; John C. McDonald, Judge.

Action by Le Roy Bremer against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bennet, Twitty & Reese, for plaintiff in error. Wilson, Bennett & Lambdin, for defendant in error.

**RUSSELL, J.** Judgment affirmed.

(9 Ga. App. 650)

**BOOTH v. MERCHANTS' BANK OF VALDOSTA.** (No. 2,948.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

*(Syllabus by the Court.)*

**HUSBAND AND WIFE (§ 87\*) — DISABILITIES — CONTRACTS — SURETYSHIP.**

A woman can neither stand surety for her husband's debts nor lawfully pay them, and if, having executed a promissory note as security for her husband, she pays the note, she may maintain an action for money had and received and recover the sum so paid from the creditor who knowingly received it. *Strickland v. Vance*, 99 Ga. 531, 27 S. E. 152, 59 Am. St. Rep. 241. As to other persons, she may not lawfully become surety, but she may pay their debts. *Villa Rica Lumber Co. v. Paratain*, 92 Ga. 370, 17 S. E. 340. Hence, if a married woman executes a promissory note as surety for a person other than her husband, she cannot be compelled by law to pay it, but, if she voluntarily pays it, she cannot recover back from the creditor the amount she has paid.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 346-353; Dec. Dig. § 87.\*]

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by Mrs. L. P. Booth against the Merchants' Bank of Valdosta. Judgment for defendant, and plaintiff brings error. Affirmed.

Patterson & Copeland, for plaintiff in error. Denmark & Griffin, for defendant in error.

**RUSSELL, J.** Judgment affirmed.

(9 Ga. App. 658)

**BUCK et al. v. DUVALL.** (No. 2,990.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

*(Syllabus by the Court.)*

**1. VENDOR AND PURCHASER (§ 54\*) — CONSTRUCTION AND OPERATION OF CONTRACT — EFFECT AS TO TITLE.**

Upon the execution and delivery of bond for title to land, the equitable title charged with the payment of the purchase money passes to the vendee, and the vendor holds the legal title only as security for the unpaid residue of the purchase money.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 85; Dec. Dig. § 54.\*]

**2. VENDOR AND PURCHASER (§ 78\*) — CONSTRUCTION OF CONTRACT — TIME AS ESSENCE OF CONTRACT.**

As to making the payments stipulated for in the sale of land where bond for title is given, time is usually not of the essence of the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 78.\*]

**3. VENDOR AND PURCHASER (§ 93\*) — RESCISSION OF CONTRACT — RESCISSION BY VENDOR.**

If the vendee under a bond for title defaults in his payments, the vendor has the right to rescind upon giving the vendee notice that he will insist upon prompt payment and upon returning to him the amount of the purchase-money which he has paid, plus the value of any permanent improvements which he may have placed upon the land, less the damages which have been occasioned to the vendor by the vendee's failure to perform the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.\*]

**4. VENDOR AND PURCHASER (§ 208\*) — REMEDIES OF PURCHASER — RECOVERY OF PURCHASE MONEY PAID — DAMAGES FOR BREACH OF CONTRACT.**

If without having completed the rescission by restoring the status the vendor in the bond for title resells the property to a third person, who takes without notice of the vendee's equitable title, the vendee may treat the resale either as a rescission of the sale or as a breach of the bond. If he elects to treat it as a rescission, he may recover from the vendor the amount of purchase money he has paid, and the value of the permanent improvements he has placed upon the land, less the damages which have been occasioned by reason of his (the vendee's) failure to perform the contract. If he treats it as a breach of the bond, the measure of damages is the value of the premises at the time of the resale, less the amount due on the unpaid purchase money.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 208.\*]

**5. LIMITATION OF ACTIONS (§ 46\*) — COMPUTATION OF LIMITATION — ACCRUAL OF CAUSE OF ACTION.**

Where a vendor in a bond for title breaches his bond by a resale of the property, the statute of limitations does not begin to run until the time of the resale.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 248; Dec. Dig. § 46.\*]

Error from City Court of Tifton; R. Eve, Judge.

Action by W. L. Duvall against A. E. Buck and another. Judgment for plaintiff, and defendants bring error. Affirmed.

L. P. Skeen, for plaintiffs in error. R. D. Smith and Fulwood & Murray, for defendant in error.

**RUSSELL, J.** Duvall sued Buck & Downing for breach of the covenant contained in a bond for title. His petition shows that on June 25, 1903, he purchased from Buck & Downing certain real estate, for which he agreed to pay them \$705 on terms of \$5 cash, \$175 on July 12th, \$175 on August 12th, and \$350 on December 12th thereafter, Buck & Downing executing to him their bond for title, conditioned to make him title upon payment to them of the full purchase price; that he paid to them the \$5 and the two notes for \$175 each, making a total payment of \$355, but failed to pay the note for \$350 due on December 12, 1903; that on July 1, 1908, Buck & Downing resold the land to other persons for \$1,250; and that Buck & Downing have never rescinded by paying back any of the \$355 paid them, or by return-



ing or offering to return the unpaid note. He alleges that Buck & Downing are liable to him in the sum of \$1,026, this amount being the difference between the price at which they resold the property in 1908 and the balance which he failed to pay them, with interest. Buck & Downing demurred to this petition on several grounds, and the case is before this court on exception to the overruling of the demurrer.

[1] "The execution and delivery of the bond for title creates a special form of trust estate. The equitable title, charged with the payment of the purchase money, passes to the vendee, and the vendor holds the legal title charged with the use that, while it may be asserted to secure the payment of the purchase money in full, nevertheless, as soon as the purchase money is paid, it (the legal title) is to pass to the vendee, his heirs or assigns." Powell, *Actions for Land*, § 374, and cases there cited.

[2] Time is not usually of the essence of the contract, and therefore, except in certain rare cases where time is of the essence of the contract, a default of the vendee in his payment does not cause him to lose his interest in the land.

[3] However, the failure of the vendee to pay according to the terms of his contract authorizes the vendor to rescind. Rescission involves the restoration of the original status so far as it is practicable, and, if the vendee has paid a portion of the purchase price, it is the duty of the vendor to pay him his money back after deducting an amount sufficient to cover the loss occurring to him by reason of the vendee's failure to perform his contract. In case of rescission the vendor stands bound to account to the vendee for the amount of the purchase money which the vendee has paid, together with the value of such permanent improvements as have been made by the vendee, less the damages which have been occasioned by the vendee's failure to perform his contract. As to all these general propositions, see Powell, *Actions for Land*, §§ 378, 379, where there is a full discussion of the subject.

[4] If the petition in the present case showed a case of rescission, the measure of damages would be, not the value of the premises at the time of the resale by the vendor (subject to deduction on account of the unpaid note due by the plaintiff to the defendant), but the amount that the plaintiff had paid to the defendants, less any damages that had been occasioned to the defendants by reason of the plaintiff's having failed to perform his contract. However, the petition does not allege a rescission of the sale, but alleges a breach of the contract evidenced by the bond for title; and in such a case the provisions of Civ. Code 1910, § 4401, are applicable, as follows: "Upon breach of a bond for title to land, the value of the prem-

ises at the time of the breach, with interest thereon, should be the measure of damages." The defendants have not rescinded for they have retained not only the money that was paid them, but also the note given them by the plaintiff. Of course, the plaintiff could have considered the resale of the property as a rescission of the contract, and could have proceeded to recover back the money equitably due him in accordance with the principle announced in the case of *McDaniel v. Gray & Co.*, 69 Ga. 433, 435. On the other hand, it was his option to treat it as a breach of the contract, and to sue for the higher measure of damages. The petition is silent as to whether the plaintiff was in possession of the land at the time the resale was made. If he was, the second vendee would have taken with notice of his rights, and the sale would not necessarily have operated as a breach of the bond. A demurrer to the petition on the ground that it was not alleged whether the plaintiff was or was not in possession of the land might have been well taken, but no such point was made, either in this court or in the lower court. From the way in which the case was argued, it is evident that the plaintiff was not in possession of the property at the time of the resale, and that the second vendee was a purchaser without notice, so that the plaintiff cannot pay to him the remaining \$350 with interest, and get title to the land. The plaintiff not being in possession of the land and time not being of the essence of the contract, in the bond for title or otherwise, it was incumbent on the defendants, before reselling, to effect a rescission, and, even then it would seem that notwithstanding the delay which had occurred, they should have given the plaintiff notice that they were going to insist upon prompt performance before making a rescission. *Ellis v. Bryant*, 120 Ga. 890, 894, 48 S. E. 352. Under the facts alleged, we think that the petition set out a cause of action, and that the court did not err in overruling the demurrer.

[5] 2. The point is made that the action was barred by the statute of limitations. We think that the plaintiff's cause of action arose on the day of the resale; and as the statutory period, counting from that time, has not expired, this point is not well taken.

Judgment affirmed.

(9 Ga. App. 646)

PATTERSON v. CHILDS. (No. 2,899.)  
(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§ 99\*)—AUTHORITY—RECEIPT OF PAYMENT.

"Payment of money due to the creditor or his authorized or general agent, or one whom the creditor accredits as agent though he may not be so, or to his partner interested with him in the money, shall be good; and if such agent

receives property other than money as money, the creditor is bound thereby." Civ. Code 1910, § 4311; *McLaughlin v. Blount*, 61 Ga. 168; *Holmes v. Langston*, 110 Ga. 861 (6), 36 S. E. 251. The rule is different as to attorneys at law. They cannot without special authority receive anything in discharge of the client's claim but the full amount in cash. Civ. Code 1910, § 4956.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 196-203; Dec. Dig. § 99.\*]

## 2. SUFFICIENCY OF EVIDENCE.

The judgment of the trial judge who passed upon all questions, both of law and of fact, is not without evidence to support it.

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action between W. W. Patterson and C. A. Childs. From the judgment, Patterson brings error. Affirmed.

Hal Lawson, for plaintiff in error. M. B. Cannon, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 650)

HAAG v. ROGERS. (No. 2,049.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

## 1. CONTRACTS (§ 155\*)—CONSTRUCTION—GENERAL RULES.

"The law will not construe a contract so as to give the debtor the right to destroy it by a simple refusal to comply with it, unless the terms of the contract are so clear and unambiguous as to make irresistible the conclusion that no other result could possibly be reached."

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 736; Dec. Dig. § 155.\*]

## 2. MASTER AND SERVANT (§ 72\*)—CREATION OF RELATION—CONSTRUCTION OF CONTRACT—COMPENSATION.

Where a contract of employment provides that it shall remain in force so long as is mutually satisfactory, and that the rate of wages shall be so much, but that the employé shall be entitled to so much extra compensation per month, provided he remain in the service until a set date, and not otherwise, the proper construction of the agreement is that either party may terminate the contract at will; and if the employé quits before the time set, or by his wrongful conduct makes it reasonable and just for his employer to discharge him prior to that time, he forfeits the extra compensation, but, if the employer himself voluntarily and without cause sooner terminates the contract, the employé is entitled to a ratable part of the extra compensation.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 72.\*]

## 3. CONTRACTS (§ 75\*)—CREATION OF RELATION—VALIDITY OF CONTRACT.

A contract by which an employer is to pay the employé a certain amount as wages in any event, and an additional amount in the event he remains in the employment till the end of the contract, is not unenforceable as to the extra compensation on the ground that it is nudum pactum.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 273-285; Dec. Dig. § 75.\*]

## 4. MASTER AND SERVANT (§ 43\*)—TERMINATION OF RELATION—GROUNDS FOR DISCHARGE—QUESTION FOR JURY.

Whether fighting on the show grounds by the plaintiff, who was a working man employed by the proprietor of a circus, was (especially in the absence of all evidence as to the nature and cause of the fight) a reasonable cause for his discharge, was a question for solution by the jury, and is not a matter absolutely settled as a matter of law by the express provisions of the contract.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 43.\*]

## 5. NO ERROR.

No error of law appears.

(Additional Syllabus by Editorial Staff.)

## 6. APPEAL AND ERROR (§ 1091\*)—REVIEW—QUESTIONS OF FACT—DECISION OF MAGISTRATE.

Where the defendant sought certiorari directly from the decision of the magistrate without appealing to a jury on writ of error to the judgment of the superior court overruling the certiorari, he must assume the burden of showing that the evidence demanded as a matter of law a finding in his favor.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1091.\*]

## 7. ATTACHMENT (§ 204\*)—PROCEEDINGS TO ENFORCE—EVIDENCE.

The attachment, being a part of the pleadings, need not be introduced in evidence on the trial of the attachment case.

[Ed. Note.—For other cases, see *Attachment*, Dec. Dig. § 204.\*]

## 8. ATTACHMENT (§ 204\*)—PROCEEDINGS TO PROCURE—WAIVER OF OBJECTION.

Where the defendant in attachment replevied the property levied on, he cannot complain that there was no proof that the property was that of the defendant or in his possession, nor that the description of the property was too indefinite to identify the property and base a judgment.

[Ed. Note.—For other cases, see *Attachment*, Dec. Dig. § 204.\*]

Error from Superior Court, Berrien County; J. H. Merrill, Judge.

Action by John Rogers against E. Haag. To a judgment of the superior court overruling certiorari to review a judgment of a magistrate for plaintiff, defendant sued out a writ of error. Affirmed.

Hendricks & Christian, for plaintiff in error. J. P. Knight, for defendant in error.

POWELL, J. In June, 1909, Haag, the proprietor of a circus, as party of the first part, and Rogers, as party of the second part, made the following contract: "The said party of the second part hereby agrees to render services as working man for the season commencing on or about July 20 and to continue for the show season, or so long as mutually agreeable to both parties, under the following conditions: 1st. Second party of the second part agrees to render services to Haag's Mighty Shows, in a painstaking manner, and to be responsible for all property damaged by careless driving or willful carelessness of any kind. 2d. Party of the second part agrees to abide by all rules made

by the party of the first part, and for any violation of said rules is liable to a fine of one week's salary, or dismissal, and contract annulled. 3d. Party of the first part agrees to pay to the said party of the second part the sum of \$10.00 per month, or if the said party of the second part remain in the employment of the party of the first part until close of season in Dec. 31, 1909, party of second part is to be paid at the rate of \$18.00 per month, but under no circumstances, if party of the second part fail to remain until said close of season, shall he be paid over the rate of \$10.00 per month. 4th. Party of the second part can in no way obtain settlement in full of the \$10.00 per month rate unless party of the first part has been notified in written form, two weeks previous to settlement. 5th. The party of the first part agrees that said party of the second part is to have a plenty to eat, always the best obtainable under circumstances and the place we are in; also that party of the second part is to have the best of treatment if his duties are performed in a painstaking manner. 6th. The management reserves the right to temporarily close the season for cause, during which time no salaries shall be paid. 7th. Be it clearly understood by party of the second part that under no circumstances, during the life of this contract, is party of first part liable for any damages, for any accident that may happen to party of the second part. 8th. Party of the second part furthermore agrees that no compensation other than board, transportation and \$1.00 in cash will be given him should he render less than one month service. 9th. \$5.00 fine for each drunk or fight on show grounds. Witness whereof hereunto set our hands and seals." On the back of the contract, which was duly signed by both parties, is the following: "Working Man's Contract. Haag's Shows. E. Haag, Proprietor. For each drunk on or around show grounds, \$5.00 fine. For each fight on show grounds, \$5.00 fine. I agree to pay the above fines. [Signed] John Rogers." On November 2d Rogers had a fight on the show grounds. Haag's manager discharged him, and tendered to him \$2.25 in full settlement of the balance due him. It is undisputed that, if it is proper to compute the wages at the rate of \$10 per month, the correct amount was tendered, and that, if they should be computed at the rate of \$18 per month, \$30.25 would be due. Rogers sued out before a magistrate an attachment, which was levied on a gray horse, and the defendant replevied by giving a bond for the eventual condemnation money. On the trial of the case the magistrate gave judgment in the plaintiff's favor for \$30.25. From this judgment the defendant sought certiorari, but, on the hearing in the superior court, the judge overruled it, and to this judgment the writ of error now before us was sued out.

[8] As the plaintiff in error (defendant in the original suit) sought certiorari directly

from the decision of the magistrate without appealing to a jury, he is in the position where he must assume the burden of showing that there was nothing to submit to a jury; i. e., that the evidence demanded as a matter of law a finding in his favor. Every issuable fact is to be taken against him. That the plaintiff fought on the show ground is undisputed. The circumstances of the fight do not appear. It is not shown whether the plaintiff was the aggressor in the fight, or whether the fight was thrust upon him as a matter of self-defense or by other reasons of justification. Whether fighting on the show grounds (in the absence of contractual stipulations on the subject) is sufficient cause for discharge would seem to be a jury question. So the judgment in the plaintiff's favor should stand, unless the contract itself is of such a nature as to forbid the recovery.

[1] The contract provided for wages at the rate of \$10 per month, which were paid or tendered, but stipulated for an additional \$8 per month to be paid if the plaintiff remained in the employment until the end of the season. Only this additional \$8 per month is involved; and the defendant's contention is that, as the plaintiff did not remain until the end of the season, but was sooner discharged, the language of the contract itself forbids a recovery. It is pointed out that there is an express provision in the contract that it was to continue only "so long as mutually agreeable to both parties," and that, therefore, the defendant had the right to terminate the employment at his will, either with or without cause. "The law will not construe a contract so as to give the debtor the right to destroy it by a simple refusal to comply with it, unless the terms of the contract are so clear and unambiguous as to make irresistible the conclusion that no other result could possibly be reached, and that such was the intention of the parties. Civ. Code 1895, § 3675, par. 4 (Civ. Code 1910, § 4268). Nor will a contract be so construed as to authorize one of the parties to take advantage of his own wrong, unless it be plain and manifest that such was the intention of the parties." *Finlay v. Luden & B. Co.*, 105 Ga. 264, 31 S. E. 180; *Milledgeville Cotton Co. v. Cary*, 9 Ga. App. —; 71 S. E. 503.

[2] 2. Applying the rule just quoted, we are of the opinion that the proper construction to give the contract before us is that either party might terminate it at will; that if the plaintiff terminated it prior to the close of the season, or caused it to be terminated by such conduct on his part as would ordinarily authorize a discharge, he forfeited all claim to compensation beyond \$10 per month; that, if the defendant terminated it voluntarily and without the plaintiff's having first given adequate cause, he would be liable not only for the \$10 per month, but for the additional \$8 per month which was being held back as a guaranty against the

plaintiff's quitting the employment before the close of the season. It is frequently the case that an employer is willing to pay a higher rate of wages to a servant who will bind himself to remain in the employment for a definite period, or so long as the employer may desire to keep him, than to one who may quit at a time when his services are most needed. It is entirely legitimate for an employer to contract that the employé shall have so much wages for his services generally, and so much additional if he does not quit prior to a named date. It is also legitimate (when the terms of the contract so permit) for the employer to hold back the extra pay until lapse of time has demonstrated that the employé has done his part. But in such a case, unless the language of the contract is too clear to admit of any other reasonable interpretation, the employer cannot capriciously terminate the contract himself so as to avoid liability for the wages at the higher rate. Here the season was nearly over. To construe the contract as allowing the defendant then to terminate it without sufficient cause, and thereby to deprive the plaintiff of the extra compensation which was being held back as a guaranty against his quitting, would be to give the contract an oppressive and unnatural effect, which can hardly be said to have been within the fair contemplation of the parties. If he could thus terminate and forfeit the plaintiff's extra compensation in November, why not in late December, say on the day before the set time would have expired?

[3] 3. The plaintiff in error makes also the point that the agreement to pay the extra compensation of \$8 per month is unenforceable because nudum pactum. He relies on the case of *Davis v. Morgan*, 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171. That decision holds that "where a contract of employment is made for one year at a stipulated salary per month, an agreement during the term to receive less, or to pay more, than the contract price is void, unless supported by some change in place, hours, character of employment, or other consideration." The distinction is plain. In that case the agreement for the extra compensation was not made as a part of the original contract, so as to be based on the consideration of mutual promises by which the contract as a whole was supported, but in the present case it was. In that case the extra compensation was purely a promised gift or bonus. In this case the extra compensation was a part of the wages promised, though it was only conditionally promised.

[4] 4. It is also contended that the contract itself made fighting on the show ground ipso facto a cause for discharge, and that the court should have so held as a matter of law. A section of the contract made violation of the employer's rules a cause for dis-

charge, but it is not shown that fighting on the show ground was a violation of rules, within the purview of that section of the contract. That section (which is quoted above) seems to deal with other matters, since fighting on the show ground is specifically dealt with in another way. The plaintiff agreed to pay a "fine of \$5.00" for that. It is true that this clause of the contract which provides for the fine may be unenforceable, because it stipulates for a civil penalty, still it is adequate to indicate that the parties did not consider fighting on the show grounds as falling within the section of the contract which relates to violation of rules. Since the contract appears to have been prepared by the defendant, it must be construed most strongly against him.

[7, 8] 5. The further points made are: (1) "That the attachment and levy were not introduced in evidence." (2) "That there was no proof that the property levied on was that of the defendant or in his possession." (3) "That the description of the property is too indefinite to identify the property and base a judgment," and one or two more of a similar nature. The attachment was a part of the pleadings. We know of no rule requiring it to be introduced in evidence on the trial of the attachment case itself. The gray horse was levied on as the property of the defendant, and he replevied. This is a sufficient answer to the other points. On some of its points the case is a close one, but we have reached the conclusion that the judgment complained of should stand.

Judgment affirmed.

(9 Ga. App. 639)

GEORGIA R. R. v. RICHARDS. (No. 2,846.)  
(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

1. CARRIERS (§ 195\*)—TRANSPORTATION OF GOODS—CONVERSION BY CARRIER.

Though a carrier is not required to deliver the goods until its lawful charges have been paid or tendered, still if it refuses to deliver the goods unless the plaintiff will pay an unlawful and extortionate charge, under such circumstances as to make it clear that a tender of the lawful charges would be refused, the shipper is excused from producing the actual money and offering it before treating the carrier's refusal to deliver as a breach of its contract of carriage or a conversion of the goods.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 873-876; Dec. Dig. § 185.\*]

2. CARRIERS (§ 94\*)—TRANSPORTATION OF GOODS—ACTION FOR CONVERSION—QUESTION FOR JURY.

The defendant having denied that the goods were worth the amount claimed by the plaintiff, and the evidence on this point being in conflict, the court erred in instructing the jury that, in the event they found for the plaintiff, they should find for the full amount claimed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 367-395; Dec. Dig. § 94.\*]

**2. No OTHER ERROR.**

Apart from the error dealt with in the second headnote, no other reason for reversing the judgment appears.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Josephine Richards against the Georgia Railroad. Judgment for plaintiff, and defendant brings error. Reversed.

Jos. B. & Bryan Cumming and Jas. M. Hull, Jr., for plaintiff in error. Pierce Bros., for defendant in error.

RUSSELL, J. Judgment reversed.

(9 Ga. App. 648)

**BARRETT v. MAYOR, ETC., OF SAVANNAH.**

**MAYOR, ETC., OF SAVANNAH v. BARRETT.**

(Nos. 2,874, 2,875.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(*Syllabus by the Court.*)

**MUNICIPAL CORPORATIONS (§ 800\*)—TORTS—DEFECT IN HIGHWAY—PROXIMATE CAUSE OF INJURY.**

To make a municipality liable for an injury caused by a defect in a highway, the defect need not have been the sole cause of the injury; but if, besides the defect, there was another cause not attributable to the negligence of the injured person, and which contributed directly but concurrently to causing the injury, the corporation may still be liable, provided the injury would not have been sustained but for the defect in the highway. In such case the concurrent acts of negligence of both wrongdoers, and not the separate act of either one, would constitute the proximate cause of the injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1666-1671; Dec. Dig. § 800.\*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Mrs. J. H. Barrett, Jr., against the Mayor, etc., of Savannah. To the overruling of a motion for new trial after verdict for defendant plaintiff excepts, and to the overruling of a demurrer to the petition the defendant excepts in a cross-bill. Judgment reversed on main bill of exceptions, and affirmed on the cross-bill.

Twiggs & Gazan, for plaintiff in error. Saml. B. Adams, for defendant in error.

**HILL, C. J.** The plaintiff was driving a horse attached to a buggy on Estill avenue, a public street or highway in the corporate limits of the city of Savannah. This street or avenue at the time was in process of being widened under a contract made with the city and in pursuance of specifications furnished by the city. The widening of the street, and the location of the new grade lines caused thereby, placed the sidewalks about two feet lower than the old roadway of the street. Accordingly, excavations were made on the north side of the street, two

feet lower than the traveled surface of the highway and extending the entire length of blocks. This excavation was eight feet wide, and was made into the roadway proper. There was no barrier, guard rail, or other fencing or protection about the excavation. It was open, and the descent from the roadway to the bottom of the excavation was precipitous, and on the bottom of the excavation an artificial stone walk was laid. In the afternoon of July 10, 1909, the plaintiff was driving her horse and buggy along this avenue, on the north or right side, which was the proper side for her to take, and which was the side nearest and next to the excavation, and while she was still on the avenue an automobile approached from the opposite direction, and, because of the narrowed condition of the street, appeared to be headed directly for the horse and buggy. The automobile was going at a rapid rate of speed, probably faster than that allowed by the city ordinance on the subject, and passed within about three feet of the horse, but did not strike either the horse or the buggy. As the automobile neared the horse, he shied and backed the buggy into the excavation, precipitating the plaintiff therein, causing her severe injuries. The horse did not become otherwise frightened or attempt to run away, or become uncontrollable. The plaintiff brought suit against the city, setting forth the foregoing facts, alleging negligence on the part of the city in not having the excavation properly protected by guard rails or other means of protection, and insisting that this negligence was the proximate cause of her injuries. The city filed a general demurrer, insisting that under the allegations of the petition the unguarded excavation was not negligence, and, besides, that it was not the proximate cause of the injuries, but that the proximate cause of the injuries was the negligence of the driver of the automobile in running at a too high rate of speed, and that but for this negligence the injuries would not have resulted. The court overruled the demurrer, and to this ruling the defendant excepts in its cross-bill of exceptions.

On the trial of the case the jury found a verdict in favor of the city. The plaintiff's motion for a new trial, based on numerous grounds, was overruled, and she excepted.

The numerous questions raised have been most elaborately and ably argued by counsel for both parties, and exhaustive briefs have been filed. We do not consider it necessary to consider the many questions therein discussed, or to enter into a dissertation on the subject of proximate cause. This subject has been so repeatedly and exhaustively discussed by both text-writers and judges that we do not think that we could make any illuminating addition to the subject.

After giving the case a most thorough and

painstaking investigation, we have decided that the plaintiff is entitled to another trial. Even conceding that she would not have been hurt but for the fright of the horse, and that the rapidly approaching automobile was responsible for that fright, yet she could still recover from the city if her injuries would not have been sustained but for the presence of the unguarded excavation. We think that under the evidence it is clearly issuable whether or not her injuries would have been caused by the running and the approach of the automobile and the frightening of the horse, even if the city had properly guarded or protected the excavation. The principle of law is well settled that, where two concurrent causes operate in causing an injury, there can be a recovery against both or either one of the parties responsible for these two concurrent causes. To make the principle applicable to the facts of this case, although the jury may have believed that the approaching automobile caused the horse to become frightened, yet the plaintiff was nevertheless entitled to recover, if the jury further believed that the injury would not have occurred as a consequence of such fright and the backing of the buggy if the excavation had been protected or guarded in such manner as to prevent the buggy from being backed into it and the plaintiff thrown therefrom. The rule was first stated in the case of *Wilson v. City of Atlanta*, 60 Ga. 474, that, where other causes concur with municipal negligence to produce the injury, the corporation is liable for all damages which its culpable negligence contributed substantially and proximately to cause, as where one while observing due care for his personal safety is injured by the combined result of an accident and the negligence of the municipal corporation in respect to a defect or obstruction, and without such negligence the injury would not have occurred; and the fact that the injury may have been increased by other concurring causes would not excuse the municipal negligence without which the injury would not have happened. 28 Cyc. 1408, 1412; 2 *Smith's Modern Law of Municipal Corporations*, § 1296; *Tiedeman on Municipal Corporations*, § 351; *Williams on Municipal Liability for Tort*, 168; 2 *Dillon on Municipal Corporations* (4th Ed.) 1259; *Elliott on Roads and Streets* (Ed. 1890) 451, 452; 5 *Thompson's Commentary on Negligence*, 538, 539. In the *Wilson Case*, supra, plaintiff was riding in a buggy on a street in the city of Atlanta, near a point where there was an unguarded embankment, and the horse became frightened by the blowing of a whistle of a nearby factory and ran over the embankment, overturning the buggy and injuring the plaintiff, and the principle of liability for concurrent negligence was fully discussed and settled by the decision of the Supreme Court rendered in that case, where it was held that the city was liable because the unguarded embankment, whether

the proximate cause of the injury or not, was certainly a concurring cause with the frightening of the horse caused by the blowing of the whistle of the factory in causing the injury. There are many other decisions by the Supreme Court of this state reaffirming the principle announced in the *Wilson Case*. See *Trippe v. City of Atlanta*, 68 Ga. 834; *Jackson v. City of Buena Vista*, 88 Ga. 406, 14 S. E. 867; *Bryan v. City of Macon*, 91 Ga. 530, 18 S. E. 351; *Georgia Railroad v. Mayo*, 92 Ga. 224, 17 S. E. 1000; *L. & N. Railroad v. Barnwell*, 131 Ga. 791, 63 S. E. 501. See, also, the case of *Harrell v. City of Macon*, 1 Ga. App. 413, 58 S. E. 124. The overwhelming weight of authority in this country is in line with the rule announced in the *Wilson Case*, supra, to wit, that the defect in the highway need not be the sole cause of the injury, but that if, besides such defect, there be another cause, not attributable to the negligence of the injured person, and which contributed directly to the result, the corporation will still be liable, provided the injury would not have been sustained but for the defect in the highway.

Some of the cases cited by the learned and indefatigable counsel for the plaintiff are so apt and so strongly illustrate and strengthen the view which we now present that we will quote from some of them: "Where one upon a highway is forced off to the side of the traveled way by the rapidly approaching vehicle, and is injured by falling into an opening upon the side of the traveled way, the negligence, if found, in leaving the opening unguarded, was the proximate cause of the injury." *Neidhardt v. City of Minneapolis*, 112 Minn. 149, 127 N. W. 494, 29 L. R. A. (N. S.) 822. In that case the plaintiff, with some companions, was walking at night upon the driveway, and, when upon or near a culvert, an automobile, coming in the opposite direction at a high rate of speed, swerved directly towards them. To avoid the machine, the plaintiff stepped off towards the north and fell into an open drain at the edge of the culvert. A recovery against the city was sustained. "A city is liable for an injury resulting from a defect in the street, negligently allowed to exist, though another cause, such as the fright of plaintiff's horse from a street car, may have concurred in such negligence." *Townsend v. City of Joplin*, 139 Mo. App. 394, 123 S. W. 474. And see *City of Rome v. Davis*, 9 Ga. App. 62, 70 S. E. 594. The learned trial judge in his charge strongly and repeatedly instructed the jury that the negligence upon which a recovery could be predicated must be the chief, preponderating, and proximate cause of the injury. He nowhere presented the doctrine of concurrent negligence as applicable to the facts of the case, but seemed to emphasize the view that there could not be a recovery against the city unless under the evidence the jury believed that the unguarded excavation was the sole cause of the plaintiff's in-

jury. If the driver of the automobile in the present case saw the dangerous situation of the plaintiff in relation to the unguarded excavation, and nevertheless, by a violation of the speed ordinance of the city of Savannah, or by any other conduct not willful or so wanton as to be constructively willful, caused the horse to become frightened and to back into the excavation, and if the injury would not have happened but for such conduct on the part of the automobile driver, while such conduct might the driver of the automobile liable as well as the city, yet it would not relieve the city from liability to an innocent person, provided that it was negligence to leave the excavation unguarded, and that this negligence was a concurrent cause of the injury. The concurrent acts of negligence of both wrongdoers would constitute the proximate cause of the injury. We think this doctrine of concurrent negligence was presented by the evidence in this case, and that the learned trial judge erred in refusing to charge in substance this rule in compliance with a written request.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill.

(9 Ga. App. 672)

PIEDMONT HOTEL CO. v. HENDERSON.  
(No. 3,177.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

**1. LIMITATION OF ACTIONS (§ 180\*)—COMPUTATION OF LIMITATION—COMMENCEMENT OF ACTION—NEW ACTION AFTER DISMISSAL.**

Where two or more separate and distinct causes of action are sued on in the same petition, and the plaintiff dismisses from the case certain of the causes of action, he has the right to sue over on the causes of action so dismissed; and, if the new suit be brought within six months from the time of the dismissal, the fact that these causes of action were sued on in the former action may be shown under Civ. Code 1910, § 4381, to avoid the bar of the statute of limitations.

(a) Amendments ordinarily relate back to the beginning of the suit. This rule, however, is not to be so applied as to affect the right to sue over within six months upon causes of action which by amendment were stricken from a case, and which would be barred by the statute of limitations but for the pendency of the suit from which they were so stricken.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 553-566; Dec. Dig. § 130.\*]

**2. APPEAL AND ERROR (§ 1040\*)—REVIEW—HARMLESS ERROR—PLEADING.**

Ordinarily, where a right or privilege is asserted under court proceedings, it is proper that a copy of the proceedings be set forth in the pleadings or copied as an exhibit, especially if there be special demurrer requiring it. However, the overruling of a special demurrer complaining that a court writing is set forth according to its alleged legal effect, and not by literal copy, will not be considered as harmful error, where the status of the case would

be the same whether the writing had the legal effect claimed or not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

**3. FALSE IMPRISONMENT (§ 22\*)—ACTS CONSTITUTING—ARREST WITHOUT WARRANT.**

Whoever arrests or imprisons a person without a warrant is guilty of a tort, unless he can justify under some of the exceptions in which arrest and imprisonment without a warrant are permitted by law; and the burden of proving the existence of the facts raising the exception is upon the person making the arrest or inflicting the imprisonment. If authority for the arrest is shown, the presumption is that it was made legally and for a lawful purpose, and the burden of proof is upon the person asserting the contrary.

[Ed. Note.—For other cases, see False Imprisonment, Dec. Dig. § 22.\*]

**4. ARREST (§ 63\*)—ARREST WITHOUT WARRANT—"IN HIS PRESENCE"—"WITHIN HIS IMMEDIATE KNOWLEDGE."**

The words, "in his presence," as used in Pen. Code 1910, § 917, and the words, "within his immediate knowledge," as used in section 921 (both sections relating to arrest without warrant), are synonymous.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5525-5526.]

**5. ARREST (§ 63\*)—AUTHORITY TO ARREST—ARREST WITHOUT WARRANT.**

The provision in the charter of Atlanta (Acts 1906, p. 616) that policemen of that city may arrest for state offenses, with or without warrant, must be construed in connection with the general law on the subject so as to authorize a policeman of that city to arrest without warrant only when one of the exceptional cases set forth in the general law exists.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.\*]

**6. FALSE IMPRISONMENT (§ 8\*)—ACTS CONSTITUTING—ARREST WITHOUT WARRANT.**

Whenever an arrest without warrant is made, the officer or person making the arrest must without delay convey the offender before the most convenient magistrate and obtain a warrant. A reasonable time (ordinarily to be determined by the jury) is allowed for the obtaining of the warrant. Imprisonment or detention beyond the reasonable time not only renders the imprisonment or detention illegal, but makes the entire transaction (including the arrest) a trespass ab initio.

(a) The rule that "when entry, authority or license is given to any one by law, and he doth abuse it, he shall be a trespasser ab initio," cited and applied.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 68-73; Dec. Dig. § 8.\*]

**7. INSTRUCTIONS—PUNITIVE DAMAGES.**

The court did not err in instructing the jury on the subject of punitive damages.

**8. FALSE IMPRISONMENT (§ 27\*)—ACTS CONSTITUTING—CRUEL TREATMENT.**

"Cruel treatment of his prisoner by the captor may be considered (where there is evidence on the point) to illustrate the purpose of the arrest and the bona fides of the custody." The rule is applicable where the mother of three young daughters was arrested at night, without warrant, and the person making the arrest refused her request that she be allowed to go to her home, conveniently near by, for the purpose of securing the safety of her daughters, who were without male protection, and

imprisoned her for the night without giving her opportunity to communicate with her children.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 100; Dec. Dig. § 27.\*]

**9. EVIDENCE (§ 314\*)—HEARSAY—PROOF OF DEATH.**

While in a sense hearsay is admissible to prove death, yet, before the hearsay is admissible for that purpose, it must come up to the requirements of Civ. Code 1910, § 5764, which provides: "Pedigree, including descent, relationship, birth, marriage, and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogies, inscriptions, 'family trees,' and similar evidence."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1171; Dec. Dig. § 314.\*]

**10. TRIAL (§ 251\*)—ACTION—INSTRUCTION—DAMAGES.**

The verdict on the second count is reasonable in amount, is well supported by the evidence, and no error affecting it was committed on the trial. The verdict on the first count (in the light of all the facts in the record and the finding of the jury in favor of the defendant on the third count) is very large, if not legally excessive; and in the course of his charge the court gave to the jury a material misdirection as to the character of the damages claimed in that count. The plaintiff is given the option of curing the error by writing off the recovery on the first count, in which event the judgment will stand affirmed; otherwise a new trial results as to the entire case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

Hill, C. J., dissenting.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Lilly Henderson against the Piedmont Hotel Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition.

The plaintiff was employed as a chambermaid in the Piedmont Hotel in Atlanta. At about 10 o'clock on the night of September 16, 1905, she was suspected of having stolen a purse and a dollar bill from one of the rooms. The manager and assistant manager of the hotel and a special policeman (nominally employed by the city, but in fact employed and paid by the hotel company) confronted her with the alleged theft, and the policeman at the instruction of the other two gentlemen arrested her. The manager consulted with the president of the hotel company, and he directed that she be "locked up." She was carried to the police station and imprisoned there until the next afternoon at 2:30 o'clock, when she was brought before the recorder and bound over to the state court for larceny. Up to this time no warrant had been sworn out, but, upon her being bound over to the state court, a warrant was sworn out by the special policeman, and an accusation thereon was preferred against her in the city court. She was tried and acquitted. On May 27, 1909, the present suit was filed against the hotel company for damages. The petition contains

three counts. The first alleges the arrest of the plaintiff without a warrant, and prays for damages, both actual and punitive, for illegal arrest. The second count takes up the transaction following her illegal arrest, alleges her incarceration in the police station without warrant or other lawful authority, and prays for damages, actual and punitive, on account of false imprisonment. The third count sets forth the swearing out of the warrant and the prosecution in the city court, and prays for damages on account of malicious prosecution. Under the petition as drawn, the several counts were employed, not for the purpose of setting forth the same cause of action with a variety of detail, as is frequently done, but for the purpose of dividing the general transaction involved in the arrest, imprisonment, and subsequent prosecution into three separate causes of action. The judge instructed the jury to render a separate verdict on each count. They found in favor of the plaintiff \$2,500 damages on the first count (for illegal arrest), and \$2,500 on the second count (for false imprisonment), and found in favor of the defendant on the third count (for malicious prosecution). Further facts necessary to an understanding of the points decided will be stated in the course of the opinion.

Smith, Hastings & Ransom, for plaintiff in error. Eb. T. Williams and Westmoreland Bros., for defendant in error.

POWELL, J. (after stating the facts as above). [1] 1. The first point, and perhaps the most troublesome point in the record, arises upon the defense under the statute of limitations. The present suit was not filed within the statutory period, but the plaintiff relies on section 4831 of the Civil Code of 1910, which is as follows: "If a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitation, with the original case; but this privilege of dismissal and renewal shall be exercised only once under this clause." It is made to appear by the pleadings and the proof that on January 26, 1906, the plaintiff filed in the superior court of Fulton county an action against the present defendant (joining also the manager and the assistant manager of the hotel company, though they were afterwards stricken by amendment). That suit set forth in one count the entire transaction set forth in the three counts of the present suit, and the defendant filed thereto a demurrer on the ground "that the same contains in the same count two separate and distinct causes of action, to wit, a cause of action for false arrest and a cause of action for malicious prosecution." The judge of the superior court sustained this demurrer, but gave leave to amend; and on January

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



28, 1909, the plaintiff filed an amendment to that petition, "striking therefrom any claim for damages on 'a cause of action for false arrest' and electing to pursue the cause of action for malicious prosecution." The case was then assigned to trial, and on March 30, 1909, terminated in a nonsuit. The present suit, it may be recalled, was filed on May 27, 1909; i. e., within six months from the date the former suit was nonsuited, and also within six months from the date on which the plaintiff struck out from the former petition the claim for damages on account of false arrest and imprisonment.

Whether the petition in the former suit did in its one count set forth more than one distinct cause of action is not now a question for determination. The demurrer raising that point and the judgment of the court (unexcepted to) sustaining it make conclusive upon the parties, and upon the court in the trial of the present case, the proposition that the false arrest (including the false imprisonment—for it is manifest from the context that the expression, "false arrest," as used in the quotations from the pleadings in the former case referred to the imprisonment as well as to the arrest) was a separate and distinct cause of action from the alleged malicious prosecution which followed thereon. The fact that we doubt the soundness of that ruling makes no difference. It is now a postulate of the case.

Before deciding the point which controls this branch of the case, we will eliminate another proposition. It may be that the language employed in the amendment to the former suit, by which the plaintiff struck from the petition "any claim for damages" on the cause of action for false arrest, left the allegations as to the false arrest and false imprisonment still in the petition as a part of the transaction declared on as a malicious prosecution. Be that as it may, we will decide the case as if the former petition in its one count set up the three separate and distinct causes of action contained in the different counts of the present petition, and as if on January 28, 1909, the plaintiff struck out two of these causes of action and was on March 30, 1909, nonsuited as to the third.

The point, the very serious point, which counsel for the plaintiff in error (the defendant in the lower court) makes, is that an amendment relates back to the date of the filing of the suit, and that when, on January 28, 1909, the plaintiff amended the petition in the former suit by striking out all causes of action except the one on account of the malicious prosecution, that amendment related back to the beginning of the suit, and left the case as if the petition had been originally brought only for the malicious prosecution; so that, when the case thus proceeding terminated in nonsuit, only a case for malicious prosecution could be renewed within six months thereafter. We believe the true rule to be that, if a peti-

tion contains two or more separate and distinct causes of action, each cause of action is to be tried and treated as if it were a separate and distinct case. In many instances the rules of pleading do allow separate and distinct causes of action to be joined in the same petition, though as a matter of technical form and of orderliness of procedure there is a requirement that each shall be set forth in a separate count. Each count, then, from a substantial point of view, is a separate suit; and the case made by the petition as a whole is determined as if separate suits had been filed and had been consolidated for the purposes of trial. For an analogue in criminal procedure, see *Tooke v. State*, 4 Ga. App. 495, 504, 61 S. E. 917. The requirement that the different causes of action shall be alleged in separate counts is technical only, and, if the case proceeds to trial with the petition asserting two or more distinct causes of action in the same count, the case nevertheless stands as if a number of separate suits were on trial by consolidation. It seems expedient, logical, and altogether just to say that if a plaintiff should file a petition setting forth in separate counts a number of distinct causes of action, and afterwards should find that he was unable satisfactorily to proceed as to one of his counts and should then strike or dismiss that count, the effect would be the same as if he had brought a like number of separate suits, and had dismissed one of them; and that, if the time required by the statute of limitations had been completed after the filing of the suit and before the dismissal of the count, the plaintiff should nevertheless be allowed to sue over upon the cause of action asserted in that count within six months from the time he struck it out or dismissed it. This is merely to give to the code section on the subject of renewal of actions that liberal, common-sense construction which the courts are accustomed to say should be given it. See *Cox v. Strickland*, 120 Ga. 104 (especially at bottom of page 111 and top of page 112) 47 S. E. 912, and authorities there cited. If by technical delinquency the plaintiff has joined two distinct causes of action in the same count, he should be allowed to strike out or dismiss one of them on like terms, for one of the very objects of the renewal statute is to give the plaintiff the right to sue over without the embarrassment of the bar of the statute of limitations, where in the first suit he attempted to assert a cause of action, but "by some accident, or inadvertence or variance, not affecting the real merits of the case, was compelled to dismiss." *Moss v. Kessler*, 60 Ga. 44, 47. That the right to claim the benefit of the statute may apply as to a part of a case only (if that part relates to a distinct and entire cause of action) is shown by Civ. Code 1910, § 4382, where it is given to a defendant whose plea of set-off has been disposed of without a hearing on the merits. In our opinion the rule

insisted upon by able counsel for the plaintiff in error, that amendments relate back to the beginning of the suit, does not destroy this right of renewal in cases such as those we have been discussing. The prime object of the rule is the saving of causes of action, not the destroying of them. It is a general rule, but it has its exceptions. When an amendment merely perfects, either in form or in substance, the manner in which a particular cause of action has been stated, it relates back to the beginning of the suit, so far as that cause of action is concerned, and makes the procedural perfection finally attained as to that cause of action a perfection *ab initio*; but there are cases into which new and distinct causes of action are inserted by amendment (though the contrary is the general rule, of course), and in such cases the amendment does not relate back, and the causes of action contained in the petition prior to the introduction of the new cause of action are in no wise affected. Cf. *Bentley v. Crummeys*, 119 Ga. 911, 47 S. E. 209.

The amendment involved in this case was twofold in its consequences. As to the allegations respecting the cause of action for malicious prosecution, it fulfilled the proper offices of an amendment—i. e., it relieved the statement of that cause of action of the procedural imperfection of being joined in the same count with the statement of another cause of action—and as to that cause of action it related back to the beginning of the case, and made the perfection attained as to it a perfection *ab initio*. But as to the cause of action for the false arrest it operated quite differently. As to the statement of that cause of action, it was no amendment at all, but was a dismissal; and dismissals do not relate back to the beginning of the suit, at least so far as counting time under the code section as to renewals of actions is concerned. We are of the opinion that the trial court properly held that the plaintiff's causes of action, so far as the questioned counts are concerned, were not barred. In holding this we think that we are applying the rule on the subject according to its reason as so ably set forth by Mr. Justice Lamar in the case of *Cox v. Strickland*, 120 Ga. 104, 109, 47 S. E. 912, 915: "Statutes of limitation are based partly on the theory that nonaction by a plaintiff tends to throw his adversary off guard, making him careless in the preservation of receipts, vouchers, documents, and other evidence needful for his defense. But when a suit is pending, whether it be brought with technical correctness or not, the defendant is warned to preserve his evidence. The attempted assertion by judicial proceedings of a cause of action in which A. gives B. notice of his claim is sufficient to stop the running of the statute during the pendency of that suit, and for six months thereafter. In like manner, if B. in the same suit, by a set-off or cross-bill (Civil Code 1895, § 3787 [Civil Code, 1910, § 4382];

*Crane v. Barry*, 60 Ga. 362; *Hunt v. Spaulding*, 18 Pick. [Mass.] 521), or other appropriate proceeding, should attempt to enforce his cause of action against the plaintiff or other party to the proceedings, the statute would likewise be tolled as to his claim. Notice had been given. The opposite party was warned. If the suit was disposed of on any matter not concluding the merits of the cause of action, or *any* [italics ours] of the causes of action, asserted in the proceeding by one party against another, it might be thereafter seasonably renewed in the proper forum, in proper form, against any of the proper and all of the necessary parties therein." See, also, *Atlanta, K. & N. Ry. Co. v. Wilson*, 119 Ga. 781, 47 S. E. 366.

[2] 2. Another exception involving somewhat of the general question we have just been discussing will now be noticed. The plaintiff in alleging the proceedings had in the former suit for the purpose of showing that the present action was not barred did not set forth verbatim a copy of the amendment of January 28, 1909, by which the cause of action as to the arrest and imprisonment was stricken out, but stated the substance of it in the following language: "The plaintiff filed an amendment striking from said suit any claim for damages on a cause of action for false arrest." The defendant filed special demurrer to this, on the ground that a copy of this amendment was not attached; and exception is taken to the overruling of the special demurrer. Counsel for the plaintiff in error cites *Atlanta, K. & N. Ry. Co. v. Wilson*, 119 Ga. 781, 47 S. E. 366, in which it is held that, "if the point be raised by special demurrer, the plaintiff, who relies on the privilege of renewal under Civ. Code 1895, § 3786 [Civil Code, 1910, § 4381], to escape the bar of the statute, may be required to attach a copy of the petition in the first suit, so that the court may determine as matter of law whether it was for the same cause of action as the second between the same parties brought before the original bar had attached, and in a court having jurisdiction of the subject-matter." The petition in the former action was set forth by exhibit in the case at bar, and the allegation attacked by the demurrer merely stated what became of that case so far as the particular cause of action is concerned. We doubt that the reason underlying the rule as announced in the case just cited applies with full vigor here. At any rate, the allegation under the facts of the present case stood in such an immaterial relation that any error in respect to its sufficiency was harmless; for, whether the pleader correctly stated the substance and legal effect of his amendment or incorrectly stated it, the case was unaffected. That is to say, if the amendment alleged by the pleader was not adequate to dismiss the cause of action as to false arrest from the case, then it remained in, and fell by nonsuit in March, 1909, and was on

that account renewable. If the amendment was adequate to effect the dismissal, the case was nevertheless renewable, for six months had not expired from the date of the amendment.

[3] 3. The jury, as has been said, found in favor of the defendant as to the third count (for malicious prosecution). Hence, only errors relating to the manner in which the other two counts were submitted to the jury will be considered. There is no dispute that the arrest and imprisonment complained of in the other two counts took place without any warrant being procured. Whoever arrests or imprisons a person without a warrant is guilty of a tort, unless he can justify under one of the exceptions prescribed by law; and the burden of proving that the case lies within the exception rests upon the person making the arrest or inflicting the imprisonment. *White v. State*, 99 Ga. 16 (3), 19, 26 S. E. 742, 37 L. R. A. 642. If a warrant is shown authorizing the arrest, the presumption is that the arrest was made legally and for a lawful purpose, and the burden of proof is upon the person asserting the contrary. *Graham v. Marks*, 98 Ga. 67, 70, 25 S. E. 931.

[4] 4. The circumstances under which an arrest without warrant may be made by an officer are set forth in section 917 of the Penal Code (1910) (which section is a codification of the common law, with slight enlargement), as follows: "An arrest may be made for a crime by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant." This applies to arrests for misdemeanors as well as for felonies, though as to arrests for felonies somewhat greater latitude may be allowed in certain cases. *Porter v. State*, 124 Ga. 297, 302, 52 S. E. 283, 2 L. R. A. (N. S.) 730; *Thompson v. State*, 4 Ga. App. 649 (2), 652, 62 S. E. 99. In this case the crime charged was a misdemeanor. There is no contention that the alleged offender was endeavoring to escape, or that for any other cause there was likely to be a failure of justice for want of an officer to issue a warrant. The only ground of justification left was that the crime was committed in the officer's presence. Complaint is made as to the court's instructions to the jury as to when a crime may be considered as having been committed in an officer's presence. There are other assignments of error bearing on the same general subject. (Were it not for the contingency that there may be another trial of the case, it would be unnecessary for us to pass upon these questions, in view of what we are going to rule a little later on in the course of the opinion.) We think that the words, "in his presence," as used in Pen. Code 1910, § 917, and the words "within his immediate knowledge," as used

in Pen. Code 1910, § 921, are synonymous. To justify the arrest without warrant, the officer need not see the act which constitutes the crime take place, if by any of his senses he has personal knowledge of its commission. Thus, if he hears shooting or other noises, and runs immediately to the place and finds the offender with evidences of the alleged crime on him, or finds the offender running away as if in apparent flight from the crime, and in similar cases, the crime is considered as having been committed in the officer's presence or immediate knowledge. See the dissent in *Porter v. State*, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730, and cases therein cited.

[5] 5. It is said, however, that policemen in Atlanta have broader powers than ordinary officers as to making arrests, because it is provided in the charter of Atlanta (Acts 1905, p. 616) as to the police officers of the city that "It shall be their duty to make arrests of any persons violating the ordinances of said city, with or without summons, and also with or without warrants; they shall likewise make arrests of any persons who have violated the statutes of said state, and their arrests for such violations are hereby authorized, either with or without warrants therefor." The general law as embodied in Pen. Code 1910, § 917, applies to policemen of all the municipalities of the state. *Thomas v. State*, 91 Ga. 204, 206, 18 S. E. 305; *Brooks v. State*, 114 Ga. 6, 39 S. E. 877; *Porter v. State*, 124 Ga. 297, 302, 52 S. E. 283, 2 L. R. A. (N. S.) 730; *Johnson v. State*, 30 Ga. 426. Unless the local law as found in the Atlanta charter is construed in such a way as to make it harmonious with the general law, the local law would fall as being unconstitutional. A construction which avoids repugnancy to the Constitution is always to be favored. With this in view we construe the provision in the Atlanta charter as authorizing policemen of that city to make arrests without warrant only where such a course is permissible under the general law. The language of the local law is easily susceptible of this construction, and the ordinary canons of interpretation require the limitation here imposed upon it.

[6] 6. Even if we should find that the court erred in any of his instructions as to the legality of the arrest, there is a reason why the error should be considered as harmless and insufficient to authorize a new trial. Pen. Code 1910, § 922, provides: "In every case of arrest without warrant, the person arresting shall, without delay, convey the offender before the most convenient officer authorized to receive an affidavit and issue a warrant. And no such imprisonment shall be legal beyond a reasonable time allowed for this purpose." Though it would probably do no violence to the prerogative of the jury as to passing on the facts for us to say that the evidence in this case demanded a finding that the defendants did not comply

with this law, still it is unnecessary for us to do so. What is a reasonable time for the detention after the arrest in order to procure a warrant is generally speaking a question for the jury; and in this case the question was fairly submitted to the jury, and by their verdict on the second count they have established the fact that the plaintiff was imprisoned for an unreasonable time before the warrant was procured. This being so, another proposition of law comes into play. One of the resolutions in the case of *The Six Carpenters*, 8 Coke, 146 (1 Smith's Leading Cases, 9th Ed. 261), cited approvingly in *Sheftall v. Zipperer*, 133 Ga. 488, 492, 66 S. E. 253, 255 (27 L. R. A. [N. S.] 442), is that "when entry, authority or license is given to any one by law, and he doth abuse it, he shall be a trespasser ab initio." This has been frequently applied to cases of arrest prima facie legal, followed by illegal detention. In the case of *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390, the policeman legally arrested the plaintiff without a warrant, but failed in the duty of carrying him before the magistrate. The court in an opinion by Mr. Justice Gray held: "Every man has the right to the enjoyment of his liberty and the use of his property, except so far as restrained by law and whoever unlawfully interferes with the enjoyment of the one, or the use of the other, is a trespasser. A man who seizes the property or arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, he may not, perhaps, in the strictest sense be said to become a trespasser ab initio, but he is often called such, for his whole justification falls, and he stands as if he had never had any authority to take the property, and therefore appears to have been a trespasser from the beginning. 2 Rol. Ab. 563; *Shorland v. Govett*, 5 B. & C. 485; s. c., 8 D. & R. 257; *Smith v. Gates*, 21 Pick. [Mass.] 55; *Coffin v. Vincent*, 12 Cush. [Mass.] 98; *Russell v. Hanscomb*, 15 Gray [Mass.] 166; *Munroe v. Merrill*, 6 Gray [Mass.] 236; *Williams v. Babbitt*, 14 Gray [Mass.] 141 [74 Am. Dec. 670]. The same rule holds good in the case of an officer who, after arresting a person on criminal process, omits to perform the duty required by the law, of taking him before a court. *Tubbs v. Tukey*, 3 Cush. [Mass.] 438 [50 Am. Dec. 744]." See, also, *Boston & Maine R. v. Small*, 85 Me. 462, 27 A. 349, 35 Am. St. Rep. 379; *Dehn v. Hinman*, 56 Conn. 320, 15 A. 741, 1 L. R. A. 374. Hence it is immaterial to inquire whether the officer could have arrested without a warrant if he had thereafter obeyed the provisions of Pen. Code 1910, § 922, for his legally ascertained disobedience of this law relates back so as to make the arrest in any event illegal.

[7] 7. The point is made that the court

erred in submitting to the jury instructions on the subject of punitive damages. Without going into the details of the evidence, we will dispose of the exception with the statement that this issue was presented by the evidence as well as by the pleadings, and was properly submitted to the jury.

[8] 8. Complaint is made that the court allowed the plaintiff to prove that at the time of her arrest at night and her imprisonment she had at home three young daughters without male protection. Taken in connection with the testimony that the defendants' agents were informed of this fact, and were requested by the plaintiff to take her by her home for the purpose of making some provision for the safety of these children, and that the request was refused (though her home was near by), the evidence was plainly admissible, not only for the purpose of showing the extent of the plaintiff's mental suffering, but also for the purpose of showing malice and wanton oppression on the part of the defendant. "Cruel treatment of his prisoner by the captor may be considered (where there is evidence on the point) to illustrate the purpose of the arrest and the bona fides of the custody." *Habersham v. State*, 56 Ga. 61 (5).

[9] 9. The defendant desired to prove the death of two persons connected with the case, a Miss Scott and the policeman, Carson. A witness was asked, "Have you heard from any member or members of Miss Scott's family whether or not she is dead?" The witness answered, "I had a letter from her sister." The court ruled this out. "As the record does not disclose what was in the letter or what the defendant expected to show by the letter, it is not necessary to consider this exception further. As to Carson, the witness testified: 'W. W. Carson was a member of the police force, and there was public announcement of his death, and my officer at the hotel told me of his death, and told me he attended his funeral, but I have no personal knowledge of it.' The court ruled this out. Civ. Code 1910, § 5764, provides: 'Pedigree, including descent, relationship, birth, marriage, and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogies, inscriptions, 'family trees,' and similar evidence.' In *Imboden v. Etowah Co.*, 70 Ga. 86, it was held in general language that hearsay as to death is admissible. In *Williams v. State*, 86 Ga. 548, 550, 12 S. E. 743, the generality of this statement was criticised. While, in a sense, hearsay is admissible to prove death, yet the hearsay must come up to the requirements of the code section quoted above. Cf. *Augusta R. Co. v. Randall*, 85 Ga. 297, 11 S. E. 706 (3). See, also, *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18 (10). The evidence was properly excluded.

[10] 10. We come now to the only error

we find in the entire record. The first count sets up that by the false arrest the plaintiff was greatly humiliated and damaged in her feelings and reputation, and mentions no other element of damage (except punitive damages). The second count sets up that by the false imprisonment which ensued after the arrest, and by the circumstances connected with it, she was "greatly humiliated and made sick, and nearly lost her reason, and her nervous system was so shocked that for over two weeks she was prostrated from the effects thereof, from which she has never recovered." We need not recite what is set up in the third count, as the verdict was for the defendant as to that. The court in his charge to the jury, in stating the contentions of the parties, took up the counts of the plaintiff's petition, and read them to the jury separately. Then, after stating the substance of the pleas in the case, he stated to the jury what facts were conceded by both parties to be true as to each of the counts. He then stated the contested issues, arising under each count, and gave to the jury the rules of law by which these contested issues were to be settled. As he concluded his instructions as to the contests under each count, he added: "I will instruct you as to the amount of the recovery later, on this proposition, if she is entitled to recover at all." After he had finished with the other portions of his charge and approached the question of damages, he made the following statement to the jury: "Now, she sets up, gentlemen, she suffered damage on each of these counts to which I have called your attention, for humiliation and for her wounded feelings, for her suffering mental and physical, for her disgrace amongst her friends and people who knew her, and humiliation, and that it affected her nervous system so that she suffered a nervous shock for two weeks or more, and asks to recover damages, laying her damages on each one of the counts at \$10,000. Well, gentlemen, the same rule or measure of damage would apply on each of these counts, and it is left to the enlightened consciences of impartial jurors to say what the amount of damages would be, if she recovers in the case. It would be your duty to look into the character of wrong done her, if she was wronged, in each count; what effect it had as to causing her humiliation; what its tendency was as to disgracing her before the public, amongst her friends; and, desiring to be fair and just to both sides and not oppressive to the defendant, you would give to her such sum as you believe would compensate her, under the circumstances, for her pain and her suffering, her humiliation, her mental suffering, if she underwent such suffering, and such sum as your enlightened consciences would approve as right and just under the facts and circumstances of the case." Then, after instructions on the subject of punitive damages, he charged the jury as to the form of their ver-

dict, directing them to make a separate finding as to each count. The verdict was: "We, the jury, find for the plaintiff twenty-five hundred dollars on count No. 1, and twenty-five hundred dollars on count No. 2, making a total five thousand dollars."

The error complained of is that the court instructed the jury in effect that under the first count, as well as under the second, they might award damages to the plaintiff for the physical suffering (including the shock to her nervous system) which she experienced through her illness which she claimed was brought about by the false imprisonment, though no such damages were claimed or alleged in the first count. The point seems to be well taken. While it is true that the court correctly read the plaintiff's petition and the various counts thereof to the jury, still, as he was repeatedly reminding them throughout the charge that he would inform them later as to how they should assess the damages in the event they found the defendant liable, and did at the close of the charge give these erroneous instructions, we cannot say that the jury was not misled. There is a possibility that the jurors decided that the plaintiff ought to have \$5,000 for the wrong done her by the false arrest and imprisonment, considered as one continuous and connected transaction, and that, having agreed on this amount, they proceeded to divide it into two parts, in order to comply with the directions of the judge as to the form of their verdict, but as judges we have no right to assume that they did any such thing; for under the law and under the charge of the court it was their duty to consider and to find as to each count separately. If the plaintiff had not divided the transaction into parts and made each part a separate cause of action, there would be no trouble in sustaining the verdict, but the fact that confronts us is that the division exists. Under all the facts of the case, the false imprisonment was a much more serious cause of damage than the false arrest. The point is made that \$2,500 for the false arrest alone is excessive. It will not be necessary for us to make an authoritative ruling on that point. However, in the light of the decision in the case of *Fire Association v. Fleming*, 78 Ga. 733, 3 S. E. 420, in which Mr. Justice Hall denounced the verdict of \$1,000 for an arrest without warrant as so excessive as to show bias or misapprehension on the part of the jury, there is much plausibility in the point. It must be kept in mind that the verdict of the jury on the third count is in effect a finding that probable cause existed for a prosecution of the plaintiff, though it was afterwards ascertained that she was not guilty. If there was probable cause for a prosecution, there was reasonable ground for an arrest. The verdict, taken as a whole, must be construed as finding that the actionable wrong which the defendant committed, so far as the first count is concerned, was

not in causing her to be arrested, but in not getting a warrant. The arrest was in private, and, standing alone, was not accompanied by specially aggravating circumstances. If the jury believed the plaintiff's version of the case, the damages assessed are very moderate so far as the second count is concerned; but this is not true as to the first count. As to the second count, the case was fairly and legally tried throughout; as to the first count, there is an error of serious import. We make this statement in explanation of the direction we are about to give the case. We are of the opinion that the proper disposition of the case, under all the circumstances, is to affirm the judgment on condition that the plaintiff will voluntarily write off the recovery had on the first count, thus relieving the case of all effects of the error, but that otherwise a new trial be had of the case as a whole.

Judgment affirmed on condition.

RUSSELL, J. (specially concurring). In concurring in the judgment of the court in this case, and as to the point passed on in the tenth division of the opinion, I do not wish to be understood, even in the light of Judge Hall's decision in *Fire Association v. Fleming*, 78 Ga. 733, 3 S. E. 420, as agreeing to the proposition that the verdict upon the first count was excessive. I conceive it to be the right of the jury to fix an amount even as large as that of the verdict upon that count, for the damages resulting upon an unlawful arrest, if the attendant circumstances in a particular case authorized such an exercise of their discretion. But in view of the fact that the ruling of the trial court in the previous litigation was not excepted to, and thereby becomes the law of this case, this court, as well as the lower court, is bound to the proposition that the transaction dealt with in the plaintiff's petition cannot be considered as one continuing cause of action, but must be treated as three causes of action entirely separate and distinct.

HILL, C. J. (dissenting). I concur in all of the views so clearly and forcibly expressed by Judge POWELL in his opinion for the majority of the court, except as to that portion embraced in the tenth division of the opinion and the tenth headnote. After a most careful consideration of the evidence and the charge of the learned trial judge referred to and discussed by Judge POWELL, I do not think that the charge relating to the damages on the first count contained a material error which in any manner misled or confused the jury; nor do I think that this court can say under the facts that the amount of the verdict found on this count was excessive, and I therefore cannot concur in the conclusion of the majority of the court that the verdict rendered on this first count in behalf of the plaintiff should be written off under penalty of another trial. The petition contained three counts. The

first count claimed damages for the illegal arrest. The second count claimed damages resulting from false imprisonment following this illegal arrest, and the third count claimed damages for the malicious prosecution following the illegal arrest and false imprisonment; all three of the counts laying the amount of the damages at the arbitrary sum of \$10,000. The damages resulting to the plaintiff from each one of the wrongful acts complained of, to wit, the illegal arrest, the false imprisonment, and the malicious prosecution, seem to me to be substantially the same, although there may have been some greater elaboration of these grounds in the second and third counts than in the first count. But, after all, considered from a reasonable and practical viewpoint, it seems to me that the character and extent of the damages claimed for each one of the three wrongful acts complained of do not substantially vary; and it is altogether reasonable to conclude that the jury, in considering the question of damages, did not make any very critical analysis of each character of the damages flowing from each separate wrongful act or make a concrete application to each count, but in all probability considered all the wrongs complained of as one continuing tort, and endeavored by the verdict to compensate the plaintiff for all the wrongs for which they found the defendant was responsible.

It is insisted that the former rulings of the superior court, acquiesced in by both parties, that the proper legal procedure was to separate the items of damages into counts, was binding upon the court and the jury, and that the jury were therefore compelled to consider each question separately, and to award damages appropriate to each separate count, and not give a lump sum for all the acts complained of. This may be the sound legal view, but I have no idea that the jury, in fixing the amount of damages, were very greatly influenced by this technical view of legal pleading. It is said by Judge POWELL that the judge committed an error which may have misled the jury, in that he instructed them on the first count that they might consider certain elements of damages not claimed as grounds of damages in that count, but which were contained in the second and third counts, and that this instruction may have led the jury to give too large a verdict on the first count for the unlawful arrest. The judge charged as follows on the question of damages: "Now, she sets up, gentlemen, she suffered damages on each of these counts to which I have called your attention, for humiliation and for her wounded feelings, for her suffering mental and physical, for her disgrace amongst her friends and people who knew her, and humiliation, and that it affected her nervous system so that she suffered a nervous shock for two weeks or more, and asks to recover damages, laying her damages on each one of the counts

at \$10,000. Well, gentlemen, the same rule or measure of damages would apply on each one of these counts, and it is left to the enlightened consciences of impartial jurors to say what the amount of damages would be, if she recovers in the case. It would be your duty to look into the character of the wrong done her. If she was wronged, in each count; what effect it had as to causing her suffering; what effect as to causing her humiliation; what its tendency was as to disgracing her before the public, amongst her friends, and then desiring to be fair," etc. I think the learned trial judge, in thus summing up all the grounds of damages which the jury were authorized to consider, was really making a summary of all the damages claimed in the three counts, and did not intend to make a distinct and separate statement of the grounds of damages set out in each of the separate counts. It would probably have been more accurate for him to have separated the items of damages claimed on each count. But I cannot bring my mind to believe that because he summed up all the damages that he thereby confused the issues submitted to the jury or misled them into giving too large an amount on the first count. Of course, the statement made by the learned judge that the measure of damages on each count was the same was correct; the measure being the enlightened conscience of impartial jurors. It must be conceded that the plaintiff was entitled to some damages under the verdict of the jury on the first count for the illegal arrest. This first count sets up that by the illegal arrest the plaintiff was "greatly humiliated and damaged in her feelings and reputation," but mentions no other element of damage, except punitive damage. In considering the evidence applicable to this count and the resulting damage from the wrong complained of, the allegations permit a very broad scope to the jury. How much was she entitled to for the illegal arrest? She says it greatly humiliated her and damaged her feelings and reputation. If she was entitled to any damages for the false imprisonment, she certainly was entitled to damages for the illegal arrest. Not only could the jury under this first count give her damages as compensation for wounded feelings and humiliation, but they were also authorized on this count to give punitive damages. I cannot bring my mind to the conclusion that the \$2,500 found under this count under the allegations and the proof (even when considered in connection with the allegations of this count only), was excessive.

I do not concur in the statement in the opinion that the verdict of the jury on the third count necessarily found that, while the arrest was illegal, it was not malicious. There was a contention—in fact, one of the

principal defenses relied on as to the third count was—that the prosecution of the plaintiff was not by authority of the defendant, but that the case was prosecuted without its consent and without its authority, and the judge very properly instructed the jury as to this question that, before they could find a verdict for the plaintiff on this count, they must find by a preponderance of the evidence that the prosecution was without probable cause, was malicious, and was by authority of the defendant. It is not beyond the evidence to conclude that the jury may have thought that the prosecution was both malicious and without probable cause, yet that the defendant was not responsible for the prosecution, and was not liable on this count. The decision in the Fleming Case, 78 Ga., 3 S. E., cited by Judge Powell, and by Judge Russell in his specially concurring opinion, I think does not furnish legitimate ground for holding that the verdict on the first count in this case, under the allegations of damages in that count, was in any sense excessive. I might dispose of the point by stating that the justice who wrote the opinion in that case was simply expressing his personal view on the amount of the verdict. He did not speak for the court, for that question was not an issue in the case. The facts in that case did not show that the plaintiff was actually arrested, but showed that his arrest was constructive, and was attended with no element whatever of aggravation, either in the act or intention, and it may have been true that under the facts of that case \$1,000 was excessive. In the present case there was an actual arrest without a warrant. The verdict found that there was great humiliation and damage to the feelings of the plaintiff. Judge POWELL justly says that there were certain facts of aggravation which the jury might well have considered on the question of punitive damages, to wit, the refusal of the defendant or its agent to permit the plaintiff to go to her home, where she had three small female children, to make necessary provision for their protection while she was under arrest and away from them. To sum the whole matter up, and without extending this discussion, which is necessarily without profit, save as a matter of personal satisfaction to the judge who renders the dissent, I do not think the charge complained of was so confusing and misleading as to demand that the plaintiff write off the amount of the verdict on this count or take the risk of total loss of compensation for the wrongs done her; and I certainly think that under the facts of the case we cannot say that the verdict was excessive under the first count, in view of the very broad latitude which the law gives to the jury in determining the amount of damages of this character.

(9 Ga. App. 691)

**RUSSELL v. CAMP.** (No. 3,202.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

*(Syllabus by the Court.)***1. SALES (§ 68\*)—CONSTRUCTION—SUBJECT-MATTER.**

Where an executory agreement for the future delivery of goods is entered into, and there is no stipulation that the goods to be delivered shall be derived from a particular source, the legal effect of the agreement is for the delivery of any goods of that class and quantity, no matter from what source produced. But if the parties expressly stipulate that the goods shall be produced from a particular source, this stipulation of the contract is to be given effect.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 184-186; Dec. Dig. § 68.\*]

**2. SALES (§ 71\*)—CONSTRUCTION—AMOUNT OF GOODS.**

Where parties enter into a contract whereby one agrees to sell and the other to buy a designated amount of cotton, stated in the contract as being a portion of a particular crop then in existence, a condition is implied (unless the contrary is stated) that delivery of the specified amount is to be required only in the event the designated crop yields that amount.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 189-196; Dec. Dig. § 71.\*]

**3. SALES (§ 164\*)—PERFORMANCE OF CONTRACT—QUANTITY DELIVERED.**

Where an executory contract for the sale of cotton specifies that the cotton mentioned is a part of a crop in existence, and it turns out that by no fault of the seller the designated crop yields less than the number of bales stated, and the seller delivers all of the cotton produced from his crop, he discharges his contract, and is not liable in damages for failing to deliver the total number of bales stated in the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 386-390; Dec. Dig. § 164.\*]

Error from City Court of Jefferson; W. W. Stark, Judge.

Action by A. A. Camp against W. J. Russell. Judgment for plaintiff, and defendant brings error. Reversed.

T. J. Shackelford and Lewis O. Russell, for plaintiff in error. G. A. Johns, for defendant in error.

POWELL, J. Camp sued Russell, alleging that during the summer of 1909 they made certain contracts by which Russell had agreed to sell and deliver to Camp a designated number of bales of cotton at various times during the fall of that year; that he delivered only a portion of it, and failed to deliver the remainder; and that the contract price was less than the market price, whereby the amount of damages sued for resulted to the plaintiff. The contracts were evidently written in the same printed form as that which is set out in full in the case of *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 596; but the point made in that case, as to the illegality of the contract, is not here involved. The defendant in the present case admits the legality of the contracts, and expressly sets up that, instead of their being specu-

lative in their nature, they were intended to represent an actual sale of growing cotton which he then and there possessed; but, as he further pleads, when the cotton was gathered, the number of bales turned out to be less than the number designated in the contracts, and he delivered to the plaintiff all of his cotton, with the exception of a few bales, as to which he has settled with the plaintiff. The court struck this defense, and this action of the court is the basis of the exception relied on in this court.

[1] The case of *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28, settles many of the preliminary propositions involved in the case. In that case it is held: "An executory agreement for the sale of goods to be delivered at a future day is valid, though at the time the seller has not the goods in his possession, has not contracted to purchase them, and has no expectation of acquiring them otherwise than by producing, manufacturing, or purchasing them at some time before the day of delivery. Such a transaction is not rendered invalid by the provisions of section 3537 of the Civil Code of 1895 [Civil Code 1910, § 4117], unless it is made to appear that neither of the parties contemplated an actual delivery of the goods, and that it was the intention of both that there should be no actual delivery, but that on the day fixed for delivery there should be a settlement of their differences, based on the market value of the goods on that day. In that event the transaction would be a pure speculation upon chances, but not otherwise. \* \* \* Although at the time an executory agreement for the future delivery of goods was entered into the seller intended to fulfill his contract by delivery of goods produced by him, and this fact was known to the buyer, the seller would have a right to deliver, and the buyer would be bound to receive, any goods of the character and quality stipulated in the contract, when it was not agreed that the goods delivered must be produced by the seller. In determining whether an executory agreement for the future delivery of cotton was valid, as one in which an actual delivery of cotton was contemplated, or whether the transaction was a pure speculation on chances, evidence that the seller was a producer of cotton, and had at the date of the agreement cotton planted and growing, was relevant. An executory agreement for the future delivery of goods of a specified class and quality is, in legal effect, an agreement for the delivery of any goods of that class and quality, no matter where made or by whom produced; and when such an agreement is reduced to writing, parol evidence is not admissible to show that there was a collateral agreement between the parties that the goods specified in the contract should be produced by the seller."



In that case the written contract was silent upon the point as to whether the cotton mentioned in the contract was to be raised by the proposed seller or not. Merely so many bales of cotton of a certain grade were called for. The buyer refused to take certain bales of cotton that were tendered to him, on the ground that they were not raised upon the lands of the seller, and alleged that there was a contemporaneous parol contract that the cotton was to be raised upon the seller's land. The court held that the evidence as to the parol contract could not be received to add to or vary the writing, and that the buyer was liable for refusing to take the cotton when tendered to him. In the case at bar, while the contract does in one of its clauses, in general terms, call for a designated number of bales of cotton of a certain grade and weight, it is specified, in another part of the contract, that "the above number of bales of cotton represents the crop or a part of the crop of the party of the second part for the present year." The point here insisted on is that this written contract itself shows that the parties did not have in contemplation an executory sale of cotton generally, but an executory sale of all or a part of a specified crop of cotton then growing.

[2, 3] We think that the court erred in striking the defense. The parties seem to have deliberately put into the contract the clause which provides that the cotton mentioned therein was specific cotton, or, as the contract itself says, "represents the crop or a part of the crop" of the seller. The court, in construing the contract, must naturally give some meaning to this provision. It was doubtless inserted for the purpose of shutting off any contention that the contract related to a mere speculation in cotton futures, and to confine its terms to a subject-matter as to which the parties, the one a cotton planter and the other a cotton buyer, could legitimately and without question deal, namely, the growing crop of cotton of the planter. While it is true that the parties might have made a valid contract by which the one should sell to the other cotton for future delivery other than the then growing crop of the planter, provided that they bona fide contemplated that the seller would procure by purchase or otherwise the actual cotton in fulfillment of his contract, nevertheless, since all such contracts are looked upon by the courts with critical eyes, and are so frequently subject to avoidance upon impeaching the bona fides of the alleged intent to deliver actual cotton, it is most natural that the parties should seek to specify in advance exactly what cotton they have in contemplation, and to designate definitely from what source it shall be procured. The parties seem to have done this in the present instance. The contract may be fairly inter-

preted as meaning that the one party undertook to sell to the other so many bales of the cotton which it was expected that his crop would yield.

We think the contract should be construed just as if it had said that Russell sold to Camp "10 bales of cotton out of his present crop." Thus construed, the case falls within the ruling in the leading case of *Howell v. Coupland*, L. R. 9 Q. B. 462, 1 Q. B. D. 258. In that case Coupland agreed to sell to Howell "200 tons of Regent potatoes grown on land belonging to said Robert Coupland in Whaplode," at a certain price, for delivery during the months of September and October. At the time of making the contract, Coupland had 68 acres of his farm at Whaplode devoted to the growing of potatoes, a portion of which was then sown, and the remainder of which was sown in due course. The crop yielded only 80 tons, which were delivered, and Howell sued to recover damages for the nondelivery of the residue of the 200 tons. The Court of Queen's Bench entered judgment in favor of the defendant, and this was affirmed in the Court of Appeals. The present case is even stronger, for here the crop was not only sown, but was approaching maturity, at the time of the sale, thus making even more irresistible the construction that a particular crop of cotton, and not cotton generally, was in the contemplation of the parties at the time they entered into the contract. We hold that delivery of the entire crop fulfilled the contract. To the same effect, see *Ontario Fruit Ass'n v. Cutting Packing Co.*, 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231. See, also, *Williston on Sales*, § 661; *Benjamin on Sales*, § 569, 570. Judgment reversed.

RUSSELL, J., disqualified.

(9 Ga. App. 695)

J. CROUCH & SON v. SPOONER et al.  
(No. 3,442.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

1. SALES (§ 441\*)—REMEDIES OF SELLER—ACTION FOR PRICE—EVIDENCE.

There was sufficient evidence to authorize the verdict.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.\*]

2. SALES (§ 355\*)—REMEDIES OF SELLER—ACTION FOR PRICE—SCOPE OF ISSUES—FAILURE OF CONSIDERATION.

A plea of total failure of consideration includes within its terms the defense of partial failure of consideration, but the defendant can have no abatement from the purchase price on account of a partial failure of consideration, unless he furnishes to the jury sufficient data to enable them to estimate with reasonable certainty the amount of the abatement.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1025-1043; Dec. Dig. § 355.\*]

### 3. APPEAL AND ERROR (§ 1068\*)—REVIEW—HARMLESS ERROR—FAILURE TO INSTRUCT.

The court having charged the jury that, unless the defendants sustained their plea of total failure of consideration, there should be a verdict for the plaintiff for the full amount sued for, and the jury having returned a verdict in favor of the defendants, the plaintiff will not be allowed to complain that the court did not submit instructions to the jury on the subject of partial failure of consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4230; Dec. Dig. § 1068.\*]

### 4. SALES (§ 358\*)—REMEDIES OF SELLER—ACTION FOR PRICE—ADMISSIBILITY OF EVIDENCE.

Where the purchase price of an article is represented by a series of promissory notes, and a plea of failure of consideration is filed, evidence is usually admissible to show that one or more of the series of notes has been paid.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049-1065; Dec. Dig. § 358.\*]

### 5. SALES (§ 358\*)—REMEDIES OF SELLER—ACTION FOR PRICE—ADMISSIBILITY OF EVIDENCE.

Where a note given for the purchase price of a horse is sued on and the defendant pleads failure of consideration, evidence is admissible to show that the keep of the horse was worth more than the services he was capable of performing.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049-1065; Dec. Dig. § 358.\*]

### 6. EVIDENCE (§ 474\*)—OPINION EVIDENCE—EXPERIENCE OF WITNESS.

One who had long experience in the handling of horses, and who had had under his observation for several months the attempts of a certain stallion to beget colts, was properly allowed, after stating his experience and the results of his observation, to give his opinion that the particular stallion was not a satisfactory and sure breeder.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.\*]

### 7. OTHER ASSIGNMENTS OVERRULED.

The other errors assigned are without merit.

*(Additional Syllabus by Editorial Staff.)*

### 8. SALES (§ 364\*)—REMEDIES OF SELLER—ACTION FOR PRICE—INSTRUCTION.

In an action on one of a series of notes for the purchase price of a stallion the failure to instruct as to a provision in the contract that, if the buyers would insure the horse, the seller would, for the amount of the insurance, replace the horse, in case he died, with another of the same kind and value, was not error, where the court did not submit the issue which the defendants sought to raise that there should be an abatement of the purchase price because the horse had died.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.\*]

Error from City Court of Miller County; M. C. Edwards, Judge.

Action by J. Crouch & Son against J. I. Spooner and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

See, also, 8 Ga. App. 626, 69 S. E. 1129.

Russell & Custer and Bush & Stapleton, for plaintiffs in error. W. I. Geer and P. D. Rich, for defendants in error.

POWELL, J. The plaintiffs sued on a promissory note. The defendants pleaded that the note sued on was one of a series of notes given for the purchase price of a stallion; that the plaintiffs had warranted the stallion to be a sure and satisfactory breeder, and that this warranty had failed and the stallion was totally worthless; also, that the stallion had been sold only conditionally, and that by a parol agreement the plaintiffs had reserved title until payment of the purchase money, and that without fault of the defendants the stallion died. In order to eliminate from a further discussion of the case the feature of defense by which the reservation of the title in the plaintiff and the death of the horse is asserted, it may be here stated that this issue was not submitted to the jury. We presume that the trial judge cut this issue out of the case because of the fact that there was a written contract between the parties which set up stipulations inconsistent with those of the alleged parol agreement. One of these writings (attached as an exhibit to one of the defendants' pleas) asserts a direct sale upon an express warranty. Another writing connected with the contract, as appearing in the evidence, provides that, if the defendants will insure the life of the horse in a designated company for the sum of \$1,200, the plaintiffs will for that sum in the event the horse dies replace it with another of the same kind and value.

[1] We think that there was sufficient evidence to sustain the plea of breach of warranty and failure of consideration. It was shown that out of 36 consecutive mares served by the stallion in the usual manner only five became with foal. The condition of the mares as to fertility, the manner in which they were served by the stallion, the method in which the stallion was treated, and a number of similar matters were detailed at length to the jury by the witnesses, and we are not in a position to say that the jury erred in finding that the stallion was wholly valueless, at least to the extent that his services were not worth the amount it took to keep him.

[2] 2. The plaintiffs contend that the court erred in not submitting to the jury instructions on the subject of partial failure of construction. It is true that a plea of total failure of consideration includes the defense of partial failure of consideration, and that under such a plea the jury may abate the purchase price if the evidence fails to make out the defense of total failure of consideration, but this is subject to the proviso that there must be before the jury sufficient data from which they may with reasonable accuracy assess the amount of the diminution.

[3] 3. In the present case we do not think that the exception to the failure of the judge to instruct the jury as to their right to abate the purchase price on account of partial fail-

ure of consideration was hurtful to the plaintiffs, even if it can be said that there was sufficient definite evidence before the jury to allow them to calculate and assess the amount of the abatement of the purchase price, in the event they found a partial failure of consideration. Upon an examination of the charge of the court, we find that he did in an abstract way refer to the fact that total failure of consideration includes partial failure of consideration, and that, in the case of partial failure of consideration only a commensurate abatement of the purchase price will be allowed, still, when he came to the specific application of the law to the case, he informed the jury that the defendants had assumed the burden of proof, and that, unless they made out their plea of total failure of consideration, the verdict should be in favor of the plaintiffs for the full amount sued for. So that, if there was any error at all, it was harmful as against the defendants, and not as against the present complainant.

[4] 4. One of the grounds of the plaintiffs' motion for new trial complains that the court allowed the defendants to prove that the purchase price of the horse was represented by a series of three notes, and that one of them had been paid. We think that this evidence was admissible, for if the jury had concluded that there had not been a total failure of consideration, but that there had been a partial failure of consideration to such an extent as the \$800 paid represented all that would remain due after allowing proper abatement for the partial failure of consideration, then the verdict should have been for the defendants.

[5] 5. The plaintiffs, for further objection to the evidence, say that the court erred in allowing a witness to state that \$50 per month was a reasonable sum for the keeping of the stallion. This was admissible, in connection with testimony as to the number of mares which he was able to impregnate, to show that the services which the stallion was capable of performing were not worth as much as it cost to keep him, thereby showing that the stallion was of little or no market value.

[6] 6. A witness who testified that he had had 18 years experience in the handling of horses, and that he had had the particular stallion in charge during the three months that it lived after it was sold to the defendants, and who had seen it put to the mares and who had kept up with the results, was allowed, after testifying to these things, to state his opinion that the stallion was not a satisfactory and sure breeder. We think that the evidence was admissible, and that the witness had sufficiently qualified as an expert to be allowed to express an opinion upon the question. Even if this is not true, in view of the fact that the witness gave all

the facts upon which he based his opinion, the error would not be sufficiently material to justify a reversal.

7. There are certain other errors assigned in the record, but we do not consider any of them to be meritorious. One of them complains of a minor verbal inaccuracy in the court's statement to the jury as to the nature and effect of the express warranty that was made. Taken in connection with the entire charge, however, this inaccuracy could not have been misleading.

[8] The other complaint is that the court failed to instruct the jury as to the undertaking of the defendants to insure the horse and as to the effect of their failure so to do. There is no evidence that the defendants did not insure the horse. The record is silent as to this. If the court had submitted to the jury the issue which the defendants sought to raise by their plea that there should be an abatement of the purchase price because the horse had died, then it would have been his duty to instruct the jury as to the terms of the contract, so far as it related to the death of the horse and to the insuring of it against death. This agreement as to the insuring of the horse was separate and independent of the warranty set forth in the other writing which was submitted to the jury as the basis of the defense. The contract did not require the defendants to insure the horse as an interdependent condition of any agreement, except the agreement that they would replace the horse with another in the event it died. Viewing the whole record carefully, we are of the opinion that the case was tried without material error, and that the verdict of the jury is fully authorized by the evidence.

Judgment affirmed.

(9 Ga. App. 647)

ATLANTA, B. & A. R. CO. v. POPE

(No. 2,902.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

1. RULINGS ON DEMURRER — ASSIGNMENTS OVERRULED.

The errors assigned as to the rulings on demurrer are not well taken.

2. DEPOSITIONS (§ 73\*)—REQUISITES OF RETURN—ENCLOSING AND SEALING.

It is not good cause for the taking of exception to the return of interrogatories that the answers are not physically attached to the interrogatories, where it appears that the interrogatories, the answers, and the commission were duly sealed together in an envelope and returned to the court, as required in Civil Code 1910, § 5898.

[Ed. Note.—For other cases, see Depositions, Dec. Dig. § 73.\*]

3. DAMAGES (§ 141\*)—DISMISSAL OF ONE CO-PARTY—EFFECT.

Where a petition is jointly filed by two persons, claiming a specified amount of damages on account of a tort, and afterwards the name of one of the parties and all of the al-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

legations relating to the cause of action in his favor are dismissed, but the original statement as to the ad damnum is left in the petition, the court does not err in telling the jury that the remaining plaintiff claims damages in that amount.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 141.\*]

**4. RAILROADS (§ 244\*)—OPERATION—ACCIDENTS AT CROSSINGS—CARE REQUIRED.**

Where a railroad crosses a public road outside of an incorporated town or city, though within less than 400 yards of the corporate limits, the engineer is required to signal the approach of his train to the crossing by blowing the whistle, and the ringing of the bell alone is not sufficient.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 755; Dec. Dig. § 244.\*]

**5. No ERROR.**

The case was fairly tried, and no material error appears.

Error from City Court of Greenville; H. H. Revill, Judge.

Action by I. E. W. Pope against the Atlanta, Birmingham & Atlantic Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Rosser & Brandon, McLaughlin, Jones & Jones, and Hatton Lovejoy, for plaintiff in error. W. S. Howell and N. F. Culpepper, for defendant in error.

**RUSSELL, J.** The record bristles with points, but many of them are what Justice Samuel Lumpkin in one of his opinions designated as "pintees." The only question which seems to be of such novelty and of such general interest as to require elaboration is the one dealt with in the fourth headnote. The injury complained of in the present case occurred at a crossing which was just outside of the town of Haralson and within about 50 yards of the corporate limits. The court charged the jury the law embodied in Civil Code 1910, § 2675, which requires locomotive engineers to blow the whistle upon approaching public crossings outside of the corporate limits of cities and towns. The train which inflicted the injury was approaching the crossing from the side of it next to the town of Haralson, and there was some evidence that the bell was being rung as the crossing was approached.

[4] The contention of counsel for the plaintiff in error is that the provisions of section 2677 of the Civil Code of 1910 are applicable—that "within the corporate limits of the cities, towns, and villages of this state, the several railroad companies shall not be required to blow the whistle of their locomotives on approaching crossings or public roads in said corporate limits, but in lieu

thereof the engineer of said locomotive shall be required to signal the approach of their trains to such crossings and public roads in said corporate limits, by tolling the bell of said locomotive." As to crossings located within the corporate limits of cities, towns, and villages, the whistle should not be blown; the requirement which we have just stated being mandatory, and not permissive only. *Georgia Railroad v. Carr*, 73 Ga. 357. Much of the reasoning in the case just cited tends to support the theory that the whistle shall not be blown while the train is within the corporate limits of the city, town, or village, even though the crossing about to be approached lies slightly beyond the limits; but the language of the statute itself seems to settle this question. The phrase, "in said corporate limits," which is twice used to designate the public roads mentioned in section 2677, *supra*, seems to have been advisedly used. The old law required the blowing of whistles as to all crossings; but the amendment contained in the section just referred to relieves from this requirement within the corporate limits of cities, towns, and villages as to trains "approaching crossings or public roads in said corporate limits."

Judgment affirmed.

(9 Ga. App. 699)

**ABRAMS v. McCALL CO. (No. 3,447.)**

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

**1. LIQUIDATED DAMAGES.**

Viewed in the light of the criteria announced in the case of *Florence Wagon Works v. Salmon*, 8 Ga. App. 197, 68 S. E. 866, and cases there cited, the amount claimed in the petition as liquidated damages was penalty, and the demurrer to the portion of the petition which sought a recovery therefor should have been sustained.

**2. PRICE OF GOODS SOLD.**

So far as the petition sought to recover for the purchase price of goods sold and delivered, it was not subject to the demurrer.

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by Sam Abrams against the McCall Company. Judgment for defendant, and plaintiff brings error. Affirmed in part, and reversed in part.

Elkins & Wall, for plaintiff in error. Griffin & Griffin and J. J. Bull, for defendant in error.

**POWELL, J.** Judgment affirmed in part, and reversed in part.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(9 Ga. App. 671)

**BURKETT v. DUNLAP.** (No. 3,151.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 781\*)—DISPOSITION OF CAUSE—SETTLEMENT OF CASE.**

Where it is made known to the court that a case has been finally settled after argument, the court has the discretion of proceeding with the decision of the points presented in the record or of dismissing the writ of error. Ordinarily the latter course will be pursued.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3122; Dec. Dig. § 781.\*]

Error from City Court of Jeffersonville; L. D. Shannon, Judge.

Action by G. L. Dunlap against J. B. Burkett. Judgment for plaintiff, and defendant brings error. Writ of error dismissed.

H. F. Strohecker, for plaintiff in error. Ryals, Grace & Anderson, for defendant in error.

**POWELL, J.** After this case was argued in this court, counsel for the defendant in error, who had recovered a money judgment in the court below, informed the court that his judgment had been satisfied by voluntary payment. Counsel for the plaintiff in error has also stated in a letter written to the clerk that the information is true. After a case has been argued in the court, the parties cannot as a matter of right withdraw the matter from the consideration of the court by any action of theirs; but usually, where the plaintiff in error decides to withdraw, or where the point involved has become a moot question by some matter intervening since the suing out of the writ of error, the court will exercise its discretion by not deciding the case. Cf. *McNells v. State*, 4 Ga. App. 419, 61 S. E. 842, and cases therein cited. Indeed, the court is usually anxious not to decide moot questions, and, if it discovers, even in an informal way, that the case has been settled, will (unless the parties themselves voluntarily give the information, as was done in this case) issue an order requiring the parties, or their counsel, to inform the court as to whether the case has been settled or not. It appearing that this case is settled, and that nothing but a moot question now remains for decision, it is ordered that the writ of error be dismissed.

Writ of error dismissed.

(9 Ga. App. 667)

**SMITH v. JASPER COUNTY.** (No. 3,072.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

*(Syllabus by the Court.)***1. BRIDGES (§ 46\*)—USE FOR TRAVEL—ACTIONS FOR INJURIES—PLEADING.**

A petition to recover damages for personal injuries, which alleges in substance that a county bridge was defective and out of repair, in that there was a large hole in the bottom of the

bridge, which hole had been permitted to remain in the bridge for a long time, and of which the county authorities had actual or constructive notice, and that the plaintiff's mule, attached to a buggy, while being driven across the bridge, became frightened at the hole and backed the buggy off the bridge, which was without guard rails or protection of any kind, and thereby injured the mule and buggy, the plaintiff himself being without fault, set forth a cause of action, and the court erred in dismissing it on general demurrer. *Georgia Railroad Co. v. Mayo*, 92 Ga. 223, 17 S. E. 1000; *City Council of Augusta v. Hudson*, 94 Ga. 136, 21 S. E. 289.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 46.\*]

**2. PLEADING (§ 248\*)—AMENDMENT TO PETITION—NEW CAUSE OF ACTION.**

An amendment proposed to the petition described in the foregoing headnote, setting up an additional ground of negligence, in that the county authorities were further negligent in having a defective plank in the bridge, which fact they knew, and that the plank broke while the plaintiff's team was crossing the bridge, which caused the mule and buggy to fall off the bridge, resulting in damage to the mule and buggy, introduced no new cause of action, but was simply an additional ground of negligence to that alleged in the original petition, and the refusal to allow this amendment was erroneous. *City of Columbus v. Anglin*, 120 Ga. 785, 48 S. E. 318.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.\*]

Error from City Court of Monticello; A. S. Thurman, Judge.

Action by Eugene Smith against the County of Jasper. Judgment for defendant, and plaintiff brings error. Reversed.

Doyle Campbell, for plaintiff in error. Fleming, Jordan & Son, for defendant in error.

**HILL, C. J.** Judgment reversed.

(9 Ga. App. 665)

**RICHBOURG v. TUCKER.** (No. 3,036.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

*(Syllabus by the Court.)***1. PRINCIPAL AND SURETY (§ 182\*)—REMEDIES OF SURETY—RECOVERY OF AMOUNT PAID.**

Richbourg and Mitchell owed a bank a past-due note. In order to pay that debt the present note, signed by Richbourg, Mitchell, and Tucker, was executed; Tucker signing as surety only. When this note became due, Tucker paid it, and had it transferred to him. At the time this note was made, Richbourg told Tucker that the debt for which he had become liable on the first note was in fact Mitchell's; but, other than Richbourg's unsworn statement as to this fact, there was no proof. Mitchell being out of the state and not subject to service of process, Tucker sued Richbourg, and recovered a judgment for the full amount of the note. *Held*, that as to the second note Tucker and Richbourg were not cosureties, so as to make the latter liable for contribution only, and that this is true, irrespective of what the relationship may have been between Richbourg and Mitchell as to the note which was paid by the execution of the note sued on.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 524; Dec. Dig. § 182.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error from City Court of Sandersville; E. W. Jordan, Judge.

Action by M. R. Tucker against A. T. Richbourg. Judgment for plaintiff, and defendant brings error. Affirmed.

Evans & Evans, for plaintiff in error. J. E. Hyman and Hardwick & Wright, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 666)

PIERCE v. GEORGIA R. & BANKING CO.  
et al. (No. 3,044.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

CARRIERS (§§ 316, 333, 347\*) — INJURIES TO PASSENGER — CONTRIBUTORY NEGLIGENCE — QUESTIONS FOR JURY — PRESUMPTIONS.

There being evidence that the plaintiff was a passenger upon a train of the defendant company, having a ticket from Redan, Ga., to Atlanta, Ga.; that there was a well-established custom in respect to this particular train, which was known as the "Shoo-Fly" train, to slow it down or stop it at various street crossings and points in the yards of the defendant company other than the regular station at Atlanta, for the purpose of receiving and discharging passengers; that the train slowed down at a point at which it was accustomed to slow down for the purpose of allowing passengers to alight; and that, when it was running very slowly, the plaintiff, as he had done a number of times before in respect to this same train, attempted to get off, and as he was in the act of alighting, and before he had time to get completely off the steps, the engineer caused the train to give a sudden lurch forward, whereby the plaintiff was thrown to the ground and hurt. *Held*: (a) It is not negligence, as a matter of law, for a passenger to be upon the platform of a moving train, or for him to attempt to alight from a slowly moving train. *Augusta Sou. Railroad v. Snider*, 118 Ga. 146, 44 S. E. 1005, distinguishing a number of cases apparently to the contrary, and criticising and practically overruling *Paterson v. Railroad Co.*, 85 Ga. 653, 11 S. E. 872. (b) The fact that the point at which the train slowed down, and at which the plaintiff attempted to alight, was in the midst of a switchyard, where there was likely to be a number of moving trains, does not render the plaintiff guilty of contributory negligence adequate to defeat a recovery, since he was not hurt by reason of any of these dangers. (c) Under the facts of the case, the presumption of negligence attached against the carrier. *Sanders v. Sou. Ry. Co.*, 107 Ga. 132 (2), 32 S. E. 840. (d) The court erred in granting a nonsuit.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1286, 1346-1397; Dec. Dig. §§ 316, 333, 347.\*]

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by Luther Pierce against the Georgia Railroad & Banking Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

Lawton Nalley, for plaintiff in error. McDaniel, Alston & Black, for defendants in error.

RUSSELL, J. Judgment reversed.

(9 Ga. App. 661)

JOHNSON v. SOUTHERN RY. CO.

(No. 2,999.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

EVIDENCE (§ 589\*)—WEIGHT AND SUFFICIENCY — TESTIMONY OF PARTY.

Taking the plaintiff's own testimony, according to the well-recognized rule that it shall be most strongly construed against him, where it is fairly susceptible of two different constructions, the case falls within the decisions of the Supreme Court in *Seaboard Air Line R. Co. v. Rainey*, 122 Ga. 307, 50 S. E. 88, 106 Am. St. Rep. 134, and *Nunn v. Georgia Railroad*, 71 Ga. 710, 51 Am. Rep. 284.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2438; Dec. Dig. § 589.\*]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by J. E. Johnson against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Eubanks & Mebane, for plaintiff in error. Geo. A. H. Harris & Sons and Maddox, McCamy & Shumate, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 667)

GRESHAM v. LYON (three cases).

(Nos. 3,076-3,078.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 125\*)—DECISIONS REVIEWABLE—CONSENT JUDGMENT.

Writ of error does not lie to a judgment rendered by consent. *Zorn v. Lamar*, 71 Ga. 80.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 883; Dec. Dig. § 125.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Actions between W. A. Gresham and B. L. Lyon. From the judgments, Gresham brings error. Writs of error dismissed.

Walter A. Sims, for plaintiff in error. Morris Macks, for defendant in error.

RUSSELL, J. Writ of error dismissed.

(9 Ga. App. 661)

KENNEDY v. ATLANTIC COAST LINE  
R. CO.

ATLANTIC COAST LINE R. CO. v.  
KENNEDY.

(Nos. 3,023, 3,035.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 284\*)—INJURY TO SERVANT—ACTION—NONSUIT.

The evidence not only failed to show that the injury received by the servant was caused by an omission of duty by the master, but showed that it was due solely to the negligence of the servant, while acting outside of the proper scope

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

of his employment. The motion to nonsuit was therefore properly sustained. *Atlanta & Charlotte Air Line Ry. v. Ray*, 70 Ga. 674; *Whitton v. South Carolina & Ga. R. Co.*, 106 Ga. 796, 32 S. E. 857; *Strange v. Wrightsville & Tennille R. Co.*, 133 Ga. 730, 66 S. E. 774.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 284.\*]

Error from City Court of Waycross; Jno. C. McDonald, Judge.

Action by Jesse Kennedy against the Atlantic Coast Line Railroad Company. From the judgment, both parties bring error. Judgment affirmed on main bill of exceptions, and cross-bill dismissed.

J. L. Sweat, for plaintiff in error. Bennet, Twitty & Reese and Wilson, Bennett & Lambdin, for defendant in error.

HILL, C. J. Judgment on main bill of exceptions affirmed. Cross-bill dismissed.

(9 Ga. App. 668)

McGEE v. LOWRY NAT. BANK.  
(No. 3,085.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 203\*)—REVIEW OF DECISION—CERTIORARI—NOTICE.

As to certiorari cases, Civil Code 1910, § 5190, provides: "The plaintiff in certiorari shall cause written notice to be given to the opposite party in interest, his agent, or attorney, of the sanction of the writ of certiorari, and also the time and place of hearing, at least ten days before the sitting of the court to which the same shall be returnable, and in default of such notice (unless prevented by unavoidable cause) the certiorari shall be dismissed."

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 790, 791; Dec. Dig. § 203.\*]

2. JUSTICES OF THE PEACE (§ 203\*)—REVIEW OF DECISION—CERTIORARI—NOTICE.

Acknowledgment of service or waiver of service is a courtesy which the law does not compel, and failure to serve the notice required by the foregoing Code section is not excused because counsel for the defendant in certiorari refused either to waive or to acknowledge service of the notice. The fact that counsel for defendant in error has actual parol notice of the sanction of the certiorari and of the time and place of the hearing makes no difference. *Frank v. May*, 86 Ga. 659, 661, 12 S. E. 1068.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 790, 791; Dec. Dig. § 203.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between W. E. McGee and the Lowry National Bank. From the judgment, McGee brings error. Affirmed.

Geo. W. Brooks, for plaintiff in error. J. H. Porter, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 668)

JACKSON v. McCRACKEN et al.  
(No. 3,108.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 206\*)—REVIEW OF DECISION—CERTIORARI—DISMISSAL.

Though a summons issued by a justice of the peace names a number of defendants, only such as are served, or voluntarily appear and plead, become parties to the case. In the case at bar, though the summons designated more than one defendant, it affirmatively appears that only one appeared and pleaded, and there is no evidence that the others were served. The verdict is in terms a finding as between the defendant who appeared and the plaintiff. The court did not err in refusing to dismiss the certiorari brought by the plaintiff, on the ground that the bond was payable only to the defendant in whose favor the verdict was rendered, and not also in favor of the other defendants named in the summons. For a similar reason, failure to serve the other persons with notice of the sanction of the certiorari was not cause for a dismissal of the certiorari.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 206.\*]

2. GRANT OF NEW TRIAL—No ERROR.

The judge of the superior court did not err in granting a new trial.

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action between J. S. Jackson and Porter McCracken and others. From the judgment, Jackson brings error. Affirmed.

I. H. Sutton and Robt. McMillan, for plaintiff in error. J. C. Edwards, for defendants in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 662)

LAURENS COUNTY v. CITIZENS' BANK  
OF VALDOSTA et al. (No. 3,029.)

(Court of Appeals of Georgia. Sept. 11, 1911.)

(Syllabus by the Court.)

1. TAXATION (§ 580\*)—COLLECTION OF TAXES—TRANSFER OF EXECUTION.

Except in a county having a population of 75,000 or more, the tax collector has no authority to transfer executions for taxes due the state and county. This authority is given to the sheriff or other officer authorized by law to levy tax executions.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1168; Dec. Dig. § 580.\*]

2. TAXATION (§ 580\*)—TRANSFER OF TAX EXECUTION—SUFFICIENCY OF PAYMENT.

Unless an execution for taxes is paid in full, including principal, interest, and costs, no legal transfer can be made, and the title to the execution remains in the state and county, to be enforced against the property of the defendant in execution, and the lien of such execution for the year the taxes are due is prior to all other liens against the property of the defendant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1168; Dec. Dig. § 580.\*]

3. LIEN OF TAX EXECUTION.

The execution for state and county taxes not having been fully paid off remained a lien

in favor of the state and county against the property of the defendant, and took precedence over all other liens.

**Error from City Court of Fitzgerald; M. Wall, Judge.**

Rule against the sheriff for the distribution of funds realized from the sale of property under execution. In an action by McIlwaine, Knight & Co. against J. L. King, the Citizens' Bank of Valdosta placed in the hands of the sheriff two executions against the same party. From the judgment of distribution and an order overruling its motion for a new trial, the county of Laurens, intervener, for the use and benefit of Mrs. M. J. Adams, transferee of a tax *fi. fa.*, brings error. Judgment reversed.

The questions in this case arise on a rule against the sheriff for the distribution of funds in his hands, realized from the sale of property under execution.

The undisputed facts are as follows: On April 8, 1909, the sheriff sold the property in question for \$1,100, in pursuance of an execution in favor of McIlwaine, Knight & Co. against J. L. King, issued from the city court of Ashburn on January 21, 1908. On the day of the sale, the Citizens' Bank of Valdosta, as transferee, placed in his hands two *fi. fas.* against the defendant J. L. King, one in favor of T. L. Griner, and the other in favor of the Southern Hat Company, based on judgments of the city court of Ashburn rendered December 16, 1907. The transfers of these two executions to the bank were duly entered on the general execution docket on January 21, 1908. Ewell Brown intervened as transferee of a *fi. fa.* based upon a judgment issued from the city court of Ashburn, rendered on October 31, 1907, in favor of the Swift Fertilizer Works against King, for the principal sum of \$354.64, interest, attorney's fees, and costs. This execution was duly entered on the general execution docket, and had on it a duly recorded transfer, purporting to have been made by J. H. Pate, attorney for plaintiff in *fi. fa.*, dated May 5, 1909, to Ewell Brown, reciting that the transfer was for value received. A credit of cash \$125, dated November 11, 1907, was entered on it, and there was also upon it an entry of levy on the identical property from which the fund to be distributed by the court was realized, dated November 4, 1908. J. B. Wall testified that in the fall of 1908 he paid to the sheriff by a draft drawn on J. L. King, the defendant, through the Lake Park Bank, the full amount due on this execution, that the execution was attached to the draft, and that he represented the defendant in making the payment, and the sheriff testified that this witness had paid him the amount due on the execution. The evidence is silent as to how the execution got into the possession of J. H. Pate, the attorney who made the transfer to Ewell Brown, or how it got into the possession of Ewell Brown except by the transfer as above stated. The county of

Laurens intervened for the use and benefit of Mrs. M. J. Adams, transferee of a tax execution issued by the tax collector of Laurens county in January, 1907, against J. L. King, for state and county taxes of the year 1906 for \$208.34, besides interest and \$1.50 costs. Upon the back of this tax *fi. fa.* was an entry that the same was transferred by C. H. Adams, tax collector of the said county, on October 18, 1907, to Mrs. M. J. Adams, for and in consideration of the sum of \$208.34, the principal of the *fi. fa.* This *fi. fa.* was entered on the general execution docket of Laurens county on October 18, 1907. The sheriff testified, and it was not controverted, that he sold the property under the *fi. fa.* in favor of McIlwaine, Knight & Co. for the sum of \$1,100; that, before any other executions were placed in his hands claiming any part of the fund realized from the sale of this property, the plaintiffs in that execution demanded payment of their execution, and that he paid it in full and had remaining in his hands for distribution the sum of \$610.86.

It was agreed that the judge, without the intervention of a jury, should decide the questions of law and fact, and distribute the fund remaining in the hands of the sheriff. The judge distributed the fund as follows: (1) The payment made by the sheriff of the *fi. fa.* in favor of McIlwaine, Knight & Co. was approved. (2) The costs due the sheriff, the costs for the attorney who filed an answer for the sheriff to the rule, and the costs due the clerk of the city court were ordered to be paid. It was ordered that the sum of \$564.36 remaining in the hands of the sheriff be applied as follows: (3) Upon the *fi. fa.* in favor of T. L. Griner transferred to the Citizens' Bank of Valdosta, \$284.40. (4) Upon the *fi. fa.* in favor of Southern Hat Company, transferred to the Citizens' Bank of Valdosta, \$86.83. (5) Upon the *fi. fa.* in favor of Swift Fertilizer Works, transferred to Ewell Brown, \$194.13. The court held that the tax execution had no lien upon the fund in the sheriff's hands. The county of Laurens, intervener, for the use and benefit of Mrs. M. J. Adams, transferee of the tax *fi. fa.*, filed a motion for a new trial on the general grounds, and it excepts to the judgment overruling its motion.

Jos. B. Wall, for plaintiff in error. W. A. Dodson and Jno. B. Hutcheson, for defendants in error.

HILL, C. J. (after stating the facts as above). [1] It is admitted by plaintiff in error that the tax collector of Laurens county had no authority under the law to transfer the tax *fi. fa.* in favor of the state and county to Mrs. M. J. Adams, transferee, and that his attempt to transfer it was void and of no legal effect, as he was not at that time the collecting officer of the county; and, the state and county taxes for that year having gone into the form of an execution, it



became the duty of the sheriff to collect the taxes, and it was the sheriff's duty to transfer the fl. fa. upon payment of the amount by Mrs. Adams. Pol. Code 1895, § 888.

It is insisted, however, that the payment by Mrs. Adams to the tax collector was not a settlement of the taxes due the state and county by the defendant in fl. fa. This did not relieve the sheriff of the duty of collecting the taxes due on that fl. fa., and, as the attempted transfer of the execution by the tax collector was void, the lien of the fl. fa. still remains in the county. See *Hill v. Georgia State Building & Loan Association*, 120 Ga. 472, 47 S. E. 897, in which case the Supreme Court holds that the execution issued by the tax collector for state and county taxes could not be lawfully transferred by the tax collector of the county, for the total population of the county was less than 75,000 inhabitants. It was conceded that the county of Laurens had a population of less than 75,000 inhabitants.

[2] It is insisted in the second place that the lien of the state and county under this fl. fa. was not divested by the payment of \$208.34 principal thereon, because there was shown to be still due on the fl. fa. interest and costs. See *Wilson v. Herrington*, 86 Ga. 777, 13 S. E. 129, in which it was held that, notwithstanding the transfer of the tax execution, the sheriff was entitled to proceed to enforce collection for the reason that there remained due upon it \$1 for costs, and, as long as there was anything still due on the execution, any attempted transfer of the same, even by the sheriff, was not legally effective to divest the lien of the fl. fa. in favor of the state and county for the taxes.

[3] We think the contention of learned counsel on both of these points is sound, and that for both of the reasons given in the decisions cited, the title to this execution remained in the county of Laurens, and it had a prior lien on the property of the defendant for the amount still due on the fl. fa., to wit, interest, and costs, and was entitled to be paid this amount before the payment of the other executions against the defendant. *Powell on Actions for Land*, § 238.

Judgment reversed.

(9 Ga. App. 695)

**WASHINGTON v. ATLANTIC COAST  
LINE R. CO. et al. (No. 3,228.)**

(Court of Appeals of Georgia. Sept. 11, 1911.)

*(Syllabus by the Court.)*

**CONTROLLING DECISION.**

The answer of the Supreme Court (71 S. E. 1066) to the constitutional questions certified in the case controls it fully.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Turner Washington against the Atlantic Coast Line Railroad Company and

others. Judgment for defendants, and plaintiff brings error. Reversed.

Osborne & Lawrence, for plaintiff in error.  
P. W. Meldrim and Shelby Myrick, for defendants in error.

POWELL, J. Judgment reversed.

(136 Ga. 771)

**JOHNSON v. HUDSPETH.**

(Supreme Court of Georgia. Aug. 22, 1911.)

*(Syllabus by the Court.)*

**1. CONSTITUTIONAL LAW (§ 248\*)—MASTER AND SERVANT (§ 344\*)—LANDLORD AND TENANT (§ 19\*)—IMPAARTIAL PROTECTION UNDER LAW—INTERFERENCE WITH CONTRACTUAL RELATION—STATUTORY PROVISION.**

The statute (Civil Code 1910, §§ 3712, 3713, 3714) fixing a penalty for a prescribed act, and giving to the injured party a remedy by civil action, with a proviso that if the action fails the defendant shall have judgment against the plaintiff for all costs and reasonable attorney's fees, does not violate the constitutional guaranty of complete and impartial protection under the law, on the ground that the plaintiff is not given any right to recover attorney's fees.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 248;\* Master and Servant, Dec. Dig. § 344;\* Landlord and Tenant, Dec. Dig. § 19.\*]

**2. STATUTES (§ 76\*)—GENERAL AND SPECIAL LAWS—INTERFERENCE WITH CONTRACTUAL RELATION.**

Nor is the proviso permitting the defendant to recover attorney's fees violative of the constitutional negation of special legislation on the subject-matter already covered by a general law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.\*]

**3. MASTER AND SERVANT (§ 344\*)—INTERFERENCE WITH RELATION—STATUTORY PROVISION.**

The Code sections (Civil Code 1910, §§ 3712, 3713, 3714) denounce as unlawful an interference with the contractual relation of employer and employé, of landlord and tenant, and of landlord and cropper, by employment or renting or furnishing land to the tenant or employé, except on certain conditions, and give to the injured party a remedy by civil action for a penalty. Section 3715 declares that "the provisions of the three preceding sections shall not apply where the employment given is of such duration and of such nature as to make it certain that it could not result in injury to the plaintiff or prosecutor." The employment referred to in the foregoing saving clause is that of such a transient character as it is not inconsistent with the service which the employé contracted to give his employer. The evidence did not authorize a charge on section 3715.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 344.\*]

**4. NO OTHER ERROR.**

No other error appears.

Error from Superior Court, Early County.  
Action between W. A. Johnson and Julius Hudspeth. From the judgment, Johnson brings error. Reversed.

W. H. Gurr, J. R. Pottle, and C. L. Glessner, for plaintiff in error. R. H. Sheffield, for defendant in error.

EVANS, P. J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(156 N. C. 29)

**CARSON v. BUNTING et al.**

(Supreme Court of North Carolina. Sept. 20, 1911.)

**APPEAL AND ERROR (§ 1097\*)—SECOND APPEAL—LAW OF CASE.**

A judgment of the Supreme Court cannot be reviewed by a second appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4353-4368; Dec. Dig. § 1097.\*]

Appeal from Superior Court, Pitt County; Ferguson, Judge.

Action by J. J. Carson against J. R. Bunting and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Moore & Long, for appellants. Jarvis & Blow and Harry Skinner, for appellee.

CLARK, C. J. This cause was decided at last term (Carson v. Bunting, 154 N. C. 530, 70 S. E. 923), in which we held that upon the pleadings and issues found the judgment ought to have been rendered for the plaintiff upon the second cause of action. The judge below, upon the certificate of the opinion of this court, rendered judgment accordingly. The defendant excepted to the judgment and appealed.

This presents for our consideration only the form of the judgment rendered, which is in strict conformity with our opinion. The appeal is in fact, and the argument of the defendant is so based, upon the ground that the former judgment of this court was erroneous. No other question is presented. In Roberts v. Baldwin, 155 N. C. 276, 71 S. E. 319, Allen, J., citing many cases, said: "It has been repeatedly decided that a judgment of this court cannot be reviewed by a second appeal." We need not discuss a decision which has been so repeatedly made.

Affirmed.

(156 N. C. 40)

**POOL v. WALKER.**

(Supreme Court of North Carolina. Sept. 20, 1911.)

**1. SALES (§ 84\*)—RIGHT TO TERMINATE—CONTINUOUS CONTRACT.**

A contract to take the output of a shingle mill, specifying no time during which it is to continue, may be determined at the will of either party on notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 234, 235; Dec. Dig. § 84.\*]

**2. SALES (§ 384\*)—BREACH OF CONTRACT—DAMAGES.**

For breach of defendant's contract to take the output of plaintiff's shingle mill, plaintiff was entitled to no more than the difference between the contract price and the price at which he sold the shingles manufactured before he closed down; there being no evidence that he thereafter had or could get material for more, or that he afterwards kept the mill.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.\*]

Appeal from Superior Court, Tyrrell County; O. H. Allen, Judge.

Action by S. E. Pool against J. L. Walker, administrator. From the judgment, giving less than claimed, plaintiff appeals. Affirmed.

It appeared that in 1906 plaintiff borrowed of J. D. Overton, the intestate, a sum of money, and to secure payment of the loan executed a mortgage on real property, with power of sale, etc.; that Overton died in 1908, and defendant, administrator, having made several efforts to obtain payment, proceeded to advertise the property for sale under the mortgage, the sale to take place the 17th of January, 1910. Thereupon plaintiff instituted the present action, and obtained an injunction staying the sale on affidavits alleging that J. D. Overton in 1906 had contracted and agreed to take the output of plaintiff's shingle mill, which he was then erecting, at a specified price per thousand, that said Overton had wrongfully failed and refused to comply with said contract, and the damages caused by said breach of contract was more than sufficient to pay off and discharge the loan. Pleadings having been duly filed, issues were submitted and responded to by the jury, in effect that the amount due on the note was \$2,998, and that the amount due plaintiff from intestate by reason of breach of contract in reference to shingle mill was \$350, with interest from September 14, 1908. Judgment was thereupon given, crediting defendant's claim with the \$350 and interest. Judgment of foreclosure entered for the balance of the debt. Plaintiff excepted and appealed.

M. Majette and E. F. Aydlett, for appellant. W. M. Bond, T. H. Woodley, and Meekins & Tillitt, for appellee.

HOKE, J. There is no error. It appeared in evidence that plaintiff's shingle mill was completed and began operations on or about the 18th or 19th of June, 1908, and closed down on the 2d of September of the same year, having manufactured 175,000 shingles, which plaintiff sold at a loss of \$2 per 1,000 on the alleged contract price. This loss was allowed plaintiff by the verdict, and has been credited on defendant's claim.

[1] There was no stated time alleged in the pleadings or shown forth in evidence during which the intestate was to take the output of

plaintiff's mill, and it is well understood that on these continuous contracts, where no time is fixed "during which it is to last, and none is fixed by law or usage, it may be determined at the will of either party upon notice." Clark on Contracts, p. 430.

[2] And on the testimony no good reason appears for a greater recovery than the loss sustained on the shingles which were in fact manufactured. In this connection the case on appeal further states: "There was no evidence that any of the shingles made were ever tendered or offered to Overton, or to defendant, or that plaintiff, when he stopped the mill, had or could get timber to make any more shingles, or that he kept the mill, or whether it was used thereafter, or remained idle, nor any evidence as to the amount of capital invested in it, or that plaintiff offered to make any more shingles."

On this record there is no error, certainly, which gives plaintiff any just ground for complaint, and the judgment is therefore affirmed.

No error.

(156 N. C. 26)

#### In re DIXON.

(Supreme Court of North Carolina. Sept. 20, 1911.)

#### 1. DEEDS (§§ 108, 97\*)—RESERVATIONS—VALIDITY.

There was a valid reservation of a life estate, so that the deed did not become effective until the death of the grantor and his wife, where it conveyed a tract to the grantor's daughter, "reserving a life interest for myself and wife \* \* \* in the above-described land"; there being no repugnancy between the granting clause and the reservation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 294-308, 267-273; Dec. Dig. §§ 108, 97.\*]

#### 2. LIFE ESTATES (§ 15\*)—RENTS—RIGHTS OF REMAINDERMEN.

While a reservation in a deed to grantor's daughter of a life interest in grantor and his wife could not operate as a conveyance to the wife, the question of title to the rents between the death of grantor and that of his wife concerned only their personal representatives and not the guardian of the child of the grantee, who had died.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 34, 35; Dec. Dig. § 15.\*]

#### 3. CURTESY (§ 4\*)—RIGHT—SEISIN OF WIFE.

Where grantor conveyed land to his daughter, reserving a life interest in himself and wife, but the daughter died before grantor and his wife, she was never seised of the land, title having passed directly to her heirs, so that her husband did not take curtesy therein.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. §§ 6-8; Dec. Dig. § 4.\*]

#### 4. GUARDIAN AND WARD (§ 25\*)—REMOVAL OF GUARDIAN—FAILURE TO ACCOUNT.

Under Revisal 1906, § 1806, authorizing the clerk of the superior court to remove a guardian from office upon his failure to account, pursuant to the order of the clerk, a guardian's refusal to account for rents and profits of a

ward's land, and his improper claim to the rent adverse to the ward, was ground for his removal.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 78-98; Dec. Dig. § 25.\*]

#### 5. DEEDS (§ 90\*)—CONSTRUCTION—INTENT OF PARTIES.

The court will examine the entire deed and construe it as a whole, to effectuate the intent of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 236; Dec. Dig. § 90.\*]

Appeal from Superior Court, Greene County; Ferguson, Judge.

On application of Roberta C. Dixon to remove a guardian. From a judgment denying the application, the ward appeals. Reversed.

George M. Lindsay, for appellant. Aycock & Winston and T. C. Wooten, for appellee J. W. Dixon.

CLARK, C. J. The clerk of the superior court, after citation to J. W. Dixon, guardian of Roberta Dixon, and upon his answer filed, removed him from his guardianship upon the ground that he had failed to file his account as guardian, and, further, because said guardian claimed an interest in the property adverse to his ward. On appeal of the judge, this order was reversed, and the ward, Roberta C. Dixon, appealed to this court, prosecuting said appeal through her guardian ad litem, appointed by the court by consent.

It is found by the judge upon facts admitted that Robert A. L. Carr executed a deed to his daughter, the mother of the ward, Roberta Dixon; that in said deed, after the warranty clause, said grantor added, "I, the said R. A. L. Carr, reserving a life interest for myself and wife, Sarah A. L. Carr, in the above described land." The grantee, the mother of said ward, and the daughter of the grantor, died first of all, then the grantor, and lastly his wife died. It being admitted that there was birth of issue of the marriage of the grantee in said deed, J. W. Dixon, the guardian, contended that he was entitled to the rents and profits of said land as tenant by the curtesy, and was not accountable to said ward for said rents.

[1, 2] The reservation in the deed is valid, and said deed did not become effective till after the death of the grantor and his wife. It is true that the exception in favor of the grantor's wife could not operate as a conveyance to her, but the question as to the title to rents and profits after death of the grantor and until the death of his widow is a question to be settled between their personal representatives, and in no wise concerns the guardian, J. W. Dixon.

[3, 4] The sole question as to him is whether he became tenant by the curtesy of this land. His wife having predeceased the gran-

tor, his wife was never seised of the premises, and, upon the expiration of the particular estate by the death of Mrs. Carr, the title passed directly to Roberta Dixon, as heir at law of her mother. J. W. Dixon's claim to be tenant by the curtesy is therefore unfounded. His refusal to account for the rents and profits and his claim to the rent, adverse to his ward, was sufficient ground to justify his removal. Revisal, § 1806.

In *Nixon v. Williams*, 95 N. C. 103, it was held that, to entitle a husband to curtesy in his wife's land, either the wife or the husband, in right of his wife, must have had seisin in deed, which is the actual possession of the land. In this case it is admitted that neither Dixon nor his wife had any possession of said land during the life of the grantor and his wife. In *Gentry v. Wagstaff*, 14 N. C. 270, it was held that the husband acquires by marriage no estate in any land of his wife of which neither he nor his wife had possession, and that where the wife's interest in real estate is in reversion or remainder, dependent on a preceding freehold estate in another, she has no seisin until the determination of that estate. In *Sasser v. Blyth*, 2 N. C. 259, it was held, upon facts exactly similar to those in this case, that where a man executed a deed to his son in fee simple, reserving a life estate, that such reservation is valid. The learned reporter (Judge John Haywood) appends a note that this is not a case of repugnancy, because it is "by no means inconsistent with the estate in fee in remainder that another should first have the estate for life." The rule that the first words in a deed and the last in a will control in cases of repugnant provisions do not apply. Construing the whole deed as written, there is here a reservation of the estate for the life of the grantor and his wife, with remainder in fee to their daughter. *Blackwell v. Blackwell*, 124 N. C. 269, 32 S. E. 676; *Wall v. Wall*, 126 N. C. 405, 35 S. E. 811. This is not like *Wilkins v. Norman*, 139 N. C. 41, 51 S. E. 790, 111 Am. St. Rep. 767, where an estate in fee simple was conveyed, and there was a subsequent clause which conveyed the land to another after the death of the grantee in fee. The last clause was held repugnant and void.

[5] In *Featherstone v. Merrimon*, 148 N. C. 199, 61 S. E. 675, Walker, J., says: "In construing a deed, the court will examine the entire instrument and construe it as a whole consistent with reason and common sense, to effectuate the intention of the parties." There can be no question here as to the intention of the grantor, which is very clearly expressed. To the same effect is *Triplett v. Williams*, 149 N. C. 396, 63 S. E. 80 (24 L. R. A. [N. S.] 514), in which Brown, J., says that the courts will look at the whole instrument to

ascertain its intention, and will "not regard as very material in what part of the deed such intention is manifested."

The judgment of his honor is reversed.

(156 N. C. 616)

#### STATE v. MARABLE

(Supreme Court of North Carolina. Sept. 20, 1911.)

##### 1. RECEIVING STOLEN GOODS (§ 8\*)—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for receiving stolen goods held to sustain a conviction.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. §§ 15-18; Dec. Dig. § 8.\*]

##### 2. CRIMINAL LAW (§ 1172\*)—HARMLESS ERROR—INSTRUCTIONS FAVORABLE TO DEFENDANT.

Defendant on appeal cannot complain of an instruction, which, if erroneous, was in his favor.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3160; Dec. Dig. § 1172.\*]

Appeal from Superior Court, Pitt County; Ferguson, Judge.

Manson Marable was convicted of receiving property knowing it to have been stolen, and he appeals. No error.

The defendant was indicted for larceny of some tin, and a count in the bill for receiving the tin, knowing it to have been stolen. There was a verdict of guilty of receiving the tin, knowing it to have been stolen, and judgment imprisoning defendant for four months, to be worked on the roads of Pitt county.

Julius Brown, for appellant. T. W. Bickett, Atty. Gen., and G. L. Jones, Asst. Atty. Gen., for the State.

BROWN, J. The only question presented for our consideration is the sufficiency of the evidence submitted to the jury.

[1] The evidence tends to prove that the prosecutor, Jenkins, had been missing tin from his shop; that in searching for the tin he found it on defendant's house. Prosecutor identified the tin by certain marks, and there was corroborative evidence in support of such identification. The evidence also shows that defendant told the prosecutor and another witness that he got the tin from Sears, Roebuck & Co. The prosecutor proposed to go with defendant to the railroad office and examine the books, but the defendant declined to go, and then said that he got the tin from a man near the railroad, and he would rather pay for it than to tell the man's name or have any trouble about it, and he did pay the prosecutor \$15 for the tin. On the trial the defendant testified that he got the tin not from Sears, Roebuck & Co., nor from a man who lived near the depot, but from one Edmundson, and Edmundson said that he got it from a dead man.

The court charged the jury that the fact

that the tin was found in the defendant's possession did not create a presumption of guilt under the circumstances of this case, but that it was a circumstance, which, taken with all the other evidence must satisfy the jury beyond a reasonable doubt.

[2] We see no error in this of which the defendant can justly complain. If erroneous, it was in defendant's favor. The finding of the tin in defendant's possession, together with the different and conflicting statements made by defendant in attempting to account for its possession, warranted the judge in submitting the question of defendant's guilt to the jury.

No error.

(156 N. C. 48)

**WHITEHURST v. NORFOLK & S. R. R.**  
et al.

(Supreme Court of North Carolina. Sept. 20, 1911.)

**1. NAVIGABLE WATERS (§ 20\*)—OBSTRUCTION—BRIDGES.**

One whose boat is wrecked while sailing to get in position to pass through a draw of a railroad bridge over navigable waters has no cause of action on the ground of illegal obstruction of the waters by erection of the bridge, constructed under authority of the state and the supervisory powers of the federal government.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

**2. NAVIGABLE WATERS (§ 26\*)—OBSTRUCTION—BRIDGES—INJURY TO BOAT—NEGLIGENCE—EVIDENCE.**

Evidence in an action for injury to a boat which grounded on a shoal while sailing to get in position to pass through the south side of the draw at the south end of an uncompleted railroad bridge over navigable waters, the north side of such draw being occupied by a pile driver, and it being impossible to open the draw at the other end of the bridge because of the cement not being dry, held to show no negligence of the railroad company.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 160; Dec. Dig. § 26.\*]

**3. NAVIGABLE WATERS (§ 26\*)—OBSTRUCTION—BRIDGES—INJURY TO BOAT—PROXIMATE CAUSE—EVIDENCE.**

Evidence in an action for injury to a boat by grounding on a shoal while trying to get in a position to pass through a draw of a railroad bridge over navigable waters held to show that her failure to answer her helm was the proximate cause of the accident.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 160; Dec. Dig. § 26.\*]

Appeal from Superior Court, Pasquotank County; Justice, Judge.

Action by C. W. Whitehurst against the Norfolk & Southern Railroad and the McLean Construction Company. Judgment for plaintiff. Defendants appeal. Reversed and dismissed.

These issues were submitted:

"First. Was plaintiff's boat and cargo damaged by the negligence of defendant railroad company as alleged? Answer: Yes.

"Second. What damage, if any, has plain-

tiff sustained? Answer: Boat and cargo \$1,500."

In apt time defendants moved to nonsuit, which motion was denied, and defendants excepted. From the judgment rendered, the defendants appealed.

W. M. Bond, for appellants. E. F. Aydlett and J. C. B. Ehringhaus, for appellees.

BROWN, J. On December 22, 1909, the defendant company by its contractors, the construction company, was constructing a railway bridge about six miles long from Mackey's Ferry, across Albemarle Sound, to its northern shore near Edenton. The bridge was not entirely completed, nor in use by the railroad company. In the northern part of this bridge is located a large drawbridge, over deep water intended for passage of vessels. This was about completed, but could not be opened on day named because the cement had not had time to set. There is also another pivot drawbridge in southern portion of the bridge about 1½ miles from the southern shore. This drawbridge is over 70 feet long. It turns upon a central pillar, and leaves 35 feet clear space open on each side of the pillar for passage of vessels. On date named the pivot draw was opened—that is, extended east and west—the main bridge running north and south. The 35-foot space on northern side of the pivotal pillar was obstructed by a pile driver at work on the bridge abutment. The other side of the draw was clear and open for passage of vessels. There was nothing to prevent a vessel passing through it, wind and weather permitting.

The evidence of the plaintiff shows that on date named he was beating (tacking) his schooner *Alva* up Albemarle Sound bound for *Avoca*, loaded with 2,000 bushels of oyster shell. The wind was blowing from west northwest, being almost dead ahead for *Avoca*, which is some miles west of the bridge. The plaintiff was tacking back and forth, making for the large northern draw, at 9 a. m., when he was told by the skipper of the *Waterboy* that the northern draw was closed. Plaintiff at once steered south for the southern draw. When he was opposite it, he saw that the northern side was blocked by pile driver at work. He attempted to tack and stand away from the bridge so as to lay his course and go through the open space on southern side of the long draw bridge. When he put his helm down to tack, the *Alva* "missed stays"—that is, failed to "go about," and put her bow into the wind. Instead, she fell off before the wind, and her sails, filling in a strong breeze, caused her to be wrecked on a shoal. The *Alva* was 25 years old, and the plaintiff, her owner and captain, 62, with 40 years' experience on the waters of Albemarle Sound.

[1] It is admitted the bridge in question was constructed under the authority of the General Assembly of this state and under the supervisory powers conferred on the government of the United States in such cases by act of Congress. The right of the state, subject to the power of the national government to authorize such structures across navigable bodies of water within its borders, is too well settled to be now discussed. *Pedrick v. N. & S. R. R.*, 143 N. C. 486, 55 S. E. 877, 10 L. R. A. (N. S.) 554, and cases cited; *Works v. Railroad*, Fed. Cas. No. 18,046. It is settled beyond controversy that where a bridge over a navigable stream is erected by authority of law for public purposes and benefit, and leaves reasonable spaces for the passage of vessels, it is not a nuisance, but a lawful structure. *Pedrick v. Railroad*, *supra*. For the convenience and safety of navigation, it is well known that the plans and specifications of such structures as this and its drawbridges must be approved by the proper federal officials. It is manifest that plaintiff has no cause of action arising out of an illegal obstruction of Albemarle Sound by the erection of this bridge across it.

[2] Nor are we able to perceive that the defendant was guilty of negligence and wanting in the discharge of any duty it owed the plaintiff, while constructing this bridge. Its "draws" had not been completed, and could not be used with the facility for passing vessels that they now afford. It is manifest that in constructing these draws navigation must necessarily be much more inconvenienced and impeded than when they are in a completed state and properly operated. Such temporary inconvenience must be suffered for the public weal.

[3] It is manifest from plaintiff's evidence that the proximate cause of his loss was an accident which neither he nor any one else could foresee or prevent. The plaintiff was beating to windward against a strong north-northwesterly wind heading for the northern draw. Before he reached it, he was informed from the Waterboy that it was closed. The plaintiff doubtless "eased off his sheets," and pointed towards the southern draw. It was no trouble for him to "stand away" from the bridge as far off as he pleased, for the bridge was to his windward, and the wind was blowing him away from it. Plaintiff says he was given no notice or signal that the northern side of the southern draw was blocked by a pile driver. It was 9 o'clock in the morning, and any reasonable vigilance could have discovered such a lofty object as a pile driver 100 yards away. Plaintiff, however, says he did see the obstruction when he got opposite the draw. At that time he was in open water and in no danger in case his vessel worked all right. He then "tacked ship" with the evident in-

tention of getting in a position, and then laying his course through the open draw, but unfortunately the *Alva* failed him at the critical moment. Instead of "coming about" in obedience to her helm, she fell off, and, before he could recover her, she grounded on the shoal, which according to the contradicted evidence was 250 yards from the bridge, and 2,000 feet from the southern draw. The failure to answer her helm and tack at the critical moment has wrecked sailing craft before the *Alva*. Her misbehavior was plainly the proximate cause of her grounding on the shoal.

It is a superstition among sailors that sailing craft have their individual peculiarities and idiosyncrasies, and become unmanageable when least expected. Some one, doubtless a crusty and disappointed bachelor, has said that is the reason they are given the feminine gender and called "she." This plaintiff, an experienced sailor, knew his craft, and that she was heavily laden, and not so active as when light. It may have been the part of wisdom to have dropped anchor and waited for a more favorable breeze rather than attempt to beat through a drawbridge against a strong head wind. However that may be, we see nothing in the record which justly renders the defendants liable for the loss of plaintiff's vessel.

The motion to nonsuit is sustained, and the action dismissed.

Reversed.

(156 N. C. 35)

S. F. BOWSER & CO., Inc., v. TARRY.

(Supreme Court of North Carolina. Sept. 20, 1911.)

1. EVIDENCE (§ 397\*)—PAROL EVIDENCE—ADMISSIBILITY.

Parol evidence will not be received to contradict or alter the terms of a contract in writing, and all oral parts of the contract and contemporary declarations are incompetent for such purpose.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.\*]

2. EVIDENCE (§ 444\*)—PAROL EVIDENCE AFFECTING WRITINGS—EXISTENCE OF CONDITIONS.

Although a written instrument purporting to be a definite contract is signed and delivered, it may be shown by parol evidence that such delivery was conditional.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 444.\*]

3. SALES (§ 53\*)—ACTION FOR PRICE—QUESTION FOR JURY—ABSOLUTE OR CONDITIONAL CONTRACT.

In an action for the price of a gasoline tank, *held*, that whether the written order was delivered to plaintiff on condition that it was not to become a binding agreement until plaintiff obtained permission from the town to bury the tank in the street, or was delivered with the intent that it should be presently binding as a contract of sale, was a question for the jury.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 53.\*]

#### 4. EVIDENCE (§ 420\*)—PAROL EVIDENCE AFFECTING WRITINGS.

Where a written order for goods, delivered with the intent that it shall be presently binding as a contract of sale, contains a stipulation that the order shall not be countermanded, the buyer cannot show in an action for the price that he had reserved the right to countermand the order.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1491; Dec. Dig. § 420.\*]

Appeal from Superior Court, Halifax County; J. S. Adams, Judge.

Action by S. F. Bowser & Co., Inc., against one Tarry. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Plaintiff sued on an instrument alleged to be a written contract bearing date December 16, 1909, for the purchase of a gasoline tank, with incidental appliances, at the price of \$140. The tank was shipped from Ft. Wayne, Ind., on December 15, 1909, and arrived at Littleton, N. C., some time in the latter part of the month, and was taken out of the railroad depot by defendant, as he stated, for purpose of saving storage. Defendant having denied liability, on issue submitted, the court charged the jury that, if they believed the evidence, the plaintiff was entitled to recover the contract price \$140. Verdict for same in plaintiff's favor. Judgment, and defendant excepted and appealed, assigning errors chiefly as to the rulings of the court on questions of evidence.

J. M. Picot and Jos. P. Pippen, for appellant. Geo. Green and Murray Allen, for appellee.

HOKE, J. The written instrument purporting to bear date December 16, 1909, expressed a definite order for the tank and appliances at the stated price of \$140, and contained further stipulation as follows: "It is agreed by purchaser that this order shall not be countermanded; and, when filled and due as per specifications and terms herein stated, that there shall be no defense for nonpayment. It is further agreed that, in default of payment, S. F. Bowser & Co., Incorporated, or their agent, may take possession of and remove said goods without legal process, unless such default be granted by special letter from S. F. Bowser & Co., Incorporated." This paper witness was received in evidence without objection. Plaintiff put defendant on the stand, who testified on his examination in chief that he signed the instrument, and that he had not paid the price or any part of same. On cross-examination the witness was allowed to state: "The agent for the Bowser Company came in to see me some time in December, 1909, and explained to me the uses and need for his gasoline tank. I told

him that I thought it was a fine thing, and would certainly like to have one, and that I would buy one if I could get permission from the town authorities to bury the tank under the street. The agent replied that there was no possible danger from the use of the tank, and that he could not see how the town authorities could object. I told him that I would buy the tank with the understanding that, if I could not get permission from the town authorities, I could not and would not accept the tank. The agent replied that his factory was greatly overrun with orders, and that it would be impossible to ship the tank before February 1, 1910, and that in the meantime I would have ample time and opportunity to see the town authorities and arrange to place the tank, and that, if I could not do so, then I could countermand the order, and need not take the tank. All of this conversation and every word of it was prior to my signing the contract, though after signing the same we had general talk, but as to what was stated by either of us in the general talk, after signing the contract, I cannot and do not swear to. The agent left. Before the 1st day of January, 1910, the tank, which he had told me would not be shipped, or could not be shipped until the 1st of February, 1910, arrived. I had not then seen the town authorities, not having had the opportunity to, and not expecting the tank before the time promised by the agent. I took the tank out of the warehouse to save storage charges, and, pending permission to plant the same by the town authorities, I immediately went to the street commissioner of the town of Littleton, who is the proper authority to give permission in such cases, and he positively refused to permit me to bury the tank in the street. I then asked my landlord if I might bury the tank under his building, and he refused me permission to do so. (I then wrote the Bowser Company that they had shipped the tank before the time agreed by their agent, and that I could not, after having tried, get permission from the town authorities nor from my landlord to place the tank where I could use it, and it was therefore valueless to me.) I went at once and shipped the tank back to the Bowser Company, prepaying freight, and have never been notified by the railroad that the shipment was refused." On objection by plaintiff this statement was excluded, and in this ruling we think there was error.

[1] The general principle insisted and relied upon by plaintiff is undoubted that oral evidence will not be received to contradict or vary a written contract. In *Ray v. Blacknall*, 94 N. C. 16, Chief Justice Smith, speaking to the question, said: "It is a

settled rule, too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict or alter the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose." And, again, in the same opinion, "the cases which are apparently to the contrary do not contravene this rule," but rest upon the idea that the writing does not contain the contract, but is in part execution of it. Numerous decisions in the state before and since are in affirmance and application of the principle. *Walker v. Venters*, 148 N. C. 388, 62 S. E. 510; *Medicine Co. v. Mizell*, 148 N. C. 384, 62 S. E. 511; *Basnight v. Jobbing Co.*, 148 N. C. 350, 62 S. E. 420; *Bank v. Moore*, 138 N. C. 529, 51 S. E. 79. Even when a contemporaneous oral stipulation would be otherwise received because it too was a part of the contract, this will not be allowed when it contradicts the portion of the agreement which is reduced to writing. This is well stated by the present Chief Justice in *Walker v. Venters* as follows: "It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and in such case the oral part of the agreement may be shown, but this is subject to the well-established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides."

[2] While this position is unquestioned, it is also fully understood that, although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that, until the specified event occurred, the instrument did not become a binding agreement between the parties. It never, in fact, became their contract. The principle has been applied with us in several well-considered decisions, as in *Pratt v. Chaffin*, 136 N. C. 350, 48 S. E. 768, *Kelly v. Oliver*, 113 N. C. 442, 18 S. E. 698, and *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408, and is now very generally recognized (*Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563; *Willson v. Powers*, 131 Mass. 539; *Rym v. Cambill et al.*, 88 E. C. L. 370; *Clark on Contracts*, p. 391; *Lawson on Contracts*, § 376; *Anson on Contracts* [Amer. Ed.] p. 313); and, except in deeds conveying real estate, obtains though the instrument is under seal and delivery has been to the other party (*Blewitt v. Boorum et al.*, 142 N. Y. 357, 37 N. E. 119,

40 Am. St. Rep. 600). In *Ware v. Allen*, supra, the rule is expressed thus: "Parol evidence is admissible in an action between the parties to show that a written instrument executed and delivered by the party obligor to the party obligee absolute on its face was conditional, and not intended to take effect until another event should take place." And in *Anson on Contracts*, supra, it is said: "In like manner the parties to a written contract may agree that, until the happening of a condition which is not put in writing, the contract is to remain inoperative." Applying the principle, we are of opinion that the proposed evidence should have been received.

[3] The statement by permissible interpretation presents the view that the instrument, though in writing and in the form of a definite contract, was delivered to plaintiff's agent on condition that same was not to become a binding agreement and operative unless and until the town authorities gave their permission to bury the tank in the street. There is also the permissible view, with evidence tending to support it, that the instrument was delivered with the intent that same should presently bind as a contract of sale, and, on the facts as they now appear, the issue should be determined by the jury on the question whether the instrument was delivered on the condition stated or with the intent that the parties should be presently bound.

[4] And in this last event it would not be open to defendant to show by parol that he had reserved the right to countermand the order. That would be to annex a condition subsequent and in direct contradiction of the express stipulation of the written instrument.

There is error, and defendant is entitled to have the cause tried before another jury.  
New trial.

(156 N. C. 6)

#### TAYLOE v. CARROW et al.

(Supreme Court of North Carolina. Sept. 13, 1911.)

#### 1. PARTITION (§ 77\*)—ACTUAL PARTITION OR SALE.

The advisability of an actual partition or sale is a question of fact for the decision of the clerk in the first instance, subject to review by the judge of the superior court.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 211-223; Dec. Dig. § 77.\*]

#### 2. PARTITION (§ 113\*)—REVIEW—DISCRETION OF TRIAL JUDGE.

The action of a judge of the superior court in setting aside the report of partition commissioners, advising actual partition, and ordering a sale, is not reviewable, unless an error of law was committed.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 424-439; Dec. Dig. § 113.\*]



**3. PARTITION (§ 77\*)—PROCEEDINGS—FINALITY OF DECREE—ACTUAL PARTITION.**

A decree of a judge of the superior court, ordering an actual partition of a part and a sale of the remainder of land, under Revisal 1905, § 2516, is interlocutory until decree of confirmation is made, though the purchase money has been paid and possession taken by the purchaser, so that the judge could, after having decreed an actual allotment to one of the heirs and sale of the remainder, upon the coming in of a second report, decree that the entire property be sold, upon a finding that actual allotment of a part is impracticable; his former decree, making actual allotment of part, not being *res judicata*.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211-223; Dec. Dig. § 77.\*]

**4. PARTITION (§ 77\*)—ACTUAL PARTITION—RIGHT.**

Tenants in common are entitled to an actual partition, if it can be made without injury to any of the co-owners.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 211-223; Dec. Dig. § 77.\*]

**5. PARTITION (§ 110\*)—DECREE—SALE—CONFIRMATION.**

Title to land sold in partition will not be executed until the purchase money has been paid, even though there has been a decree of confirmation of the sale.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 398-400; Dec. Dig. § 110.\*]

**6. PARTITION (§ 113\*)—PROCEEDINGS—FINALITY OF DECREE—ACTUAL PARTITION.**

That separate appeals from the determination of the clerk as to partition or sale go up to different judges of the superior court does not prevent a judge hearing a second or subsequent appeal from a decree of sale of the whole tract, though another judge has on a former appeal ordered an actual allotment of a part; such order being interlocutory.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 113.\*]

Appeal from Superior Court, Beaufort County; Ward, Judge.

Action by Joseph F. Tayloe against Annie H. Carrow and others for the partition of land. From a decree of partition by sale, the named defendant appeals. Affirmed.

Nicholson & Daniel, for appellant. W. C. Rodman and Small, MacLean & McMullan, for appellee Tayloe. Martin & Critcher, for appellee Godwin.

CLARK, C. J. [1] This is a petition for sale of land for partition; the plaintiff alleging that the land was not susceptible of actual partition. Some of the defendants answered, asking that the land be actually divided. The clerk made an order directing actual partition and appointing commissioners. To this order the petitioner and certain of the defendants excepted. The commissioners attempted to make actual partition, and filed a report; but two of them reported further that, owing to the shape, area, and topography of the land, the best interest of all the parties would be subserved by a sale. This the clerk overruled, and confirmed the

report. Upon appeal to the judge the partition was set aside, and the commissioners were directed to set apart and allot one-seventh in value of the land to the defendant Annie Carrow (who alone insisted on actual partition), and ordered a sale of the remainder for partition. The second set of commissioners made their report, which was confirmed by the clerk; but on appeal the judge set aside the report of the commissioners and directed that the entire property be sold for partition, finding as a fact that this property could not be fairly divided and that a sale would best subserve the interests of all parties. In *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123, the court said: "The only controverted fact arising on the pleadings was as to the advisability of a sale for partition or an actual partition. This was not an issue of fact, but a question of fact for the decision of the clerk in the first instance, subject to review by the judge on appeal."

[2] This action of the judge in setting aside the report and ordering a sale is not reviewable, unless there is an error of law committed. In *Simmons v. Foscue*, 81 N. C. 86, the court said: "Of the force and effect of the evidence in inducing the exercise of that reasonable discretion reposed by law in the judge when called on to confirm the action of the commissioners, he alone must determine, and if no error in law was committed we cannot reverse his decision." This has been cited and approved. *Trull v. Rice*, 92 N. C. 572; *McMillan v. McMillan*, 123 N. C. 577, 31 S. E. 729.

[3] The appellant, Annie Carrow, insists that error in law was committed, in that the judge, having decreed actual allotment to her of one-seventh and a sale of the remainder, the matter was *res judicata*, and he could not, upon setting aside the report, decree a sale of the part allotted to her. Revisal 1905, § 2516, authorizes the judge to decree actual partition of a part of the land and a sale of the remainder; but his decree to that effect is interlocutory, as much so as the decree for the sale of the remainder. Until the confirmation of the report, the whole matter rests in the judgment of the clerk, subject to review by the judge, whose action is binding on us, unless an error of law has been committed. A judge might well find, on the coming in of a report, that the clerk's former order directing actual partition was impracticable, as the judge found here upon the report of two of the commissioners, and direct, as his honor has done, that the report be set aside and actual partition of part and a sale for partition of the rest. For the same reason he might find, as he has done on the second report coming in, that the evidence showed that the actual allotment of a part of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

land to one tenant in common was impracticable, or that it damaged the sale of the remainder of the tract. He has so found as a fact in the case, and thereupon it was eminently proper that he should set aside the report, and with it the former order directing the allotment to Annie Carrow, and decree a sale of the whole tract at an upset price, both in parcels and as a whole (as he has done here), and on coming in of the report of this sale it will be competent for the judge, upon appeal from the clerk, to confirm said sale, or set aside the report and direct actual or partial partition, or a resale as he may then find to be to the interest of the parties. Such orders, being interlocutory, rest in the discretion of the court.

[4] *Prima facie*, tenants in common are entitled to actual partition, but only when such partition can be made without injury to any of the parties. Revisal 1905, § 2512; Gillespie v. Allison, 115 N. C. 548, 20 S. E. 627. In Skinner v. Carter, 108 N. C. 109, 12 S. E. 908, it is said that, the judge "having the power to set aside the report, he might also make any order that could formerly have been made either by the clerk or the judge under such circumstances." The judge in the beginning was vested with the power to decree actual partition, or a partial partition, or a sale for partition. Having set aside the report, as he had power to do, the matter was then open to him, as *res nova*. Being better advised by the report or further evidence, he could not only refer it to new commissioners, but he could direct actual partition of the whole tract, or a sale of the whole, or a partition of part and a sale of the remainder, just as he could originally. No title vested until the decree of confirmation upon the final report of the commissioners. Until the decree of confirmation the proceedings are not final, but interlocutory, and rest in the discretion of the court, even though the purchase money has been paid and the purchaser has taken possession of the premises. Knapp on Partition, 335.

[5] On the other hand, even when there has been a decree of confirmation, title will not be executed until the purchase money has been paid. Burgin v. Burgin, 82 N. C. 197; White, *Ex parte*, 82 N. C. 378.

[6] It makes no difference that the appeals may go up to different judges. The appeals are all from the clerk to the judge of the superior court. The former judgments of the judge, being interlocutory, are subject to be set aside or modified by him or his successors.

The minutiae of the controverted details as to the successive appeals from the clerk to the judge need not be discussed by us. The judge below correctly held that they were immaterial irregularities at the most. Affirmed.

(156 N. C. 150)

# BARNES v. POSTAL TELEGRAPH-CABLE CO.

(Supreme Court of North Carolina. Sept. 27, 1911.)

## 1. TELEGRAPHS AND TELEPHONES (§ 66\*)—DELAY IN DELIVERY—EVIDENCE.

In an action for delay in delivery of message, evidence held to show that the company was not guilty of any negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 63; Dec. Dig. § 66.\*]

## 2. TELEGRAPHS AND TELEPHONES (§ 68\*)—DAMAGES—MENTAL ANGUISH.

A recovery cannot be had for mental anguish suffered from delay in delivering a telegram, unless it is coupled with negligence proximately causing the injury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.\*]

## 3. TELEGRAPHS AND TELEPHONES (§ 51\*)—DELAY IN DELIVERY—DEFENSES—CONTRIBUTORY NEGLIGENCE.

To authorize a sendee to recover for negligent delay in delivery of a telegram, he himself must have been without negligence contributing to the delay.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 35; Dec. Dig. § 51.\*]

## 4. TELEGRAPHS AND TELEPHONES (§ 37\*)—MESSAGES—CARE REQUIRED.

Telegraph companies need only exercise that degree of care in delivering messages which one of ordinary prudence would use under like circumstances.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 37.\*]

## 5. TELEGRAPHS AND TELEPHONES (§ 40\*)—MESSAGES—CONTRACT—DELIVERY.

Since a telegraph company cannot disclose the contents of a message to other than the sendee without the permission of the sender or sendee, the company under its usual contract need not telephone the message, nor has it the right to do so to one not the agent of the sendee, unless authorized to receive it.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 40.\*]

## 6. TELEGRAPHS AND TELEPHONES (§ 54\*)—MESSAGES—ACTIONS—CONDITIONS PRECEDENT—WRITTEN DEMAND.

A stipulation in a contract for the transmission of a telegram requiring a claim in writing to be presented to the company within 60 days after it is filed for transmission, in order to maintain an action for negligence in its transmission, is reasonable and valid, and must be complied with.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 42; Dec. Dig. § 54.\*]

Appeal from Superior Court, Martin County; Ward, Judge.

Action by F. M. Barnes against the Postal Telegraph-Cable Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

H. W. Stubbs and S. A. Newell, for appellant. R. C. Strong, for appellee.

WALKER, J. This action was brought to recover damages for mental anguish, alleged to have been caused by the negligent delay of the defendant in transmitting and

delivering a telegram. The message, dated November 26, 1909, was addressed by Mrs. Frank Barnes to Francis W. Barnes at Williamston, N. C., and read as follows: "Come at once. Your father very sick." It was transmitted from the initial point to Greenville with due promptness, and reached the office in that place at 8 o'clock a. m. The defendant had no office at Williamston, and the agent at Princess Anne so notified the sender. He also told her that it would have to be sent by telephone, owned by another company, from Greenville to Williamston, for which a charge or toll of 25 cents would be made by that company. When the message was received by the operator at Greenville, "he put in a long-distance call for Mr. Barnes at Williamston, and he was informed that Mr. Barnes was not there, but in the woods four or five miles away; he being a lumberman." The operator of the defendant at once instructed the telephone operator "to keep in the call for Williamston"—that is, to get Mr. Barnes as soon as it could be done—but he did not return until about 5:30 o'clock p. m., when the message was communicated to him by telephone. The plaintiff alleges that had the message been delivered to him at 8 o'clock a. m. on November 26th, the day it was sent, he could have left by the 8:28 a. m. Atlantic Coast Line Railroad Company train, and reached his father's bedside 17 hours before his death, which occurred about 5 o'clock p. m. November 27, 1909. We do not well see how he could have done any such thing. It would seem to be a physical impossibility. By his own calculation, there would be only 23 minutes of time for the relay of the message at Greenville, and the delivery of it to him at Williamston, he being at the time, according to his own statement,  $4\frac{1}{2}$  miles from his home. Some time must be consumed in making the necessary connection between telegraph and telephone lines, and in making the call on the "long-distance phone" for him. He had to travel  $4\frac{1}{2}$  miles to Williamston to catch the train. To charge the defendant with negligence under such circumstances would be anything but justice. Plaintiff says he could have taken the 4:30 p. m. train out of Williamston on November 26, 1909, and arrived at Princess Anne at 2:23 p. m. on November 27, 1909, a few hours before his father's death.

[1] But the crucial fact in the case is that plaintiff was not at home, but some distance therefrom, and this is what prevented an earlier delivery of the message. It was his misfortune, and not the defendant's fault, and plaintiffs fail so often to distinguish between the two. The service rendered to the plaintiff in the effort to reach him with the message was far more prompt and efficient than was the service in *Marquette v. Telegraph Co.*, 153 N. C. 156, 60 S. E. 73, which we so recently held to be sufficient in law. We will hold these com-

panies to a strict accountability in the performance of their duties and obligations to the public and their patrons, but we are impelled by our sense of justice to apply the law fairly and reasonably, and not to rule harshly and oppressively in regard to the measure of diligence required of them in the delivery of messages.

[2, 3] It is not mental anguish alone that entitles a plaintiff to recover, however much he may have suffered, but it must be coupled with the negligence of the company, and, too, that negligence must be the proximate cause of the injury as in other cases, and there must also be the absence of negligence on the part of the plaintiff directly or "in continuous sequence" contributing to his alleged injury, as in other cases. *Brewster v. Elizabeth City*, 137 N. C. 392, 49 S. E. 885, and especially *Hauser v. Telegraph Co.*, 150 N. C. 557, 64 S. E. 503, and *Hocutt v. Telegraph Co.*, 147 N. C. 186, 60 S. E. 980; 2 *Joyce, Elec. Law*, § 816a.

[4] Telegraph companies are only bound to the exercise of that degree of diligence which a man of ordinary prudence would use under like or similar circumstances. They must be prompt and diligent, it is true, but to demand more of them would be to apply a rule which would result sometimes, if not in the large majority of cases, in oppression and gross injustice. We will require of them their full duty, but no more. "If the plaintiff has lost, he has not been injured, as it is expressed in one of the maxims of the law." *Galney v. Telegraph Co.*, 136 N. C. 261, 48 S. E. 653.

[5] There was some question as to the right of the telephone company to disclose the contents of the message to a person other than the addressee. This could not be done without the consent of the sender and the sendee, or at least the sender or the sendee, depending upon the nature of the message or the terms of the contract. The telegraph company under its ordinary contract is not required to telephone a message, as it would impair the confidential relations assumed, but it can agree to deliver a message in this manner. 37 *Cyc.* 1683; *Hellams v. Telegraph Co.*, 70 S. C. 83, 49 S. E. 12; *Lyles v. Telegraph Co.*, 77 S. C. 174, 57 S. E. 725, 12 *L. R. A. (N. S.)* 534. It is a part of the undertaking of the telegraph company, with respect to the transmission and subsequent handling of the message, that its contents shall not be disclosed to any person whomsoever, without the consent of either the sender or addressee, and, if it does divulge the contents without being released from the obligation of secrecy, it acts at its peril. 37 *Cyc.* 1684; *Cocke v. Telegraph Co.*, 84 *Miss.* 380, 36 *South.* 392. Nor has the company the right to deliver the message, especially by telephone, which necessarily discloses its contents, to one not the agent of the addressee to receive telegrams, unless he is otherwise expressly or impliedly authoriz-

ed to receive it. *W. U. Tel. Co. v. Mitchell*, 91 Tex. 454, 44 S. W. 274, 40 L. R. A. 209, 68 Am. St. Rep. 906. We should carefully distinguish between the mode of delivery in respect to telegrams which are to be transmitted by telephone beyond the telegraph company's line and a delivery of the telegraphic message itself by the messenger of the transmitting company. Observing the distinction will reconcile some apparently conflicting decisions. In this case the telegraph company performed its full duty, and is not liable to the plaintiff.

[8] There is a stipulation in the contract of the defendant with its patrons that a claim or demand in writing must be presented to the telegraph company within 60 days after the message is filed for transmission. We have held this provision to be reasonable and valid. *Sherrill v. Telegraph Co.*, 109 N. C. 532, 14 S. E. 94; *Lewis v. Telegraph Co.*, 117 N. C. 436, 23 S. E. 319. In *Sykes v. Telegraph Co.*, 150 N. C. 431, 64 S. E. 177, we said that "the validity of a stipulation as to presenting the plaintiff's claim (in writing) within 60 days after knowledge of the non-delivery of the message has been received by him is too well settled now to be longer questioned"—citing *Jones on Telegraph and Telephone Companies*, p. 380, § 395, and quoting therefrom a passage of the text giving the reasons for the validity of this term of the contract.

The judge was right in nonsuiting the plaintiff, and we affirm the judgment.

No error.

(156 N. C. 56)

#### GASKINS v. HANCOCK.

(Supreme Court of North Carolina. Sept. 27, 1911.)

##### 1. NUISANCE (§ 3\*)—NUISANCE PER SE.

An automobile is not a nuisance in itself, but its use must be negligent to make the owner liable for resulting damages.

[Ed. Note.—For other cases, see *Nuisance*, Dec. Dig. § 3.\*]

##### 2. HIGHWAYS (§ 184\*)—USE BY AUTOMOBILE—NEGLIGENCE.

It is not negligence per se to go on public highways and cross public bridges with an automobile.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 184.\*]

##### 3. HIGHWAYS (§ 172\*)—USE BY AUTOMOBILE—NEGLIGENCE.

An automobile owner must take notice that such machines are liable to scare horses along a highway, and keep a proper lookout to avoid injuries.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 172.\*]

Appeal from Superior Court, Craven County; Ferguson, Judge.

Action by W. L. Gaskins against H. S. Hancock. From a judgment for plaintiff, defendant appeals. Affirmed.

W. D. McIver, for appellant. E. M. Green and Guion & Guion, for appellee.

CLARK, C. J. According to plaintiff's evidence, he was driving a pair of mules across Neuse river bridge, a structure about a mile in length and 18 feet wide, perfectly straight. A few yards ahead when he first drove upon the bridge the defendant was crossing the bridge in an automobile, and when plaintiff had crossed probably one-half the bridge, going at the rate of about three miles an hour, he saw defendant returning and coming towards him at a rate of speed of about ten miles an hour. His mules showed signs of fright, whereupon the negro riding with him on the back of the cart, at the direction of plaintiff, signaled and called to the defendant, when at a distance of about 40 yards, requesting him to stop his machine. He came on, and, the mules becoming uncontrollable, plaintiff, an old man, was thrown to the floor of the bridge under the mules' feet, and the two wheels of the double horse wagon, with the negro upon the rear, passed over and across the small of his back, from which injury he sustained great suffering, and for several months was disabled to labor.

There was conflicting evidence as to the distance at which the plaintiff signaled the defendant, and also the speed at which the automobile was traveling. The defendant's evidence put the speed at less than five miles an hour, while the plaintiff's witnesses placed it at more than that. The defendant's testimony was that he could not have stopped his machine sooner without injury to occupants.

The judge read to the jury the statute regulating the operation of moving vehicles in the use of highways (*Laws 1909, c. 445, §§ 9, 10, 11, 12*), and gave a careful charge in accordance therewith, applying the law to the various phases of the facts as they might be found by the jury, in which charge we find no error.

The exception as to the form of the issues cannot be sustained, as upon them every phase of the controversy could be, and was, fairly submitted to the jury. *Humphrey v. Church*, 109 N. C. 137, 13 S. E. 793, and cases there cited. The exceptions of the defendant are largely addressed to the refusal of the court to grant a nonsuit and refusal to instruct the jury to answer each of the issues, seriatim, in favor of the defendant. In refusing to do so there was no error. The case is almost entirely one of fact, and was properly submitted to the jury, who evidently gave a moderate verdict. The judge cautioned them very properly that they were to give only compensatory damages, and nothing by way of punishment.

[1-3] He also instructed them that an

automobile is not a nuisance in itself, and that it was not negligence per se for a person to use one in traveling along public highways and across public bridges, and that the owner is liable for damages only when caused by his negligence, that he is required to take notice that such machines are liable to scare horses along the highway, and he should keep a proper lookout not to cause any injury to others which could be avoided by proper care in the use of his machine.

No error.

(156 N. C. 68)

**CARROLL v. JAMES et al.**

(Supreme Court of North Carolina. Sept. 27, 1911.)

**1. PLEADING (§ 377\*)—BURDEN OF PROOF—ADMITTED FACTS.**

The burden was not upon plaintiff to establish a fact alleged in an answer and admitted in the reply.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1228-1231; Dec. Dig. § 377.\*]

**2. APPEAL AND ERROR (§ 1177\*)—ADMISSION OF EVIDENCE.**

Error in claim and delivery proceedings to recover property claimed under a chattel mortgage, in which defendant counterclaimed, in requiring plaintiff to show that a certain sum was paid by plaintiff from the proceeds of defendant's property to discharge a mortgage at defendant's request, when payment of such sum was admitted by the pleadings, requires a new trial where it cannot be said from the record that the jury have not already allowed such amount to plaintiff, preventing the Supreme Court from crediting it upon defendant's recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.\*]

Appeal from Superior Court, Carteret County; Peebles, Judge.

Action by L. C. Carroll against Martha James and others, administrators. From a judgment for defendants, plaintiff appeals. Reversed, and new trial ordered.

This is an action to recover personal property under a chattel mortgage executed by Caesar James, who is dead. The property was seized under claim and delivery proceedings issued in this action, and delivered to the plaintiff, and sold by him. The defendants are the administrator of Caesar James and his grandson. They allege in their answer that a part of the property seized was not embraced in the chattel mortgage; that other parts of the property were bought by the plaintiff at the sale under the mortgage for less than its value; and that after the death of Caesar James the plaintiff took into his possession and sold 5,000 pounds of tobacco belonging to James; and that he retained all of the proceeds of the sale of the tobacco, except \$112, which he paid Y. Z. & A. O. Newberry at the request of the defendants. The sum

of \$112 paid to Newberry, at the request of the defendants, out of the proceeds of the sale of the tobacco, was due on an agricultural lien, executed by Caesar James to E. H. & J. A. Meadows, and transferred by them to Newberry. There was a controversy between the parties as to the amount of property that went into the hands of the plaintiff, its value, and as to the state of the account between them. The plaintiff, among other things, contended he was entitled to charge against the defendants the sum of \$112 paid to Newberry. The court charged the jury on this contention as follows: "In order for the plaintiff to get credit for the amount of the Meadows mortgage, it was incumbent upon him to show what was due on the Meadows mortgage, because the mortgage was an agricultural lien. It was a promise to advance so much money, and not to exceed so much money, and, when the plaintiff saw fit to pay on the Meadows mortgage \$112 in order to sustain that payment, it was necessary for him to show that Meadows had at that time advanced on that agricultural lien \$112, including the interest that was due. There was no interest due on the Meadows claim until November 1, 1908." Plaintiff excepts. There was a verdict and judgment for the defendants, and the plaintiff excepted and appealed.

Simmons & Ward and C. R. Wheatley, for appellant. Abernethy & Davis, for appellees.

ALLEN, J. (after stating the facts as above). The charge of his honor placing the burden on the plaintiff to prove the item of \$112 is erroneous, and entitles the plaintiff to a new trial. It would have been correct but for the fact that the defendants allege in their answer that this sum was paid by the plaintiff out of the proceeds of the sale of the tobacco at the request of the defendants, and the plaintiff admits this in his reply.

[1] Being a fact admitted by the pleadings, it was not in controversy, and the burden was not on the plaintiff to establish it. The error was the result of an inadvertence, as is shown by the statement made by the presiding judge, which is attached to the case on appeal. He says that he overlooked the answer of the defendants as to the \$112, and that his attention was not called to it.

[2] As the item is admitted, we would direct it to be credited on the amount recovered by the defendants, instead of ordering a new trial, if we had any means of ascertaining the decision of the jury with reference to it, but we cannot say on the record that it has not already been allowed, and, as the question was submitted to them erroneously, we must order a new trial.

New trial.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

(156 N. C. 44)

## MANN v. GIBBS

(Supreme Court of North Carolina. Sept. 20, 1911.)

## 1. APPEAL AND ERROR (§ 70\*)—ORDERS APPEALABLE.

An appeal from an order denying a motion to dismiss an action to try title to office was premature and will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 372; Dec. Dig. § 70.\*]

## 2. DRAINS (§ 17\*)—DRAINAGE COMMISSIONERS—APPOINTMENT.

General Drainage Law (Laws 1909, c. 442) § 19, provides that, after a drainage district is established, the court shall appoint three persons as drainage commissioners, who shall first be elected by a majority of the landowners, and that it shall appoint those receiving a majority of the votes. Laws 1909, c. 509, authorizes the establishment of a particular drainage district by the state board of education and certain landowners, and section 3 provides that two members of the board of drainage commissioners provided for in section 19 of the general drainage law shall be appointed by the state board of education and one appointed by the court before which the petition is filed. Held that, even if an actual election were necessary under section 19, and the court must appoint those as commissioners who received a majority of the votes, that provision is not applicable to the commissioner appointed by the court under section 3; the reference in that section to the general drainage law being only to indicate the number of commissioners and the nature of their duties, and not how they shall be appointed.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 12; Dec. Dig. § 17.\*]

Appeal from Superior Court, Hyde County; Allen, Judge.

Proceeding by the State, on relation of T. C. Mann, against T. H. B. Gibbs, to determine title to office. Defendant's motion to dismiss the action was denied, and he appeals. Appeal dismissed.

This action is brought to determine whether the relator, Mann, or the defendant, Gibbs, is a drainage commissioner in the drainage district for Mattamuskeet Lake and the lands adjoining thereto. The relator alleges that an election was held for drainage commissioner under chapter 442, § 19, Laws of 1909; that he and the defendant were the only candidates for the position; that he was legally elected; that a majority of the votes cast were in favor of the defendant, but that enough of these were illegal to change the result; that the clerk of Hyde county, before whom the petition for the drainage district was filed, appointed the defendant a commissioner; and that he, the relator, is eligible to the position and entitled thereto. The defendant denies that any illegal votes were cast for him, alleges that he was duly elected, and admits that he has been appointed by the clerk, under section 3, c. 509, Laws of 1909. The defendant moved to dismiss the action, and, upon the denial of his motion excepted and appealed.

Mann & Jones and E. F. Aydlott, for appellant. J. C. B. Ehringhaus and W. M. Bond, for appellee.

ALLEN, J. [1] It requires no citation of authority to sustain the proposition that the appeal is premature and must be dismissed; but as both parties request it, and much expense may be saved by the determination of the right of the relator to maintain his action, if he sustains his allegation that he received a majority of the legal votes cast, we proceed to consider it. The question involves the construction of section 19 of chapter 442 of the Laws of 1909, and section 3 of chapter 509 of the Laws of 1909. The first of these statutes is a general law, applicable to the whole state, and is for the establishment of drainage districts upon petition filed before the clerk; while the second relates to a particular drainage district, and is "An act to authorize the state board of education to unite with certain landowners in Hyde county in establishing a drainage district, including Mattamuskeet Lake and the lands adjacent thereto." The language of the two sections, upon which the controversy arises, is as follows:

Chapter 442, § 19, Laws of 1909: "After the said drainage district shall have been declared established, as aforesaid, and the survey and plan therefor approved, the court shall appoint three persons, who shall be designated as the board of drainage commissioners. Such drainage commissioners shall first be elected by the owners of the land within the drainage or levee district, or by a majority of same, in such manner as the court shall prescribe. The court shall appoint those receiving a majority of the votes. If any one or more of such proposed commissioners shall not receive a vote of a majority of such landowners the court shall appoint all or the remainder from among those voted for in the election. Any vacancy thereafter occurring shall be filled in like manner."

Chapter 509, § 3, Laws of 1909: "Two members of the board of drainage commissioners provided for in section nineteen of the general drainage law shall be appointed by the state board of education and one appointed by the court before which the petition is filed. The corporate name of said district shall be 'Board of Drainage Commissioners of Mattamuskeet District,' and the State Treasurer shall be the ex officio treasurer of said board."

The contention of the relator is that the two statutes should be construed together, and that, when so construed, by correct interpretation, the provisions as to elections contained in the first are applicable to appointments made by the clerk under the second. In the view we take of the case, it is

not necessary to pass upon the effect of an election under section 19 of chapter 442; but we incline to the opinion that it is recommendatory in its nature and does not confer title. There is an absence of all the usual requirements attending elections for general or special purposes, and the qualifications of an elector are not those prescribed by the Constitution. The owners of land within the district, and no others, are entitled to vote, thereby excluding those who are not landowners from the right to vote, and including infants and married women who own lands. There is no provision for holding an election, for the count of the vote, for returns, or for declaring the result. We do not mean that no election can be held under a statute unless these regulations appear, but that the absence of them, when taken in connection with the language of the act and its purpose, indicates that by an election was meant a meeting of the landowners and an expression of their opinion, expecting the clerk to follow it. The latter part of section 19 adds force to this view: "If any one or more of such proposed commissioners shall not receive the vote of a majority of the landowners, the court shall appoint all or the remainder from those voted for at said election"—thus providing for the appointment of commissioners who are not the choice of a majority of the landowners.

[2] If, however, it be conceded that an election is necessary under section 19 of chapter 442, and the clerk must appoint one who receives a majority of the votes, we are of opinion that this provision is not incorporated in section 8 of chapter 509, and is not applicable thereto. The reference to the general drainage law in section 8 is for the purpose of indicating the number of commissioners and the nature of their duties, and not to designate how they shall be appointed or elected. The section says, without qualification, that two of the commissioners shall be appointed by the state board of education and one by the clerk. If it had been the intention of the Legislature for the clerk to make the appointment under the provisions of section 19, it would have been easy to add to the power conferred on the clerk, "as prescribed in section 19 of chapter 442," and not leave the matter to conjecture.

There was a reason for the difference in the two acts. Under the first, the landowners of the drainage district were the only parties interested, and it was right and advisable that their choice should be respected in the selection of commissioners; while under the second the state board of education was uniting with certain landowners to form a district, upon the understanding that the state board should name a majority

of the commissioners. The plan, therefore, outlined in section 19, could not be applied to the new scheme, and another was adopted.

We conclude that the relator, upon the facts submitted, is not entitled to maintain his action. The appeal is dismissed as premature.

Appeal dismissed.

(156 N. C. 52)

#### DE BRUHL v. HOOD.

(Supreme Court of North Carolina. Sept. 20, 1911.)

#### 1. TENDER (§§ 18, 24\*)—SUFFICIENCY—REQUIREMENTS.

To constitute a valid tender, the party making it must allege and show that since the refusal of acceptance he has always been ready to pay the same, and should bring the amount of the tender into court.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 55-58, 67-75; Dec. Dig. §§ 18, 24.\*]

#### 2. TENDER (§ 24\*)—PLEADING—SUFFICIENCY.

A plea of tender, not accompanied by a deposit of the money in court, is bad.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 79-81; Dec. Dig. § 24.\*]

#### 3. TENDER (§ 19\*)—EFFECT AS ADMISSION OF LIABILITY.

In an action to enjoin a mortgagee from selling the mortgaged premises, where the mortgagor alleged that only a certain amount was due and that he had made tender, but did not deposit the money in court and the mortgagee answered, insisting that a much larger sum was due, the mortgagee could not claim the amount of the tender, where upon trial the jury found a less amount to be due, as the tender of a larger amount did not entitle him to it, or deprive the court of the right to ascertain the true amount.

[Ed. Note.—For other cases, see Tender, Cent. Dig. §§ 59-64; Dec. Dig. § 19.\*]

Appeal from Superior Court, Craven County; Ferguson, Judge.

Action by C. J. De Bruhl against J. T. Hood. From a judgment for plaintiff, defendant appeals. Affirmed.

Guion & Guion, for appellant. Moore & Dunn, for appellee.

**WALKER, J.** This action was brought to enjoin the defendant from selling certain property under powers of sale contained in two mortgages, originally executed by plaintiff to Mrs. Sophia B. Duffy and the Citizens' Bank of Newbern, to secure notes of the plaintiff, and by them sold and transferred to the defendant. It is alleged in the complaint that several cash payments were made upon said indebtedness by the plaintiff, which, with the proceeds of certain timber cut from the land and received by the defendant, which, by reason of the contract between the parties, should have been applied to the debt, have reduced the amount thereof to \$273.68, which sum was tendered by the plaintiff to the defendant, who refused to accept the same.

[1] No money was deposited in court in order to keep the tender good. It is the universal rule that, in order to constitute a valid and effectual tender, the party who makes it must allege and show that since the refusal to accept the money he has always been ready to pay the same, and must bring the amount of the tender into court; and it has been said that he should take a rule on the plaintiff, or party to whom the debt is due, to accept the same or proceed at his peril. *Cope v. Bryson*, 60 N. C. 112. In *Bissell v. Heyward*, 96 U. S. 580, 24 L. Ed. 678, it was said, with reference to a sufficient tender: "To have the effect of stopping interest or costs, a tender must be kept good; and it ceases to have the effect when the money is used by the debtor for other purposes."

[2] A plea of tender, not accompanied by proferat in curiam, is bad. *Soper v. Jones*, 56 Md. 503. The subject is fully discussed in *Parker v. Beasley*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231, with ample reference to the authorities. Justice Allen, in a very recent case decided by this court (*Lee v. Manley*, 154 N. C. 244, 70 S. E. 385), adopts the statement of Wilde, C. J., in *Dixon v. Clark*, 57 E. C. L. R. 376, as follows: "The principle of the plea of tender, in our apprehension, is that the defendant has been always ready (tousjours prêt) to perform entirely the contract on which the action is founded, and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (uncore prêt), but must be accompanied by a proferat in curiam of the money tendered." The case of *Dixon v. Clark* was cited with approval, also, in *Bank v. Davidson*, 70 N. C. 122.

[3] The defendant in his answer insisted that the amount due upon the indebtedness secured by the mortgages was not \$273.68, as alleged by the plaintiff, but a much larger sum, to wit, \$1,180.96, and demanded the payment of that amount. The jury found that the true sum was neither of the said amounts, but \$203. It was urged by the defendant in the court below that this verdict was erroneous, as he was entitled to recover at least \$273.68, the amount of the tender. We do not see upon what ground any such claim can be based. The tender was rejected, and, as the money was not paid into court, it left the matter open and at large, the same as if no such tender had been made. The defendant should have taken the money when it was tendered, if he wished to avail himself of the tender. It is now too late for him to get the benefit of the

same. The law will not compel the plaintiff to renew his tender, so that the defendant, who has submitted his cause to the jury and been defeated in his contention, may have another chance to accept it. This would be giving him two chances, to which he is not entitled, either in law or equity. Good faith requires that he be made to abide by his first decision. The fact that a greater sum was tendered than was actually due did not entitle the defendant to that sum if he rejected the offer, so as to prevent the court from ascertaining the true amount for which judgment should be given. In *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643, the court, in dealing with a similar question, said: "The objection that the sum of \$30 was tendered, and the decree only required the payment of \$25.50, cannot be held well taken, because in a chancery proceeding the offer to bring the money into court and abide by the order of the court as to its payment is a sufficient tender, and, being incorporated in the bill, the court may find the actual amount due, and require that sum to be paid, and is not required to find a greater amount due than actually exists, because a tender for such greater sum had theretofore been made."

We see from this case that, even when the tender was held to be good and continuing, by reason of what was said to be equivalent to actual payment into court, the court has the right to find the correct amount and enter judgment for it, and not for the larger amount which was tendered; and a fortiori this can be done when the tender was made out of court and under the circumstances stated in this case. In *Abel v. Opel*, 24 Ind. 250, the court held that, while a tender is an admission of the amount due upon the debt, it is not conclusive, no more than any other admission of fact, and does not preclude the court from inquiring as to the true amount; nor does it exclude the consideration of all other evidence upon the subject, and, further, that if too much has been tendered, no obligation arises to pay the larger sum or to keep the tender good at that amount. That case was very much like this. The mortgagor tendered \$1,440, when only the sum of \$1,309 was found to be due, and it was held proper to enter judgment for the smaller amount, notwithstanding the tender. See, also, 28 Am. & Eng. Enc. pp. 15 and 16, title, "Tender as Admission of Liability."

The jury have decided against the defendant, mortgagee (who was oppressively demanding far more than he was justly entitled to recover), and upon evidence, as we think, sufficient to sustain the verdict, and there was no error committed during the trial which invalidates that verdict. We therefore affirm the judgment.

No error.



(156 N. C. 42)

**WHITFORD v. NORTH STATE LIFE INS. CO.**

(Supreme Court of North Carolina. Sept. 20, 1911.)

**EXECUTORS AND ADMINISTRATORS (§ 436\*)—ACTION BY EXECUTOR—VENUE.**

Where a cause of action in a complaint by an administrator is not one which must be tried in the county in which the subject of the action is situated, as provided by Revisal 1905, § 419, nor one to be tried in the county where the cause arose within section 420, and section 421, relating to venue in actions brought against administrators, does not provide for actions by administrators, the administrator in the action in question was party plaintiff, authorizing the action to be brought in the county of his residence under Revisal 1905, § 424.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 436.\*]

Appeal from Superior Court, Craven County; Ferguson, Judge.

Action by G. A. Whitford, as administrator of the estate of W. B. Burgess, deceased, against the North State Life Insurance Company. Motion for change of venue was allowed, and the plaintiff excepted and appeals. Reversed.

The admitted facts are: (1) The plaintiff is G. A. Whitford, administrator of W. B. Burgess. (2) The defendant is a domestic corporation, whose principal place of business is in Lenoir county. (3) The action is to recover the amount of a life insurance policy. (4) The intestate Burgess was a resident of Lenoir county at the time of his death. (5) The plaintiff qualified as administrator in Lenoir county. (6) The plaintiff G. A. Whitford, is a resident of Craven county. The motion was allowed, and the plaintiff excepted and appealed.

Guion & Guion, for appellant. Rouse & Land, for appellee.

ALLEN, J. The cause of action alleged in the complaint is not one of those provided for in section 419, Revisal 1905, which must be tried in the county "in which the subject of the action, or some part thereof is situated," nor is it one of those mentioned in section 420, Revisal 1905, which are to be tried in the county "where the cause or some part thereof arose." The section requiring actions against administrators to be instituted in the county where the bond of the administrator is given has no application, because this is not an action against an administrator, but one brought by him.

As no provision is made elsewhere as to the place of trials of actions instituted by administrators, it follows that the controversy between the plaintiff and the defendant is dependent upon the construction of that part of section 424, Revisal 1905, saying: "In

all other cases the action shall be tried in the county, in which the plaintiffs or the defendants, or any of them, shall reside at the commencement of the action."

The question is settled when we determine who are the parties to the record, because, if G. A. Whitford is the party plaintiff, he is a resident of Craven, and entitled to sue there. In our opinion, by proper construction of section 424, in connection with section 421, he is the party plaintiff, and the addition of "administrator of W. B. Burgess" to his name is merely descriptive of his title, or the capacity in which he sues. If this is not the correct view, and it was the intention of the Legislature that the place where letters of administration were taken out should determine the residence of the administrator, why is it that provision was not made in section 421 for actions by administrators as well as for actions against them? The clear inference from the last section is that it was the purpose of the Legislature to make a distinction between actions by and against administrators, and when it is said that actions against administrators shall be brought in the county where the bond is filed, and nothing is said as to actions by administrators, it excludes the idea that actions instituted by the administrator are necessarily to be brought in the county in which letters are granted.

The case of Rankin v. Allison, 64 N. C. 674, seems to be in accord with this view. In that case the action was brought in Caldwell county in the name of Jesse Rankin, guardian of John S. McRorie, against two defendants, one of whom was a nonresident of the state, and the other a resident of Iredell county. The answer alleged that John S. McRorie was a resident of Iredell county at the commencement of the action. The court treats the answer as an application for removal, and says: "We might regard the answer in this case as such an application: but then it does not allege that Rankin, the plaintiff of record, resides in Iredell county, and consequently, as for such a purpose the court can only look to the parties of record, it could not be allowed." Here there is a direct statement that the court can only look at the parties of record in deciding where the action shall be tried, and that Rankin, although suing as guardian of John S. McRorie, was the plaintiff of record. The same rule is stated in 18 Cyc. p. 912, as follows: "Actions which are transitory and not local in their nature need not be brought by a personal representative in the county where the estate is being administered."

We conclude that the order of removal was erroneous, and it is reversed.

Reversed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(156 N. C. 55)

**NICHOLSON et al. v. EUREKA LUMBER CO.**

(Supreme Court of North Carolina. Sept. 27, 1911.)

**1. EVIDENCE (§ 372\*)—DOCUMENTARY EVIDENCE—ANCIENT WRITINGS—AUTHENTICATION.**

Ancient documents, relevant to the inquiry, purporting to be 30 years old or more, and produced from a proper custody, are admissible in evidence without proof of the signature, and, if offered as a muniment of title, without evidence of possession or occupation under the document; but the presence or absence of occupation may be considered by the jury after their admission, for the presumption as to the authenticity of an ancient document is rebuttable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1613-1627; Dec. Dig. § 372.\*]

**2. EVIDENCE (§ 474\*)—OPINION EVIDENCE—COMPARISON OF HANDWRITING.**

Any witness who, in the ordinary course of business, has seen a person write or received his writing, may give his opinion as to the genuineness of certain writing, and a witness who in the course of his duty had had occasion to note the handwriting in other ancient documents entirely free from suspicion may testify as to the authenticity of the signature to an ancient document in controversy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2010-2213; Dec. Dig. § 474.\*]

**3. TRIAL (§ 307\*)—TAKING PAPERS TO JURY ROOM—HANDWRITING—COMPARISON BY JURY.**

Writings whose authenticity is disputed may not be taken by the jury to their room, and inspected and compared during their deliberations.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 732-737; Dec. Dig. § 307.\*]

Appeal from Superior Court, Beaufort County; J. S. Adams, Judge.

Trespass by P. A. Nicholson and another against the Eureka Lumber Company. There was a judgment for defendant, to which plaintiffs excepted and appealed. Reversed, and new trial ordered.

Nicholson & Daniel, for appellants. Wiley C. Rodman, for appellee.

**HOKE, J.** On the trial it appeared that both parties claimed under Ruel Windley, deceased, who by his last will and testament, bearing date in 1854, made disposition of certain real estate as follows:

"I give and devise to my two grandsons, George C. Respass and John B. Respass, all of my river shore lands, lying on the North side of Pamlico River and known as the William Windley, deceased, lands excepting one hundred acres which I shall lend to Ruel W. Jordan and given to his children, and also except one hundred acres which I shall give to my friend, James Windley, and the rest of the said tract to be equally divided between the said George and John B. Respass.

"Item 2. I give and bequeath to my friend and relative, James Windley, for favors done

me by him, the following tract of land lying near the waters of old Town Creek and beginning at or near the head of Ash Branch at an oak, and from thence south 80 east 17 poles to a corner; thence with William Windley's own line east one hundred and twenty-nine poles to a corner; thence north 15 west 66 poles to a corner stake in the Savannah; thence north 78 west 160 poles to a corner; thence south 10 east 16 poles to said Ash Branch, and then to beginning. Containing one hundred acres more or less, and was patented by William Windley, deceased, to have and to hold to him and his heirs in fee simple forever."

Plaintiff claimed the 100 acres devised in this will to James Windley under a deed from a surviving child and one of the devisees of said James, and defendant claimed under a deed from the said John B. Respass, to whom the said George Respass, codevisee had conveyed his interest, and which said deed purported to convey the land devised to John B. and George Respass, under said will of Ruel Windley, and, on matters relevant to this appeal, the issue as to title was made to depend largely on the correct location of this devise of 100 acres to James Windley, defendant alleging that plaintiff had failed to locate the said land at all, and that any correct location of same, if made, would not include the locus in quo.

[1] On this question of location there was evidence on part of plaintiff tending to fix the beginning corner of the 100 acres as a certain "oak at or near the head of Ash branch" as called for in the devise and subsequent deeds, and that the placing as contended for would result in locating this land so as to include the locus in quo, and, in rebuttal of this testimony, defendant offered, and same was received in evidence over plaintiff's objection, a certificate of survey for a land warrant and grant to Calvin Windley for 200 acres of land in Beaufort county. This certificate bearing date, or purporting to bear date, in 1841, contained a plat of land, with courses and distances, and was signed by Ruel Windley, surveyor and also the chainbearers, was without erasures or interlineations of any kind, and, as we understand the record, was the plat and survey accompanying a grant to Calvin Windley, of same date, for a tract of land in that neighborhood of the quantity stated, and was produced from the proper custody. This plat was introduced because it apparently showed a placing of Ash branch entirely different from that claimed by plaintiff, and tending to show that a correct location of the 100 acres would not cover the locus in quo. Before the same was admitted, John B. Respass, Jr., a witness for defendant, testified as follows: "Q. Do you know Ruel Windley's handwriting? A. I know it in this way: He raised my father, and was very much

devoted to him, and often in looking over his papers, which I have now, my father would show me, and say, 'This is grand-father's signature.' Q. Have you seen a great deal of that writing? A. Yes, sir. Since I have been surveying I have seen quite a lot of it. By family reputation, my great-grandfather was a surveyor, and my father was a surveyor." A small map, marked "A," was handed to witness, and he was asked: "Q. Whose handwriting is this, if you know? A. That is Ruel Windley's from the source of information that I have. By the Court: Q. Do you mean to say that somebody told you that that identical paper was in Ruel Windley's own handwriting? A. Not this one. By Counsel for Defendant: Q. From the writing you have seen purporting to have been written by Ruel Windley is that, or is it not, his handwriting? A. Yes, sir; that is his handwriting."

On these facts and accompanying testimony, we are of opinion that the plat with the certificate was properly received in evidence, being admissible as an ancient document, and also by reason of competent testimony tending to show that the certificate just below the plat and giving the corners of same was signed or subscribed in the handwriting of Ruel Windley, deceased. It is well established that ancient documents—that is, documents relevant to the inquiry and bearing date or purporting to bear date at or before a period of 30 years prior to the time the same are offered in evidence—prove themselves; that is, they are admissible in evidence without the ordinary requirements as to proof of execution or as to handwriting, the recognized limitation being that they should be produced from proper or a natural custody and be free from suspicious circumstances, indicative of fraud, or invalidity (McKelvey on Evidence [2d Ed.] p. 440); these preliminary requirements being for the determination of the court. The principle is stated in Stephen's Digest of the Law of Evidence, as follows: "Where any document purporting to be 30 years old is produced from any custody which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested, and the attestation or execution need not be proved, even if the attesting witness is alive and in court. Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable."

This statement, copied with approval in 2 Elliott on Evidence, § 431, will be found very generally sustained, and applies, except where modified or restricted by statute, not only to deeds, but to wills, leases, letters, records, contracts, maps, certificates, and all other writings which are relevant to the inquiry and may need authentication. 3 Wigmore, § 2145; 2 Elliott, § 1333; Starkie on Evidence, § 521 et seq.; 2 A. & E. p. 322. Where such a document is offered as a muniment of title, it was formerly held that it should be fortified by some evidence of possession or occupation under and consistent with the purport of the instrument, a position referred to as prevailing in *Plummer v. Baskerville*, 36 N. C. 252-269, but the view which now more generally obtains does not seem to make this evidence of cotemporaneous or accompanying occupation a necessary requirement to the introduction of the paper, but its presence or absence is a relevant circumstance for the consideration of the jury after the same has been received in evidence; the presumption as to the authenticity of an ancient document being a rebuttable one. McKelvey on Evidence, p. 441; Wigmore on Evidence, § 2441; Starkie on Evidence, § 524; Wharton, Law of Evidence, 1358, 1359.

[2] Again, as stated, we think the testimony of John B. Respass, concerning the document, would require that the same be received in evidence. While the doctrine of opinion evidence, by what is in strictness termed a "comparison of handwriting," as a rule, is only permitted in this state in the case of expert witnesses, and then in a restricted line of cases, as shown in *Tunstall v. Cobb*, 109 N. C. 316, 14 S. E. 28, and *Yates v. Yates*, 76 N. C. 142, a witness, expert or other, who has acquired knowledge and formed an opinion as to the character of a person's handwriting from having seen such person write, or from having, in the ordinary course of business, seen writings purporting to be his, and which he has acknowledged or upon which he has acted or been charged, as in the case of business correspondence, etc., may give such opinion in evidence when a relevant circumstance. *Pope v. Askew*, 23 N. C. 16, 35 Am. Dec. 729; *Stephen on Evidence*, p. 98; *Abbott's Trial Evidence*, pp. 485, 486. And the position excluding proof of handwriting by comparison is now so far relaxed with us that, although a jury is not allowed to make comparisons for themselves (*Fuller v. Fox*, 101 N. C. 119, 7 S. E. 589, 9 Am. St. Rep. 27), a witness, expert or not, who has been properly allowed to express an opinion as to the handwriting of a given paper, on being shown a writing admitted to be genuine may "show the two papers to the jury, and, by making comparisons between them, explain and point out to the jury the similarity or difference between the two." *Martin v. Knight*, 147 N. C. 564, 61 S. E. 447. And the means of acquiring the requisite knowledge to enable one to form

and express an opinion as to handwriting has in case of ancient documents and of necessity been extended to include a witness who, in the course of his duty, has had full opportunity and frequent occasion to observe and note the handwriting in other ancient documents, entirely free from suspicion, and states that he has thus been enabled to form a satisfactory opinion as to the handwriting of the ancient document in question. 3 Taylor's Evidence, Amer. notes, 1229, 21; Chamberlayne, Best on Evidence, p. 231; Starkie on Evidence, § 521. Writers on evidence usually refer to such testimony as coming only from expert witnesses, but we doubt if an examination of the decisions would justify the statement. The opinions in these cases, so far as examined, seem rather to lay stress on the fact as stated that the witness had charge and custody of numbers of documents, with full opportunity and frequent occasion to examine them, rather than the fact that a witness was in strictness and technically an expert. The Fitzwalter-Peerage Case, 10 C. & F. Rep. p. 193; Cante v. Platt, 2 McCord (S. C.) 260; Swelgart v. Richards, 8 Pa. 436; Jackson v. Brooks, 8 Wend. (N. Y.) 426. In this last case the doctrine is stated as follows: "Where witnesses to ancient writings are dead, and such a period of time has elapsed since the execution of the instruments that no person can be presumed to be living who can testify to the handwriting of the parties or witnesses, evidence by a witness verifying the signatures of the parties and witnesses is admissible, although his knowledge of such genuineness is derived solely from an inspection of other ancient writings having the same signatures, which have been treated and preserved as muniments of title to estates." And, generally, on the question of the admissibility of this evidence, Tuttle v. Rainey, 98 N. C. 513, 4 S. E. 475; Strother v. Lucas, 31 U. S. 763, 8 L. Ed. 573; Hognas v. Carruth, 19 Fla. 84; Floyd v. Tewksbury, 129 Mass. 362.

A proper application of these authorities fully support the ruling of the court in admitting the certificate and plat in question, and, as stated, on both grounds: (1) It was an ancient document, produced from a custody both reasonable and natural, and apparently without any fact or suggestion casting doubt or suspicion upon it. (2) The witness John B. Respass fully qualified himself to give an opinion as to the handwriting of Ruel Windley in testifying that he had had occasion and full opportunity to examine and note other ancient documents having Ruel Windley's signature in care and keeping of his father and himself, the son and grandson of Ruel Windley, and to observe and note his signature as surveyor to numerous papers coming under his inspection in the line of his duty.

[3] While we uphold the action of the court on the question suggested, the plaintiff is entitled to a new trial by reason of another exception duly entered for that the court over plaintiff's objection allowed the jury to take this plat and certificate to their room and inspect the same in their deliberations. This is contrary to our practice, and has been condemned in several decisions of the court. Williams v. Thomas, 78 N. C. 47; Outlaw v. Hurdle, 46 N. C. 150; Watson v. Davis, 52 N. C. 178-181. For this error, as stated, plaintiff is entitled to a new trial, and it is so ordered.

New trial.

(156 N. C. 30)

**BRADDY et ux. v. DAIL et al.**

(Supreme Court of North Carolina. Sept. 20, 1911.)

**1. GIFTS (§ 34\*)—POWER OF OWNER.**

The owner of property may give it with such restrictions as he sees fit, and his intention will be effectuated unless unlawful.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 68-71; Dec. Dig. § 34.\*]

**2. TRUSTS (§ 202\*)—CONSTRUCTION OF TRUST DEED—SALE OF TRUST PROPERTY—APPLICATION OF PROCEEDS.**

A trust deed recited that grantor desired to provide for the support of his daughter, and that she enjoy the income of the realty described for life. He thereby conveyed it to the grantee named, as trustee, for the following purposes: First, to allow the daughter to occupy the premises, rent free, so long as she paid taxes, etc., and, upon her inability to do so, the trustee should rent the property, keep it repaired, insured, etc., and pay any surplus to the daughter; and, second, to convey the land to such persons as the daughter might designate, if in the trustee's judgment a change were desirable, and invest the proceeds in a suitable home for the daughter upon the same terms and conditions theretofore mentioned, and that upon the daughter's death the trust should cease, and the land be in fee simple to the grantor's heirs, if any be living. The daughter is one of six children, all of whom, except herself, are minors and heirs of the grantor, and was 16 years of age when the deed was executed, and is now 21, with an expectancy of 41.5 years, and the value of her life estate in the proceeds of the fair value of the land, \$2,000, is \$1,500. Held that, even if the daughter acquired an equitable life estate under the deed, she is not entitled to have the value of her life estate paid to her absolutely upon the sale of the land by the trustee; but he must reinvest the proceeds upon the same trusts as the original property was held, leaving it to pass to the grantor's heirs upon the daughter's death.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 271, 272; Dec. Dig. § 202.\*]

Appeal from Superior Court, Beaufort County; Allen, Judge.

Action by E. A. Braddy and wife against George I. Dail, trustee, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

The plaintiffs in this action are Rena E. Braddy, who before her marriage was Rena E. Thomason and a daughter of Macon B.

Thomason, and her husband, E. A. Braddy, and the defendants are George I. Dail, trustee, Beulah Thomason, Jasper Thomason, Laurence Thomason, Bonner Thomason, and Louise Thomason, the last five being children of Macon B. Thomason, and under the age of 21 years. Macon B. Thomason was formerly the owner of the land in controversy, and on the 6th day of April, 1906, he executed a deed in trust in the following words:

"North Carolina, Beaufort County.

"This indenture, made and entered into this the 6th day of April, 1906, by and between Macon B. Thomason and wife, Eliza L. Thomason, parties of the first part, and Geo. I. Dail, as trustee, party of the second part, all of the state of North Carolina, county of Beaufort, witnesseth: That whereas, said Macon B. Thomason is desirous of making provision for his daughter, Rena B. Thomason, now of the age of sixteen years, against future contingencies, and for the maintenance and support of the said Rena E. Thomason; and whereas, the said Macon B. Thomason is desirous that the said Rena E. Thomason should enjoy the proceeds, rents, and income of the real estate herein more particularly described during the natural life of the said Rena E. Thomason, free from liabilities or interference of any one whatsoever: Now, therefore, in consideration of the premises and the sum of one dollar to him paid by the party of the second part, the receipt whereof is hereby acknowledged, the said party of the first part has bargained, sold, and conveyed, and by these presents doth bargain, sell, and convey, unto the said party of the second part, as trustee, all that certain lot of land situate in the city of Washington, N. C., bounded and described as follows: [A full description is given.] To have and to hold the above mentioned and described premises, together with the appurtenances, unto the said Geo. I. Dail, trustee, his successors and assigns, in trust, and upon the uses, trusts, and purposes hereinafter mentioned, viz.: First. To allow the Rena E. Thomason to occupy the said premises free of rent so long as she can pay the taxes and assessments and repairs upon said premises. Should she be unable to do so, then Geo. I. Dail, trustee, will take charge of the premises, and rent the property, collect and receive the rents, and out of the same to keep the premises in good order and repair, properly insured, and pay all the taxes, assessments, and charges that may be imposed thereon, and the surplus pay to the said Rena E. Thomason, and take her receipt therefor, which will serve as a proper voucher to the said Geo. I. Dail, trustee. Second. To convey the said land and premises to such persons or person as she, the said Rena E. Thomason, may designate, if in the judgment of Geo. I. Dail, trustee, it is desirable to make a change, and invest the proceeds of such sale in a suitable home for my said daughter, upon the same terms and

conditions as hereinbefore mentioned. And the said Macon B. Thomason hereby declares that upon the decease of the said Rena E. Thomason the said trusts hereby created shall cease and determine, and the land and premises above described shall be in fee simple absolute to the heirs at law of the said Macon B. Thomason, if any should be living. And the said party of the second part doth hereby signify his acceptance of this trust, and does hereby covenant and agree to and with the said party of the first part faithfully to discharge and execute the same according to the true intent and meaning of these presents. In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

"M. B. Thomason. [Seal.]

her  
"Eliza X L. Tomason. [Seal.]"  
mark

The plaintiffs and George I. Dail, trustee, purporting to act under said deed, have sold the land conveyed therein to Junius D. Grimes for \$2,000, which is a full and fair price for the same. The plaintiff, Rena E. Braddy contends that an equitable estate for life in said land was conveyed to her by said deed, and that she is entitled to have the value of the same ascertained and paid over to her, to be used as she sees fit. The defendants deny that the deed to said Grimes is valid, but contend, if it does convey a good title, that the whole fund must be reinvested.

His honor held that the deed of the plaintiffs and said trustee to said Grimes conveyed an estate in fee, and further adjudged: "(2) That the said Geo. I. Dail, trustee, has no power to pay to the plaintiffs the value of the life estate of the said Rena E. Braddy, but is directed to reinvest the said sum of \$2,000, the proceeds of sale to Grimes, in its entirety in another piece of property, such as he may deem proper, the title to be taken upon the identical uses and trusts set out in the deed from Macon B. Thomason and wife to Geo. I. Dail, trustee, recorded in Book 138, page 475, of the Beaufort County Records."

The plaintiffs excepted and appealed.

Ward & Grimes, for appellants. C. H. Harding, for appellee guardian ad litem. Small, McLean & McMullan, for appellee Dail.

ALLEN, J. (after stating the facts as above). It is not clear that the plaintiff Rena E. Braddy is entitled to a life estate in the land in controversy under the deed in trust. No estate, legal or equitable, is in terms conveyed to her, and a construction would be permissible that it was the purpose of the grantor to give her the rents and profits of the land for her support, and no more. This question is not, however, raised by the appeal, and the case of *Cox v. Jernigan*, 154 N. C. 584, 70 S. E. 949, seems to sus-

tain the contention of the plaintiff as to the extent of her interest.

[1] Conceding, therefore, that she acquired an equitable estate for life under the deed, we are of opinion that this does not confer on her the right to have the value of this interest ascertained and delivered to her for her own use. As was said in *Cox v. Williams*, 58 N. C. 154, the owner of property "has the right to give it with such restrictions and upon such terms as he sees proper, and the courts are bound to carry his intentions into effect, unless there be something unlawful and against public policy." We find nothing unlawful or against public policy in the deed, and the language used, as it seems to us, admits of but one construction as to the question in controversy. The land is conveyed to the trustee in fee, under the act of 1879, and the trusts specifically declared. Authority is given to the trustee to convey to such person as the said Rena E. may designate; but this power is limited by the provision that the trustee must first determine that a change is desirable, so that the plaintiff cannot compel a conveyance against his judgment, honestly exercised. The conveyance authorized is evidently one to consummate a sale of the property, as in the same sentence conferring the power the trustee is directed "to invest the proceeds of such sale." The proceeds are to be invested in a suitable home for the plaintiff, to be held "upon the same terms and conditions as hereinbefore mentioned," and upon the death of the plaintiff the trust is to determine, and "the land and premises above described" are to belong to the heirs of the grantor "in fee simple absolute."

[2] If the grantor had the right to dispose of his property as he wished, he could direct that it be sold, and, if sold, that the proceeds be invested on such terms as he thought wise and just. He could give the use of it to the plaintiff during her life, and direct that it be held in its original form or as reinvested until her death, and then that it go to his heirs. The language indicates clearly that this was his intention. He does not say that a part of the land shall go to the heirs, but "the land and premises above described," meaning all of it.

If the construction contended for by the plaintiff should be adopted, a serious injustice might arise. The plaintiff is one of six children, all of whom are heirs of the grantor. At the time the deed was executed, in 1906, she was 16 years of age, and is now 21, and has an expectancy of 41.5 years. The value of her life estate in the proceeds of the sale of the land (\$2,000), based on her expectancy, would be about \$1,500. If this should be ascertained and turned over to her, and she should die within a year, the money would belong to her husband,

and the five minor children, for whom the grantor intended property of the value of \$2,000, would get \$500.

We think the judgment was in accordance with law, and it is in all respects affirmed. Affirmed.

(156 N. C. 103)

### CARSON v. BLOUNT.

(Supreme Court of North Carolina. Sept. 27, 1911.)

#### 1. WITNESSES (§ 255\*)—REFRESHING MEMORY—ACCOUNT BOOKS.

A witness who made the entries in an account book may use the book to corroborate his testimony, and refresh his memory.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 874-890; Dec. Dig. § 255.\*]

#### 2. EVIDENCE (§ 113\*)—COMPETENCY—MARKET VALUE.

Where the market value of cotton at a certain point was in controversy, testimony as to the market value at a point six miles distant was competent, though the witness testifying did not know the value of cotton at the place where the controversy arose.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 259-296; Dec. Dig. § 113.\*]

#### 3. EVIDENCE (§ 217\*)—ADMISSIONS BY PARTIES—RELEVANCY.

Plaintiff contended that defendant purchased his cotton, agreeing to pay him the Norfolk market price at any date plaintiff wished to close it out, and offered the testimony of a witness that defendant told him that he had shipped the plaintiff's cotton and offered to ship the witness' cotton under an arrangement, whereby it might be held in Norfolk, and closed out at any time. Held, that this testimony was relevant and admissible, as tending to raise an inference that defendant had shipped plaintiff's cotton under the same arrangement.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 760; Dec. Dig. § 217.\*]

Appeal from Superior Court, Craven County; Ferguson, Judge.

Action by J. J. Carson against M. O. Blount. From a judgment for defendant, plaintiff appeals. Reversed and remanded in part.

Civil action to recover damages for an alleged breach of contract in the sale of cotton and cotton seed. These issues were submitted:

"(1) Is the defendant indebted to the plaintiff on account of the cotton as alleged; if so, in what amount?" Answer: "No."

"(2) Is the defendant indebted to the plaintiff on account of the cotton seed as alleged; if so, in what amount?" Answer: "No."

From the judgment rendered, plaintiff appealed.

Harry Skinner, Julius Brown, and F. C. Harding, for appellant. F. G. James & Son and Albion Dunn, for appellee.

BROWN, J. The complaint sets out two distinct causes of action: (1) Breach of contract on account of certain cotton sold to

defendant by plaintiff. (2) Breach of contract on account of certain cotton seed sold to defendant by plaintiff.

We will consider the second cause of action first. The plaintiff contends that he delivered 946 bushels of cotton seed to the defendant during the fall of 1909 under agreement that settlement would be made therefor on any day called for by plaintiff at the market price on such day, that he demanded settlement on December 28, 1909, when the market price of seed was 55 cents per bushel, but received therefor only the sum of 45 cents, and brings this action to recover the difference. The defendant admits the purchase of the seed, but denies that he agreed to take the seed on the terms contended by plaintiff. Defendant avers that he agreed to take the seed and pay plaintiff the market price for same as they were delivered, and allow him 50 cents per ton in addition; that from the opening of the market there was a gradual rise in the price of seed during the fall; that plaintiff became dissatisfied with the contract as made, and that on December 8th, in order to settle the controversy, he offered to give and plaintiff accepted 45 cents per bushel for all seed delivered to that time; that this was the market price on this day, and plaintiff was given credit as of that day for said seed.

Upon this cause of action two errors are assigned:

[1] First. In that the court committed error in permitting the defendant to introduce the seed book of defendant, showing the prices paid by defendant for cotton seed during the fall and winter of 1909 and 1910, and permitting the witness Buroughs to testify to same over the objection of plaintiff. This exception cannot be sustained. The entries in the book were made by Buroughs himself, and it was competent to use them to corroborate that witness. This has been frequently decided. *Neill v. Childs*, 32 N. C. 195; *Davenport v. McKee*, 94 N. C. 326; *Greenleaf*, Ev. § 436 et seq. But as the contest was over the price to be paid for the seed, and not over the quantity delivered, we fail to see the materiality of the evidence.

[2] Second. In that the court committed error in permitting defendant's witness Ashburn, manager of Conetoe Oil Mills, over the objection of the plaintiff, to testify to the market price of cotton seed at Conetoe during the course of the fall season of 1909, after the witness had previously stated that he did not know the price of cotton seed at Bethel. It is admitted that Conetoe is on same railway, and only six miles from Bethel. We think the evidence competent to establish the general market price of cotton seed in that section of the country, and to corroborate defendant's contention that it did not exceed 45 cents per bushel on December 8th at Bethel. It is not conclusive evi-

dence of the price at the latter place. We find no error in the trial of the second cause of action.

[3] As to the first cause of action, there is only one assignment of error, viz., in that the court committed error in excluding the following testimony of plaintiff's witness R. D. Whitehurst: "That in the fall of 1909 witness had conversation with defendant about Carson's cotton, in which defendant told witness he had shipped Carson's cotton. Blount said to me: 'You are putting your cotton in the yard and letting it rot. I have got a proposition for you. Instead of letting your cotton lie in the yard and rot, I will take it and ship it, and give you weights and grades, and ship it to Norfolk, you pay storage and freight, and you can close out any day you please at Norfolk prices. I have shipped J. J. Carson.'" The plaintiff contends that the defendant agreed to pay him the Norfolk market price for his cotton on any day plaintiff wished to close it out; that defendant misrepresented the Norfolk price, and settled for 23 bales at 15½ cents per pound, when, in fact, on that day the Norfolk market price was 16¼ cents per pound. The defendant denies the contract as well as the misrepresentation.

The evidence was excluded upon the ground that it was irrelevant, and tended to prove nothing. It is said in 16 Cyc. 939: "A voluntary and certain statement, oral or written, of the existence of any relevant matter of fact, is competent evidence against the party by whom or by whose authority it is made as a fact tending to show the truth of the statement." This is not an attempt to prove that, because A. made a contract with B. for the sale of his cotton on a certain date, he therefore made a similar contract with C. because made on same date and concerning the same subject-matter. *Thompson v. Exum*, 131 N. C. 111, 42 S. E. 543.

The plaintiff contends that in talking to Whitehurst about shipping his cotton it was irrelevant and unnecessary to refer to the shipment of Carson's cotton, unless for the purpose of producing on Whitehurst's mind the impression that the defendant had shipped Carson's cotton on the same terms then offered Whitehurst. We think the inference a legitimate one; and, while the jurors may or may not draw it, the evidence should have been submitted for what it is worth. This conversation with Whitehurst is not exactly substantive evidence, which standing alone would be sufficient to support a verdict, but it is a circumstantial fact from which an inference may be drawn tending to corroborate the plaintiff's version of the contract. As pertinently said by counsel in their brief: "What did Blount mean if not that he had shipped J. J. Carson's cotton on the same terms which he was then offering witness? It might have meant a great deal to the witness that defendant had offered the

same proposition to the plaintiff, or any other man of good judgment, and that it had been accepted; but without this meaning does the statement made under the existing circumstances amount to anything? And, if we in simple manner reason thus, why not the jury?"

We think the court erred in excluding the evidence, for which error we direct a new trial upon the first issue. Let the costs of this court be equally divided.

Partial new trial.

(156 N. C. 78)

**BAILEY v. MATTHEWS et al.**

(Supreme Court of North Carolina. Sept. 27, 1911.)

**1. DISCOVERY (§ 55\*) — APPLICATION — AFFIDAVIT.**

Where plaintiff applied under Revisal 1905, § 865, for an order for the examination of one of the defendants, to ascertain facts necessary to be known to file his complaint for libel, but did not file an affidavit, the application was properly denied, for such an application, being based upon extrinsic facts and not matters of record, should be supported by proof, and its good faith should be attested by oath.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 68-70; Dec. Dig. § 55.\*]

**2. DISCOVERY (§ 61½, New, vol. 7, Key No. Series)—PLACE OF EXAMINATION.**

An examination of a party before trial should be had in the county of his residence, under Revisal 1905, § 866.

Appeal from Superior Court, Nash County; Ward, Judge.

Action by W. S. Bailey against John C. Matthews and others. From an order denying plaintiff's application for an examination of one of the defendants, plaintiff appeals. Affirmed.

E. B. Grantham, for appellant. Bunn & Spruill and Jacob Battle, for appellees.

**WALKER, J.** This action seems to have been brought by the plaintiff against his wife, Mrs. Ella Frances Bailey (née Ella Frances Finch), Susie Nelson Finch, stepdaughter of plaintiff (now Susan N. Hester, wife of Dr. Joseph Hester), and others, to recover damages for a libel committed in conspiring with each other to make, and in making, fraudulent, libelous, and slanderous charges of and concerning the plaintiff, who at the time was postmaster at Spring Hope, N. C., for the purpose of preventing the Post Office Department at Washington, D. C., from issuing a commission to him as postmaster; John C. Matthews, one of the defendants, acting postmaster at Spring Hope, being a rival candidate for the said appointment. We gather this much from the unsworn statement of the plaintiff; no complaint having been filed. The plaintiff appealed to the court below for an order

for the examination of one of the defendants, Mrs. Susie N. Hester, under Revisal 1905, § 865, before the clerk of the superior court of Nash county, on March 9, 1911, in order that he might ascertain facts necessary to be known for the purpose of preparing and filing his complaint. Mrs. Hester objected to the granting of the order, upon the following grounds: (1) The summons was served upon her in Halifax county, she now being a resident of Wake county, and therefore she cannot be compelled, by order of the court, to submit to examination in Nash county, under Revisal, § 866. (2) No complaint has been filed, and no affidavit, showing the nature or probable nature of the cause of action, or other facts entitling the plaintiff to the relief he seeks. (3) If the action is for libel, and as she cannot be compelled to discover any matter or any facts which would incriminate her or tend to do so, and as she claims her constitutional privilege exempting her from examination in such a case, and as any testimony that she could give in this cause would necessarily tend to that result, the plaintiff is not entitled to an order for her examination, under Revisal, § 865.

[1] We are of the opinion that the second ground of objection is a valid one, and that the order of T. A. Sills, clerk of the superior court (affirmed by the judge), was right, though their decision was based, not upon the reason we now give for its correctness, but upon the third of the grounds assigned by the respondent. It is the general rule, and the custom in judicial proceedings, that a motion for an order should be based upon an affidavit stating the facts which entitle the mover to the order for which he asks, and the reason of the thing fully justifies the rule. It is said by the text-writers that, "where a motion is founded upon extrinsic facts, and not solely upon matters apparent upon the face of the record or proceeding, it must, of course, be supported by evidence or proof" (14 Enc. of Pl. & Pr. 147), though, in passing upon this kind of proof, the ordinary rules of evidence are not strictly observed. The form of this proof may vary with the particular nature of the case. Affidavits, depositions or admissions in pleadings may be considered, but the usual form of the proof is an affidavit; that is, the evidence must be under oath. It is again said, in 14 Enc. of Pl. & Pr. at page 158: "Where the right to the relief sought is based upon facts not apparent of record, the existence of such facts must be proved by affidavits or other competent evidence. And conversely, where the motion is grounded solely upon matters apparent upon the face of the record or proceeding, it need not be thus supported." And again: "In practice affidavits are most frequently used to initiate legal proceedings, and to



further the various stages therein, to certify and prove the service of process, or other matters relating to the proceedings in a cause, and to support or oppose motions, in cases where a court determines matters in a summary way, and for various other purposes." 1 Enc. Pl. & Pr. at page 333. Numerous cases are cited in the notes to these passages, sustaining the rule as thus stated. In a proceeding of this kind, it is of the first importance that the application for an order of examination should be under oath, stating facts which will show the nature of the cause of action, so that the relevancy of the testimony may be seen, and the court may otherwise act intelligently in the matter; and it should appear, in some way or upon the facts alleged, that it is material and necessary that the examination should be had, and that the information desired is not already accessible to the applicant. It should also appear that the motion is made honestly and in good faith, and not maliciously; in other words, that it is meritorious. 8 Enc. of Pl. & Pr. p. 41 et seq. Surely a clerk or judge is not bound to grant such an order if it appears to be unnecessary, or if the evidence sought to be elicited is immaterial, or the application appears to be made in bad faith. It is but just and right that the application should be made under the obligation and responsibility of an oath to protect the respondent against false and malicious accusations and vexatious proceedings. The law will not permit a party to spread a dragnet for his adversary in the suit, in order to gather facts upon which he may be sued; nor will it countenance any attempt, under the guise of a fair examination, to harass or oppress his opponent. It is a very rare case that requires the exercise of this function of the court, and the order should not be made without careful consideration and scrutiny. 8 Enc. of Pl. & Pr. 35 et seq. In *Jenkins v. Putnam*, 106 N. Y. 272, 12 N. E. 613, the court said: "Where the judge can see that the examination is sought merely for annoyance or for delay, and that it is not in fact necessary and material, he ought not to be required, and cannot absolutely be required, to make the order." Whether this provision of the statute is mandatory or not, we do not decide. It is sufficient now to hold that the order in this case should not have been made without a proper affidavit to sustain it. In some states, notably New York, the statutes are very stringent in their provisions, and require a detailed affidavit fully setting out the facts upon which the right to the examination is claimed. *Stovers' N. Y. Anno. Code* (6th Ed.) § 872, and notes; 16 Am. Digest (Century Ed.) p. 2058, § 65, where the cases are collected.

[2] It would seem that the party should be examined in the county of his residence.

Revisal, § 866. The other question, as to the privilege of the respondent arising out of the criminatory nature of the testimony, need not be considered at this time, for the purpose of a decision upon it, though it may be proper to refer to the statement of the doctrine in 8 Enc. of Pl. & Pr. 49: "A party cannot be forced to answer questions which tend to criminate him or to subject him to a statutory penalty. It is held in some cases, however, that he cannot on this ground resist an application for an order for his examination, but may avail himself of his privilege at the time the objectionable questions are propounded to him; while in others it is held that, if the only material evidence sought is criminating, the examination will not be allowed; otherwise the party will be left to his privilege at the examination, and this seems to be the general rule." It might be difficult sometimes to determine, in advance of the actual examination, whether or not the testimony proposed to be elicited will tend to criminate the party to be examined, but we express no opinion in regard to the question, as it may not arise again, and if it does we prefer to give it more careful study before reaching a conclusion.

No error.

(156 N. C. 70)

BOSS v. ATLANTIC COAST LINE R. CO.  
et al.

(Supreme Court of North Carolina. Sept. 27, 1911.)

1. CARRIERS (§ 185\*)—FREIGHT—INJURY—PRESUMPTION.

It is presumed that goods were injured while under the control of the delivering carrier, where they were first found in damaged condition in its possession.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 835-850; Dec. Dig. § 185.\*]

2. APPEAL AND ERROR (§ 995\*)—FINDINGS—CONCLUSIVENESS.

The Supreme Court cannot pass on the weight and sufficiency of the evidence, but only whether there was evidence for the jury's consideration.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8907; Dec. Dig. § 995.\*]

3. CARRIERS (§ 185\*)—FREIGHT—ACTIONS FOR DAMAGE—SUFFICIENCY OF EVIDENCE.

In an action against an intermediate and the delivering carrier for damages to household goods in transit, evidence held to sustain a finding that the goods were not injured while in the possession of the delivering carrier.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 185.\*]

Appeal from Superior Court, Pasquotank County; Justice, Judge.

Action by J. C. Boss against the Atlantic Coast Line Railroad Company and another. From a judgment against the defendant named, it appeals. Affirmed.

This is an action to recover damages for injury to household goods while in the

course of transportation. The defendants are the Norfolk Southern Railroad Company and the Atlantic Coast Line Railroad Company.

The goods were shipped from Washington, D. C., on the 20th of October, over the Washington & Southern Railroad Company, which issued the bill of lading, to Richmond, and thence by the Atlantic Coast Line to Plymouth and from Plymouth over the Norfolk Southern Railroad to Elizabeth City. They arrived at Plymouth on the 23d of October, when the Atlantic Coast Line at once notified its connecting line, the Norfolk Southern, of their arrival, but the last company, under the direction of the plaintiff, refused to receive the car until November 12th, when it did receive it and carried it over its line to Elizabeth City, a distance of 52 miles; that it arrived in Elizabeth City on November 13th, on schedule time, in about 24 hours after it left Plymouth. When the car reached Plymouth, and likewise when it was delivered by the Atlantic Coast Line to the Norfolk Southern Railroad for shipment to Elizabeth City, the original seal was unbroken, and the car was received without exception or protest by the Norfolk Southern. The plaintiff notified the Norfolk Southern Company not to accept the car when it arrived at Plymouth, because of an overcharge of freight.

The plaintiff testified that the goods were well packed and crated when delivered to the Washington & Southern Railroad, at Washington, D. C.; that they were received at Elizabeth City about four weeks after shipment over the Washington & Southern Railroad. "The original seals were unbroken, and the Norfolk Southern agent broke the seals and sent a man with me to look in. Found the back end of the car nearly empty. The furniture, etc., was piled in front end broken and defaced, and looked as if it had been in a collision. The car was an Atlantic Coast Line car."

The Norfolk Southern Company introduced the following evidence:

One Nicholson, agent at Plymouth of the Norfolk & Southern, testified that the Atlantic Coast Line Railroad Company brought the car to Plymouth, with charges \$50.40. "I received the car finally by instruction of Mr. Garrett, the Norfolk Southern agent at Elizabeth City, and shipped it immediately (November 12th) to Elizabeth City, where it arrived next day (13th). The car remained in Plymouth 10 or 15 days; came there on the 23d of October, and offered to me the same day, and for lack of credentials I did not take it, because charges were not prepaid or guaranteed. It stayed on the side track. The distance from Plymouth to Elizabeth City is 52 miles. When I forwarded the car to Elizabeth City, the original seals on the car were unbroken."

One Garrett, agent of the Norfolk Southern at Elizabeth City, testified that he told plaintiff the car was at Plymouth when it arrived there, and what charges were against

it. Plaintiff directed him not to receive it. "In about a week (November 12th) I wired, at plaintiff's direction, to receive it, and on the 13th it arrived in Elizabeth City on schedule time. The distance from Elizabeth City to Plymouth is 52 miles. It came in about 24 hours or less."

One Bernard testified that he was flagman on train between Plymouth and Mackey's Ferry, which had plaintiff's furniture in charge; that he saw it landed on the steamer Garrett at Mackey's Ferry, en route to Elizabeth City, but that he stopped there and went no further; the distance being 11 miles from Plymouth on the way to Elizabeth City. He further testified that no accident or injury occurred to this car while he was with it, but he knew nothing about it after it left Mackey's Ferry on its route to Elizabeth City.

The Atlantic Coast Line Company introduced no testimony whatever, and there was no further testimony introduced by the plaintiff or the Norfolk Southern Railroad Company.

His honor, among other things, charged the jury: "That primarily the law raises the presumption that the injury, if you find injury to the plaintiff's property, occurred while in the hands of the Norfolk Southern Railroad Company, and it would devolve on it to rebut the presumption by proof that it did not injure the goods. If, however, you find by the greater weight of the evidence that the Atlantic Coast Line Railroad had the goods and brought the same to Plymouth, and there turned the same over to the Norfolk Southern Railroad; and if you further find as a fact that the Norfolk Southern Railroad Company did not cause the injury and find that the presumption has been rebutted, then and in that case the presumption would arise that the damage occurred while the goods were in the hands of the Atlantic Coast Line, and it would devolve upon the Atlantic Coast Line to rebut that presumption by showing that the injury was not caused by it, being a matter peculiarly within its own knowledge."

The Atlantic Coast Line Company does not challenge the correctness of the legal principle involved in this charge, but does except upon the ground that there is no evidence to rebut the presumption that the Norfolk Southern Company caused the injury. The same question is also presented by a motion to nonsuit, and by a prayer for instruction.

The jury rendered the following verdict: "First. Was the plaintiff's furniture and goods injured by the negligence of the receivers of the Norfolk Southern Railroad Company, as alleged in the complaint? Answer: No. Second. Was the plaintiff's furniture and goods injured by the negligence of the Atlantic Coast Line Railroad Company, as alleged in the complaint? Answer: Yes. Third. What damage, if any, is plaintiff en-

titled to recover? Answer: \$276.25. Delay of goods, \$15.00. Total, \$291.25."

Judgment was entered against the Coast Line Company, and it excepted and appealed.

Pruden & Pruden, for appellant.

ALLEN, J. (after stating the facts as above). [1] The goods were found, in a damaged condition, in the possession of the Norfolk Southern Company, and his honor properly held that this raised the presumption that they were injured by the negligence of that company. *Manufacturing Co. v. Railroad*, 121 N. C. 514, 28 S. E. 474; *Manufacturing Co. v. Railroad*, 128 N. C. 284, 38 S. E. 894; *Meredith v. Railroad*, 137 N. C. 488, 50 S. E. 1. This presumption was sufficient, standing alone, and in the absence of other testimony, to sustain a verdict in favor of the plaintiff. If evidence in rebuttal was offered, it was for the jury to determine its weight.

[2] Recognizing this as a correct statement of the law, the Norfolk Southern Company has introduced evidence which, it contends, rebuts the presumption of negligence on its part. Has it done so? If it has, there is no error in the trial. The evidence is not as full as it ought to have been, and the failure of the Norfolk Southern Company to introduce one of its own employes on the train, to show that there was no accident or collision between Mackey's Ferry and Elizabeth City, ought to have had weight with the jury. We cannot, however, pass on the sufficiency of the evidence. This is for the jury, and our duty ceases when we inquire whether there was evidence for their consideration. We think there was.

The goods were securely packed and crated at Washington city, and when they reached Elizabeth City the back end of the car was nearly empty, and the furniture was piled in the front end, broken and defaced. This would indicate that the injury did not occur in the ordinary operation of the train. No one could afford to ship furniture, nor would railroads be willing to accept it for carriage, if such damage usually occurred in the prudent management of their trains. The plaintiff testified, without objection, that the furniture looked like it had been in a collision.

The Norfolk Southern Company offered evidence that the original seal on the car was unbroken, thus explaining its acceptance of the car without protest, and that it received the car on November 12th, and delivered it at Elizabeth City on November 13th, *on schedule time*. The car was in the possession of the Coast Line Company from ten to fifteen days, and in the possession of the Norfolk Southern one day, and it had been transported by one from Richmond to Plymouth, and by the other 52 miles. The goods

were in a car of the Atlantic Coast Line, and the seals were unbroken.

If there was evidence against the Coast Line Company that the injury was caused by an extraordinary event; that the car was in the possession of this company 10 or 15 days; that it transported the goods from Richmond to Plymouth, a distance of about 150 miles; that the goods were delivered at Washington to the Washington & Southern Railway, and arrived at Plymouth in a Coast Line car; and evidence in favor of the Norfolk Southern Company that it received the car on November 12th and delivered it on November 13th, at Elizabeth City, on schedule time, having possession of the car one day and carrying it 52 miles; and that the original seal was unbroken, was it not permissible to contend that the probabilities were greater that the injury occurred while in possession of the Coast Line Company. There was evidence of these facts, and if, accepting them as true, the probability of injury by the Coast Line Company was more reasonable it was for the jury to say what inference should be drawn from them. *Fitzgerald v. Railroad*, 141 N. C. 584, 54 S. E. 391, 6 L. R. A. (N. S.) 337.

[3] The evidence is not conclusive, and the jury would have been justified in finding that the presumption of negligence raised against the Norfolk Southern had not been rebutted; but we cannot say there was no evidence to support the verdict and judgment.

No error.

(156 N. C. 76)

HARDY et al. v. MITCHELL.

(Supreme Court of North Carolina. Sept. 27, 1911.)

BILLS AND NOTES (§ 539\*)—ACTION ON NOTE—VERDICTS—INCONSISTENT FINDINGS.

In an action on a note, the jury found that it had been indorsed to plaintiffs in due course before maturity, and that the note was not given for a valuable consideration, but the plaintiffs had no notice of such fact when they purchased the note. The judge set aside the finding of the jury as to notice, and submitted such issue to a second jury, who found that plaintiffs had notice of the want of consideration at the time of the purchase. Such finding was not set aside, but judgment was rendered for plaintiffs. *Held* that, under Revisal 1906, § 2201, under the first finding plaintiffs were holders in due course, entitled to judgment, and under the finding of the second jury defendant was entitled to judgment; section 2176 making the absence of consideration a defense to one having notice thereof, and, the findings being inconsistent, the verdict must be treated as void, and the judgment set aside.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 539.\*]

Appeal from Superior Court, Greene County; Peebles, Judge.

Action by R. H. Hardy and another against N. C. Mitchell. Judgment for plaintiffs. Defendant appeals. Reversed and remanded.

J. P. Frizzelle and G. V. Cowper, for appellant. L. V. Morrill and Aycock & Winston, for appellees.

**ALLEN, J.** This action was instituted to recover the amount of a note for \$250, executed by the defendant to J. T. Canady, and indorsed by him to R. G. Canady and by R. G. Canady to the plaintiffs. The plaintiffs allege that they purchased said note before it was due, and that they are the holders thereof in due course. The defendant alleges that the note was without consideration, and that the plaintiffs had notice of this infirmity at the time they bought it. At May term, 1910, of the superior court, the action came on for trial, and the following verdict was rendered by the jury:

"(1) Was the note indorsed to plaintiffs in due course before maturity?" Answer: "Yes."

"(2) Was the note given for a valuable consideration?" Answer: "No."

"(3) If not, did plaintiffs have notice of such want of consideration at the time they purchased the note, if they did purchase the same?" Answer: "No."

"(4) Was the note sued on purchased by fraud and under circumstances against public policy, as set out in the answer?" Answer: "No."

The judge who presided at said term, in the exercise of his discretion, set aside the finding of the jury on the third issue, and ordered that it be tried anew, and declined to set aside the findings on the first, second, and fourth issues. The action again came on for trial at May term, 1911, of said court, and the jury answered the third issue, "Yes." The judge who presided did not set aside the finding of the jury, but rendered judgment in favor of the plaintiff. In this condition of the record, a new trial must be ordered of the issues raised by the pleadings, because of the inconsistent findings of the two juries. The first jury has found, in response to the first issue, that the plaintiffs are the holders of the note in due course, and, if so, they purchased it for value, before it was due and without notice of any infirmity. These are necessary elements to constitute one a holder in due course, as is shown by Revisal 1905, § 2201: "Sec. 2201. What Constitutes a Holder in Due Course. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The first jury also says there was no valuable consid-

eration given for the note, and the second jury finds that the plaintiffs had notice of the want of consideration at the time of their purchase.

Under section 2176 of the Revisal absence of consideration is a defense against any one not a holder in due course. In other words, the plaintiffs were entitled to judgment on the first issue, because it involved the finding that they were purchasers for value, before due and without notice of any infirmity, and the defendant was entitled to judgment on the second and third issues, finding that the note was without consideration, and that the plaintiffs had notice of the infirmity. As was said in *Kornegay v. Kornegay*, 109 N. C. 191, 13 S. E. 772, in reference to inconsistent findings of a jury: "In such a state of uncertainty, the verdict must be treated as void, and a new trial directed to be had."

New trial.

(156 N. C. 83)

#### NEW BERN BANKING & TRUST CO. v. DUFFY et al.

(Supreme Court of North Carolina. Sept. 27, 1911.)

#### 1. CORPORATIONS (§ 514\*)—ACTION ON NOTE—CORPORATE EXISTENCE—ALLEGATION.

Where it appeared from the allegations of the complaint of a corporation on a note transferred to it that the payee indorser dealt with the plaintiff as if it had lawful right to contract with him, impliedly admitting that it was a corporation by indorsing the note to it, the complaint was not demurrable for failure to allege plaintiff's corporate existence.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 514.\*]

#### 2. PLEADING (§ 34\*)—CONSTRUCTION.

Revisal 1905, § 495, providing that the allegations of a pleading shall be liberally construed with a view to substantial justice between the parties, means only that if it can be seen from the general scope of the pleading that the party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it, and will not be construed to mean that a pleading says what it does not.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 66-75; Dec. Dig. § 34.\*]

#### 3. PLEADING (§ 48\*)—COMPLAINT—DEMURRER.

A complaint cannot be overthrown by a demurrer if, in any portion or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered therefrom.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 48.\*]

#### 4. PLEADING (§§ 192, 367\*)—OBJECTIONABLE FEATURES—CORRECTION.

Any formal defect in a pleading which renders it unintelligible may be corrected on motion as authorized by Revisal 1905, § 496, or in cases where it contains a defective statement, as the omission of a necessary allegation which can be cured by amendment, a demurrer will lie.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 408-427, 1173-1193; Dec. Dig. §§ 192, 367.\*]

**5. PLEADING (§ 346\*) — DEMURRER — FRIVOLOUSNESS.**

A demurrer to a complaint was not frivolous so as to entitle plaintiff to judgment on the pleadings where it raised a question fit for consideration or discussion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1060-1064; Dec. Dig. § 346.\*]

Appeal from Superior Court, Craven County; Ferguson, Judge.

Action by the New Bern Banking & Trust Company against R. N. Duffy and others. From an order overruling the demurrer of defendant D. H. Green, he appeals. Affirmed.

Simmons & Ward, for appellant. Moore & Dunn, for appellee.

**WALKER, J.** This is an action upon a note originally made by R. N. Duffy and A. C. Burnett to D. H. Green, and by the latter indorsed for value to the plaintiff. In a former suit we directed that a judgment be entered against R. N. Duffy, and that the cause proceed against D. H. Green, for whom a new summons was issued and executed. A. C. Burnett has never been served with process, and is therefore not a party to the suit, so as to be bound by any judgment therein. The facts are stated in a case by the same title (153 N. C. 62, 68 S. E. 915).

[1] Defendant demurred to the complaint upon the following grounds: (1) That the corporate existence of the plaintiff is not alleged. It appears by allegations of the complaint that defendant D. H. Green dealt with the plaintiff as if it had lawful right to contract with him, and he indorsed the paper to plaintiff, thereby impliedly admitting that it is a corporation, as it purported to be. In *Ryan v. Martin*, 91 N. C. 465, Judge Merriam said: "It is true that it must appear that there was a corporate existence either de jure, or de facto at least. And, if the corporation itself were suing, it would be necessary for it to prove its charter, and an organization in accordance therewith, if these matters were properly put in issue. But if a person entered into a contract with a body purporting to be a corporation, or which claims to hold property purchased and derives title thereto from it, this is prima facie evidence against such person that such corporation was in existence de facto at least at the time of the contract with or purchase from it, and the presumption arises in such case that the existence of the corporation continues at the bringing of the action. Accordingly it has been held in an action against the maker of a promissory note executed to a corporation as payee, in its corporate name, that the production of the note duly indorsed to the plaintiff was sufficient evidence that the corporation was duly organized and competent to transact business. *Williams v. Cheney*, 3 Gray (Mass.) 215, 220. It was

said in that case that the defendants by giving their notes to the corporation in their corporate name as payees admitted their legal existence and capacity to make and enforce the contracts declared on, so far at least as to render proof on that point unnecessary in the opening of the plaintiff's case." So in *Stanly v. Railroad Co.*, 89 N. C. 331, it was held that a railroad company in a suit against it may be designated as a company by its corporate name, without an averment of its corporate capacity, and, if this is disputed, it should be by answer, and not by demurrer. Where the defendant's counsel insisted that a declaration describing the defendant as a company, without showing whether or not it was a corporation, was open to a demurrer, Mr. Justice Maule said: "There is no positive rule that I am aware of which requires such a mode of description as the defendant's counsel insists upon in this case, nor is the description which is given at all out of the usual form. It impliedly amounts to an allegation that the defendant is a corporate body." *Wolfe v. Steamboat Company*, 62 E. C. L. 103.

The note was to become due at a day certain, with a provision that if there was a default in payment of any installment of interest at its maturity, and for 10 days after a demand, plaintiff might sue upon the note before the day fixed for its maturity. Plaintiff alleged that demand had been made for the payment of interest after default, and that the same has not been paid. It is argued by the defendant's counsel that there is neither an allegation that demand was made upon this defendant, nor that, if made, 10 days had expired before this suit was commenced, so as to bring the demand within the terms and requirements of the bond. The record shows that the suit was begun on April 20, 1911, and summons served on April 24, 1911. We may look at the summons to ascertain this fact. *Harrington v. Wadesboro*, 153 N. C. 437, 69 S. E. 399, where a learned discussion of the subject by Justice Hoke will be found, backed by a copious citation of authorities. So that this ground of demurrer is not true in fact. That the demand was made upon this defendant, D. H. Green, sufficiently appears in the complaint. He is now the only defendant, and we cannot assume that the plaintiff made a demand upon some one who did not owe the debt, or upon a person who had not been sued. The allegation by fair construction and intentment means that it was made upon D. H. Green.

[2] We have had occasion to state the rule by which, under the Code, a pleading should be construed so as to ascertain its meaning, and it is to this effect: The uniform rule prevailing in our present system is that, for the purpose of ascertaining the meaning and determining the effect of a pleading, its al-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

legations shall be liberally construed, with a view to substantial justice between the parties. Revisal 1905, § 495. This does not mean that a pleading shall be construed to say what it does not, but that if it can be seen from its general scope that a party has a cause of action or defense, though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it. *Bule v. Brown*, 104 N. C. 335, 10 S. E. 465.

[3] As a corollary of this rule, therefore, it may be said that a complaint cannot be overthrown by a demurrer, unless it be wholly insufficient. If in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however artificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. 4 Enc. Pl. & Pr. p. 74 et seq.; *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566; *McEachin v. Stewart*, 106 N. C. 336, 11 S. E. 274; *Halstead v. Mullen*, 93 N. C. 252; *Purcell v. Railroad Co.*, 108 N. C. 414, 12 S. E. 954, 956, 12 L. R. A. 113; *Holden v. Warren*, 118 N. C. 327, 24 S. E. 770. There should, of course, be at least substantial accuracy in the averments. *Norton v. McDevit*, 122 N. C. 755, 30 S. E. 24.

[4] It is also required that there should be not only certainty, but clearness and conciseness, and a compliance with the other essential rules in the science of pleading, which have been adopted for the purpose of evolving the real issues from the controversy; but if there is any formal defect in this respect, which renders the pleading unintelligible, or the precise nature of the charge or defense be not apparent by reason thereof, it can be corrected on motion (Revisal, § 496), or in some cases where there is a defective statement, as the omission of a necessary allegation which can be cured by amendment, a demurrer will lie. *Bowling v. Burton*, 101 N. C. 176, 7 S. E. 701, 2 L. R. A. 285; *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927; *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 190; *Blackmore v. Winders*, 144 N. C. 212, 36 S. E. 874.

Tested by this rule, the complaint, while not very explicit in its statements, is sufficiently so to resist and repel the attack of a demurrer.

[5] We will not adjudge this demurrer to be frivolous, as the plaintiff alleges it to be, but it narrowly escapes such a condemnation. The able and ingenious argument of the learned counsel has convinced us that

it should not be so characterized, and has thus rescued it from the fate to which we have been asked to consign it. We have held that a pleading will not be adjudged frivolous, irrelevant, or impertinent, so as to entitle the other party to a judgment non obstante placito, unless it is clearly and palpably so. *Hull v. Carter*, 83 N. C. 249. If it raises a question, whether of law or fact, fit for consideration or discussion, we will not adjudge it to be irrelevant, and as not standing in the way of a summary judgment upon the pleadings. *Womble v. Fraps*, 77 N. C. 198. Even under the old system of pleading and practice, the courts hesitated to give judgment upon a pleading unless it plainly raised no real issue of law or fact, for Baron Parke, in *Linwood v. Squire*, 5 Exch. (W. H. & G.) 234, said: "I do not say that the plea is a good plea, as it is not necessary to decide that question, but a plaintiff has no right to sign judgment, if the plea raises a serious question, and one which is fit for discussion." The courts do not encourage the practice of moving for judgment upon an answer or demurrer as being frivolous. *Womble v. Fraps*, supra; *Sweepson v. Harvey*, 66 N. C. 436; *Erwin v. Lowrey*, 64 N. C. 321. The more recent cases upon this subject are collected in the excellent note of Judge Pell in his annotations to section 472 of the Revisal, a reference to which will suffice, without any further remark upon the decisions. We have found it necessary in this case to discuss the question presented by the demurrer, especially as to the demand, in order to decide it.

We find no error in the ruling of the court.  
No error.

(156 N. C. 97)

# CROMARTIE v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Sept. 27, 1911.)

## 1. CONTINUANCE (§ 51\*)—ABSENT WITNESSES—REFUSAL—ABUSE OF DISCRETION.

The trial court granted defendant a continuance because of the absence of a witness, and, after naming the day for trial, gave defendant permission to take the deposition of the witness. Defendant failed to take this deposition, thinking that the witness would be present in person. Two days before the day of trial defendant found that the witness would be too ill to appear, and, upon plaintiff's refusal to consent to the taking of a deposition, took an unsworn statement. *Held*, that a refusal to grant another continuance was not an abuse of discretion, particularly where the unsworn statement was read in evidence.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 69, 79, 85, 87, 88; Dec. Dig. § 51.\*]

## 2. CONTINUANCE (§ 7\*)—APPEAL AND ERROR (§ 966\*)—DISCRETION.

The granting of a motion for continuance rests in the sound discretion of the trial judge,

whose ruling is not reviewable save where there has been an abuse of discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. § 7;\* Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 996.\*]

**3. MASTER AND SERVANT (§§ 278, 281\*)—INJURIES TO SERVANT — EVIDENCE — SUFFICIENCY.**

In an action by an injured brakeman, evidence held to support the findings that he was injured by the negligence of the master, and that, notwithstanding any negligence on his part, the master by the exercise of reasonable care might have avoided the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954-972, 987-996; Dec. Dig. §§ 278, 281.\*]

**4. MASTER AND SERVANT (§ 243\*)—INJURY TO SERVANT—RULES.**

Where the rules for the employees of a railroad company were habitually disregarded, superiors directing inferiors to pursue other methods, a breach of a rule will not bar an employee's right to recover for an injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 763; Dec. Dig. § 243.\*]

**5. MASTER AND SERVANT (§ 137\*)—INJURY TO SERVANT.**

Where an engineer knew that a brakeman was, in the exercise of his duties, riding upon the opposite side of the pilot, it was his duty to keep a careful lookout so as to protect him from possible injuries, and, as he could not see him from the throttle window, his failure to immediately stop the engine upon hearing screams and unusual noises was negligence, for which the master is liable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 137.\*]

Appeal from Superior Court, Pitt County; Ferguson, Judge.

Action by A. A. Cromartie against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action to recover damages for personal injury.

These issues were submitted:

"(1) Was plaintiff injured by the negligence of defendant company as alleged?" Answer: "Yes."

"(2) Did the plaintiff by his own negligence contribute to his injury?" Answer: "No."

"(3) Notwithstanding plaintiff's negligence, could the defendant company by the exercise of reasonable care have avoided said injury?" Answer: "Yes."

"(4) What damage, if any, is plaintiff entitled to recover?" Answer: "\$6,300."

From the judgment the defendant appealed.

Harry Skinner, for appellant. Ward & Grimes and Julius Brown, for appellee.

**BROWN, J.** The defendant excepts to the refusal of the court to continue the case on account of the absence of two of the defendant's witnesses, claiming that the refusal in this instance amounts to a gross abuse of discretion.

[1] The facts stated in the record acquit his honor of any abuse of the discretion vested in him. They are as follows: On May 1, 1911, when this case was called for trial, defendant stated that it could not go to trial. The reason assigned was that at the former term this case was continued by consent, owing to the fact that a witness under subpoena for the defendant company (W. D. Medley, engineer) was then sick. The court, after hearing affidavits and telegrams connected with Engineer Medley's condition, stated that it would continue the case, but that it would fix Monday, May 1st, peremptorily for the case to be called for trial and in the meantime gave permission that depositions necessary should be taken. On the day before the day appointed for taking the deposition, attorney for defendant received telegrams that Medley was then up and out, and that his physicians stated that he would be able to attend court on Monday, May 1st. Under these conditions and circumstances, with the consent of plaintiff's counsel, the taking of the deposition was called off. On Saturday, the 29th of April, attorney for defendant received telegrams saying that Medley had had a relapse, and would not be able to attend court at Greenville on May 1st. On receipt of these telegrams, counsel for defendant informed counsel for plaintiff of their contents, and notified them that, although it was irregular, they would take the deposition of W. D. Medley, engineer, on the night of the 29th of April, at Rocky Mount, unless they would agree to continue the case. Counsel for plaintiff refused either to continue the case or to take the deposition. Therefore counsel for defendant notified counsel for plaintiff that he would take a statement from Engineer Medley on Saturday night, the 29th of April, and would use it as a basis for continuance on the calling of the case on May 1st; and, on this being refused, would ask that the statements contained therein be admitted in evidence on affidavit. When the case was called on Monday, May 1st, these statements were made in open court, and not disputed. The court held, that it would not continue the case as defendant should have taken the deposition in regular order, but would permit the written statement made by Medley to be read to the jury as the testimony of Medley as if he were present. In this there is nothing indicating any abuse of discretion. The defendant had opportunity to take the depositions, but failed to do so. Nevertheless Medley's ex parte statement was read to the jury, and is set out in the record. We think his honor was very liberal in his treatment of the defendant under the circumstances.

[2] It is well settled that a motion for continuance is addressed to the sound discre-

tion of the presiding judge. The exercise of such discretion is not reviewable, except in a case where it is grossly abused. *Lanier v. Insurance Co.*, 142 N. C. 15, 54 S. E. 786.

[3] A motion to nonsuit was made, overruled, and exception duly taken, and is the first assignment of error discussed at length in the brief of the learned counsel for defendant. The plaintiff's evidence tended to prove that plaintiff was a brakeman on defendant's train. On April 5, 1909, he was on duty on a freight running from Rocky Mount to Florence. His duties were opening and closing switches, and shunting off cars. The train on this day went into the yards at Florence about 5:40 o'clock p. m. These yards contained many switches. As the train approached the yards, plaintiff got upon the pilot to open the main line switch, and rode on it into the yards. There were four or five switches to open and close. After throwing a switch, the train continued to run on. The next switch, 50 or 100 yards away, was on the opposite side of the train to that of the one last thrown. Plaintiff crossed over the pilot in front to get over to the other side to throw the switch. He got safely over, and was standing in the foothold made for the purpose of standing in it, on the front and bottom of the pilot, nine inches wide and four or five inches high, holding by his hands to a rod of iron, which crosses the pilot at the top, his back to the front, and looking toward the cab windows of the engineman and fireman, to give signals by hand waving. While so standing, the pilot plowed through a pile of cinders or something piled on the track. The pilot is V-shape. The substance on the track knocked plaintiff's foot off the foothold upon the track between the rails. As he fell, plaintiff threw his weight upon the iron rod. This gave way, plaintiff slipping by his weight towards the side of the pilot five or six inches. Plaintiff held on to the lift lever, his heel on ground between rails. The beam of the pilot pressing on his instep pushed plaintiff's heel across the ties, and on the track backwards. Plaintiff testifies that he held firmly to lift lever unable to extricate his foot dragging on rail; that all the time he was screaming for help as loud as possible, and looking at fireman's window; that the fireman was not in his window, and the engineer was at the throttle. Plaintiff testifies that he knew there was a switch and frog just ahead, and that it would hold his foot, break his hold, and pull him backwards before the moving train. He held on for some 40 yards, and then turned loose and fell, and the wheels crushed his foot and ankle. Plaintiff testifies that at speed engine was going it could have been stopped "almost instantly." Plaintiff had been riding on the pilot in this way to throw switches during his entire employment, nearly three years. The trainmasters, conductors, and

engineers had known of his riding there, and had directed him to do it. The conductor of that particular train had ridden by his side on same pilot going into the same yards. The engineer, Medley, testifies that he knew that plaintiff was on the pilot for the purpose of changing switches, and, further, that he heard the hollowing, but thought it was a woman laughing, but he did not stop his engine. We will not discuss the many assignments of error presented in the record, and discussed in the brief.

In our view there is sufficient evidence to support the findings of the jury upon the first and third issues, which renders it unnecessary to consider the defense of contributory negligence so earnestly discussed by counsel.

[4] The evidence shows that it was a very common custom for brakemen to ride on the pilots of engines in order more expeditiously to change switches in the defendant's yards. In this case the evidence is abundant that plaintiff had done so constantly for years with the knowledge and by direction of his superiors. But, assuming for argument's sake that he had violated a rule of the company, that does not necessarily bar recovery. *Thomas v. Railroad*, 129 N. C. 392, 40 S. E. 201; *Biles v. Railroad*, 139 N. C. 528, 52 S. E. 129. The plaintiff was actually on the pilot with the knowledge of the engineer and conductor for the purpose of opening switches.

[5] Under such conditions, it was the peculiar duty of the engineer to keep a careful lookout for the brakeman so as to protect him from injury if possible. He knew the brakeman was on the opposite side of pilot, and he could not see him from the window at the throttle. He heard the hollowing or screaming of plaintiff, but thought it was a "woman laughing." There is no evidence that there was a woman anywhere in the neighborhood. Knowing plaintiff's dangerous position and hearing the unusual and extraordinary sounds in front of his engine, it was the plain duty of the engineer to resolve all doubts in favor of human life and stop his engine at once. The engineer says he was running  $3\frac{1}{2}$  miles per hour. There is evidence that he could have stopped almost instantly; that plaintiff was dragged 40 yards, "screaming at top of his voice all the time." This evidence is scarcely controverted, and fully justifies the conclusion that the injury was occasioned by the negligence of defendant's servant, and that such negligence was the immediate or proximate cause of plaintiff's injury.

This view of the case renders it unnecessary to discuss other assignments of error of the defendant or other phases of the evidence of negligence presented by plaintiff's counsel. The motion for new trial on account of newly discovered evidence is denied.

No error.



(112 Va. 547)

**HARDIN v. CITY OF RADFORD.**

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

**1. LICENSES (§ 6\*)—POWERS—MUNICIPALITIES—SALE OF CIDER.**

Under Radford City Charter (Laws 1910, c. 192) § 54, providing that the council may raise taxes annually on all subjects taxable by the state, and section 57 authorizing the council to levy a tax on licenses to agents of insurance companies and others and upon any other business, whether a license may be required by the state or not, the city may impose a license tax upon one in the business of selling cider, for the first section gives general powers of taxation upon all businesses not prohibited, and that the enumeration in the second section did not except that business.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.\*]

**2. STATUTES (§ 95\*)—SPECIAL LEGISLATION—LICENSES.**

Radford City Charter (Laws 1910, c. 192) § 57, providing that the city council may levy a tax upon licenses to agents of insurance companies, to auctioneers, and others and any other business, whether a license may be required therefor by the state or not, is not a violation of Const. § 117, inhibiting special legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 105, 106; Dec. Dig. § 95.\*]

**3. CONSTITUTIONAL LAW (§ 70\*)—PROVINCE OF LEGISLATURE—TAXATION—REASONABLENESS.**

License taxes upon occupations are within the province of the Legislature, and their reasonableness cannot be determined by the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.\*]

**4. MUNICIPAL CORPORATIONS (§ 592\*)—CONFLICTING REGULATIONS—SALE OF CIDER.**

Act March 15, 1910 (Acts 1910, c. 190) § 14, which is part of an act defining and regulating the sale and manufacture of intoxicating liquors, and permitting the sale of pure apple cider, in no way prohibits cities and towns from imposing license taxes upon persons in the business of selling cider.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.\*]

**5. LICENSES (§ 19\*)—SALE OF CIDER—EXEMPTIONS.**

Code 1904, § 1042a, prohibits any city or town from imposing any tax or penalty upon any person selling his own farm and domestic products within the limits of such city and outside of the regular market houses. Defendant was in the business of selling cider, which was not made from apples growing on his land, but was the product of an incorporated fruit farm. *Held*, that the exemption of the statute did not extend to case of defendant, and a license tax might be lawfully imposed upon him.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 43-54; Dec. Dig. § 19.\*]

**6. LICENSES (§ 40\*)—FAILURE TO PROCURE—LIABILITY OF AGENT.**

Where a license is required, one transacting a business without it cannot escape personal liability by showing that he acted merely as agent for the owner of the business.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 79-83; Dec. Dig. § 40.\*]

Error to Corporation Court of Radford.

Action by the City of Radford against H. T. Hardin. There was a judgment for the

city imposing a fine upon defendant for conducting a business without a license, and defendant brings error. *Affirmed*.

Woods & McNulty, for plaintiff in error.  
H. C. Tyler, for defendant in error.

**HARRISON, J.** The plaintiff in error seeks to set aside a judgment imposing upon him a fine of \$10 for conducting the business of selling cider without a license, in violation of an ordinance of the city of Radford.

[1] The contention that the city of Radford has no power to levy a tax upon the business of selling cider, and that, if it has, the tax imposed of \$50 is unreasonable, cannot be sustained. The language of the charter (Acts 1910, p. 318, § 54) with respect to the powers of taxation thereby conferred upon the city is substantially the same as that found in the charters of other cities of the commonwealth, and has been repeatedly held to confer upon the city council general powers of taxation, including all persons and subjects of taxation, except only as they may be limited by the laws of the state or of the United States. The business of selling cider is not exempt from taxation because it is not mentioned among the subjects of taxation enumerated in section 57 of the charter. It is clear that the Legislature did not undertake to enumerate all the subjects and classes upon which a license tax might be imposed. On the contrary, it followed the few subjects enumerated with the broad language, "and any other business, whether a license may be required therefor by the state or not," thereby plainly indicating that there were other pursuits not named that might be licensed. *N. N. & O. P. Ry. & C. Co. v. City of Newport News*, 100 Va. 157, 40 S. E. 645.

[2] There is no merit in the contention that section 57 of the charter is void because it is in violation of section 117 of the Constitution (Code 1904, p. ccxxxviii), inhibiting special legislation.

[3] As to the contention that the tax of \$50 imposed upon the business of selling cider is unreasonable, it is enough to say that the power of taxation rests with the legislative, and not with the judicial, department of the government, and its province cannot be invaded by the courts. *Woodall v. City of Lynchburg*, 100 Va. 318, 40 S. E. 915.

[4] It is further contended that section 14 of an act approved March 12, 1908 (Acts 1908, c. 189), as amended by an act approved March 15, 1910 (Acts 1910, p. 289), permits the sale of cider which is the pure juice of the apple.

This is an act defining and regulating the sale and manufacture of intoxicating liquors and malt beverages and imposing license taxes thereon. In what way it prohibits the cities and towns of the commonwealth from imposing a license tax upon persons engaged in the regular business of selling cider, such

as the plaintiff in error is shown to be conducting, has not been pointed out, and we are unable to see that the statute invoked in any way bears upon or affects the issue involved in this case.

[5] In resisting the fine imposed, the chief reliance of the plaintiff in error seems to rest upon the contention that, under section 1042a of the Code of 1904, the business of selling cider within the limits of a city is exempt from taxation, because it is a farm or domestic product.

The record shows that during the month of May, 1910, the plaintiff in error was occupying a regular place of business upon the principal business street of Radford, conducting daily without a license the business of selling cider, which was not made from apples grown on his own land, but was the product of apples grown or bought by the Rose Cliff Fruit Farm, Incorporated, at Waynesboro, Va.

Section 1042a of the Code has no application to this case. That section of the statute law, as its language clearly shows, was intended to prohibit the several cities and towns of the commonwealth from imposing and collecting any tax, fine, or other penalty upon and from persons selling farm and domestic products of their own production within the limits of such town or city. In other words, persons are thereby permitted to bring their own farm and domestic products to the towns and cities and sell the same upon the streets and outside of the regular market houses and sheds without paying a curbage license tax for the privilege. The plaintiff in error does not claim to own a foot of land or to produce himself an article of farm or domestic production. On the contrary, he admits that he is conducting the business of selling cider made by the Rose Cliff Fruit Farm of Waynesboro, Va. If the interpretation sought to be placed upon section 1042a by the plaintiff in error were possible, many businesses not contemplated by the statute could be regularly conducted in the towns and cities without paying a tax for the privilege.

[6] The plaintiff in error further contends that the fine was improperly imposed upon him because he was conducting the business, not for himself, but as agent of the Rose Cliff Fruit Farm, Incorporated.

The plaintiff in error cannot escape liability by showing that he was acting as agent for the Rose Cliff Fruit Farm, Incorporated. He was personally conducting a regular place of business without the required license, and for this he was fined. The city had no means of knowing that he was acting for the Rose Cliff Fruit Farm, a wholesale manufacturer of cider at Waynesboro, Va.

A person who transacts business without a license, where a license is required, is not relieved from the consequences by showing

that he acted as agent for another. *O'Donnell v. Commonwealth*, 108 Va. 882, 62 S. E. 373; 1 Am. & Eng. Enc. of L. p. 1133, note, and cases cited.

There is no error in the judgment complained of, and it is affirmed.

Affirmed.

(112 Va. 527)

#### ADAMS EXPRESS CO. v. GREEN.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

#### 1. CARRIERS (§ 158\*)—EXPRESS COMPANY—LIMITATION OF LIABILITY—STATUTES.

Under Code 1904, § 1294c, subsec. 24, declaring that any carrier issuing its receipt shall be liable for loss or damage from its own negligence or the negligence of any connecting carrier, and that no receipt shall exempt it from the liability of a common carrier, the provision of an express company's receipt limiting its liability to a certain sum, unless a greater value was declared by the shipper, would furnish no defense to the shipper's action to recover the value of goods lost or injured.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 708, 709; Dec. Dig. § 158.\*]

#### 2. CARRIERS (§ 148\*)—LIMITATION OF LIABILITY—WHAT LAW GOVERNS.

Where the limitation of liability in the receipt of a common carrier is not contrary to a fixed public policy, the general rule in cases involving a conflict of laws in respect to contracts for carriage is that the carrier's liability is governed by the *lex loci contractus*, and not by the *lex fori*.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 650, 686; Dec. Dig. § 148.\*]

#### 3. CARRIERS (§ 148\*)—LIMITATION OF LIABILITY—WHAT LAW GOVERNS—PUBLIC POLICY.

The provision of an express company's receipt, issued in the state of New York, on a shipment of goods to this state, that, in consideration of the rate charged, which was based upon a value not exceeding \$50, unless a greater value was declared, the shipper agreed that the value of the goods was not more than that sum, and that the company would not be liable in any event for more than that sum, though valid in New York, is contrary to the public policy of this state, as declared by Code 1904, § 1294c, subsec. 24, which makes a common carrier liable for any loss or injury to goods caused by its neglect or that of a connecting carrier, and provides that no receipt shall exempt any common carrier from the liability which would exist in the absence of contract, and hence furnishes no defense to an action in this state to recover the full value of the goods upon loss or injury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 650, 686; Dec. Dig. § 148.\*]

#### 4. CARRIERS (§ 110\*)—LOSS OR INJURY TO GOODS—SHIPPER'S MISREPRESENTATION OF VALUE—DEFENSE.

Where a shipper misrepresents the character of a package for shipment, or misleads the carrier as to its value, he can, in case of loss, recover only its apparent value according to the representations made; and this is especially true where the representation was made in order to obtain a lower rate.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 497-500, 503, 504; Dec. Dig. § 110.\*]

**5. CARRIERS (§ 110\*)—LOSS OR INJURY TO GOODS—DEFENSES—CONTRACTS IN VIOLATION OF INTERSTATE COMMERCE ACT.**

While the interstate commerce act (Act Feb. 4, 1887, c. 104, § 10, par. 3, 24 Stat. 382, as added by Act March 2, 1889, c. 382, § 2, 25 Stat. 858 [U. S. Comp. St. 1901, p. 3160]) prohibits a shipper from obtaining the transportation of property at less than the regular rates then established and in force, by fraudulent representations as to value, and makes such fraud a misdemeanor and imposes a penalty therefor, it does not prevent the shipper, on loss of the goods, from recovering their apparent value according to the fraudulent representations made, since, as the carrier's charges were based on that value, it is fair and just that it should be held liable for their loss upon the same basis of value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500, 503, 504; Dec. Dig. § 110.\*]

**6. CARRIERS (§ 110\*)—KNOWLEDGE OR CONCEALMENT BY SHIPPER—NEGLECT TO STATE VALUE—DEFENSE.**

That an express company accorded shipments of the value of \$50 and over a higher degree of care than shipments under that value, that, had it known the value of the shipment involved, it would have accorded it the unusual and extraordinary care that shipments of its value were accorded, that the shipper had knowledge that valuable shipments were handled with more care than shipments of ordinary value, and that the contract prepared by the company had a blank space containing the word "value," as a request to the shipper to value the shipment, and that by his failure to do so it was not informed of its value and was deprived of the opportunity of giving the shipment unusual care, do not amount to a case of fraudulent representation or concealment of the value of the shipment, and afford no defense to an action to recover its full value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500, 503, 504; Dec. Dig. § 110.\*]

Appeal from Law and Chancery Court of City of Roanoke.

Action by Mrs. K. W. Green against the Adams Express Company. Judgment for plaintiff, and the defendant appeals. Reversed and remanded.

Woods, Jackson & Smith and Cox & Cocke, for plaintiff in error. Moomaw & Moomaw and D. Saylor Good, for defendant in error.

**BUCHANAN, J.** This action was brought by the defendant in error to recover damages from the plaintiff in error for the loss of a package of jewelry, delivered to the latter in the state of New York, to be carried to the former at Roanoke, in the state of Virginia. The express company filed the plea of not guilty and offered five special pleas, which were objected to by the plaintiff and rejected by the court. The plea of the general issue was afterwards withdrawn, and upon proof of the value of the package of jewelry lost there was a judgment against the express company for \$412.70. To that judgment this writ of error was awarded.

The ground of defense relied on in rejected special pleas Nos. 1 and 2 was that by the contract for shipment entered into when the

package was received it was provided that, "In consideration of the rate charged for said property, which is regulated by the value thereof and is based upon the valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars unless a greater value is stated herein, and that the company shall not be liable in any event for more than fifty dollars if no value is stated herein," and that such a contract limiting the liability of the express company, being valid in the state of New York where it was made, is valid in this state, and that since the value of the package was not stated in the contract there could be no greater recovery than \$50, notwithstanding subsection 24 of section 1294c, of Pollard's Code.

That subsection contains the following provision: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues its receipt or bills of lading in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss or damage or injury to such property caused by its negligence or the negligence of any common carrier, railroad or transportation company operating within any territory or state of the United States to which such property may be delivered, or over whose lines such property may pass; and the fact of loss or damage in such case shall itself be prima facie evidence of negligence, and the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover in a proper action the amount of any loss, damage, or injury it may be required to pay to the owner of such property from the common carrier, railroad or transportation company aforesaid through whose negligence the loss, damage, or injury may be sustained. No contract, receipt, rule, or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into."

[1] If the contract for shipment had been entered into in this state, there can be no question that under the decisions of the court in *Chesapeake & Ohio Ry. Co. v. Beasley, Couch & Co.*, 104 Va. 788, 52 S. E. 566, 8 L. R. A. (N. S.) 183, *Same v. Pew*, 109 Va. 238, 64 S. E. 35, and *Southern Ex. Co. v. Keeler*, 109 Va. 459, 64 S. E. 38, the provision limiting the liability of the express company would have furnished no defense to the right of the plaintiff to recover the full value of the property lost. The question, therefore, which we are called upon to determine is whether the law of the state of New York or the law of this state should govern in de-

termining the liability of the express company.

[2] The general rule seems to be that in cases involving a conflict of laws in respect to contracts of affreightment, the carrier's liability is governed by the *lex loci contractus*, and not by the *lex fori*. *Minor's Conflict of Laws*, § 169; 1 *Hutchinson on Carriers* (3d Ed.) §§ 212 and 206; 6 *Cyc.* 411, 412, and cases cited. But a different rule prevails in the Supreme Court of the United States and in some of the state courts, where the limitation in the bill of lading is contrary to the fixed public policy of the United States or of the particular state. 1 *Hutchinson on Carriers*, § 214.

In the recent case of *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190, the contention was in effect, as stated by Mr. Justice White (now Chief Justice), that, "where a contract limiting the liability of a carrier against its own negligence is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or by virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even though to do so requires the violation of the public policy of the United States." In replying to that contention, the learned Justice said: "To state the proposition is to answer it. It is true as a general rule that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. \* \* \* Nor is the suggestion that because there is no statute expressly prohibiting such contracts, and it is assumed no offense against morality is committed in making them, therefore they should be enforced despite the settled rule of public policy to the contrary. The existence of the rule of public policy, and not the ultimate causes upon which it may depend, is the criterion."

[3] While the precise question involved in the case under consideration has never been passed upon by this court, the conclusion was reached, in the case of *National Car Co. v. Louisville & Nashville R. Co.*, 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010, that a contract with a common carrier, made in another state, valid there, but to be partly performed in this state, would not be enforced by its courts when in violation of the public policy of this state, as shown by its statutes. In that case the contract whose validity was involved was made in the state of Kentucky, by which the common carrier gave to one person the exclusive right to place advertisements on its box cars; a part of its line of road being in this state. That contract, whether valid or invalid in the state of Kentucky, where made, it was held, would not be

enforced in the courts of this state, because it gave to one person an undue and unreasonable preference and advantage over others, in violation of the public policy of this state, as shown by subsection 3, § 1294c, Va. Code 1904.

The principle involved in that case and the one under consideration seem to be substantially the same. Both were contracts made in another state, and valid, or conceded to be valid, where made. The provisions of both were to be executed or performed in part in this state. The provisions in each were in violation of the public policy of this state, as shown by its statutes.

The decisions in the *Chesapeake & Ohio Ry. Co. v. Beasley, Couch, etc.*, *supra*, and the cases which follow it, are based upon the view that a contract with a common carrier, limiting its liability to a sum less than the actual value of the article shipped, in consideration of a reduced rate, was in effect exempting the carrier, *pro tanto*, from its own negligence or misconduct. It is clearly as much against the fixed policy of this state to permit a common carrier to exempt itself from liability for its own negligence, as it is to allow it to give one person an undue and unreasonable preference and advantage over others.

The court is of opinion that the trial court properly rejected special pleas numbered 1 and 2.

Pleas numbered 3 and 4 aver a state of facts which, if true, show that the consignors of the package of jewelry knew that the value of the goods shipped regulated the rate of charges for carriage, and that they fraudulently, by their acts and conduct, represented that the package of jewelry delivered to the defendant company for shipment did not exceed the value of \$50, and thereby obtained a lower rate of charge, when in fact they knew that the jewelry was worth \$412.50, the amount now sought to be recovered as damages for its loss.

Although the courts of this state will not enforce a contract like that relied on in special pleas numbered 1 and 2, because it is in violation of the public policy of the state as declared by statute, yet, if the shipper through fraudulent representations, verbal or otherwise, conceals the true value of the article shipped, there is no reason why he should not, as in other cases, suffer the consequences of his own fraud.

[4] It seems to be established in England and in this country by the weight of authority, and by the better reason, that where the shipper misrepresents the character of a package for shipment, or misleads the carrier as to its value, he can in case of loss only recover its apparent value according to the representations made; and especially is this true where the representation was made in order to obtain a lower rate of charges. See 1 *Hutchinson on Carriers*, §§ 328-332; 6 *Cyc.* 380; 5 *Am. & Eng. Ency. L.* (2d Ed.) 345;

note to *Bottum v. Charleston, etc., Ry. Co.*, 5 Am. & Eng. Ann. Cas. 118, 120-122, where a large number of cases, English and American, are cited.

Such a rule is fair and just to both parties. It would be not only unreasonable, but wrong, for a shipper by his fraudulent representations to have his goods carried for a compensation based upon a valuation much less than their actual value, and then in case of loss to recover their full value from the carrier. To so hold would permit the shipper to take advantage of his own wrong.

[5] The trial court, we think, erred in rejecting special plea numbered 4, but properly rejected special plea numbered 3, because that plea denied the plaintiff's right to recover anything. While paragraph 3, § 10, of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 382, as added by Act March 2, 1889, c. 382, § 2, 25 Stat. 858, 3 Fed. St. Ann. 835 [U. S. Comp. St. 1901, p. 3160]), relied on in that plea, prohibits a shipper from obtaining the transportation of property at less than the regular rates then established and in force by fraudulent representations as to the value, and makes such fraud a misdemeanor and imposes a penalty therefor, it ought not, we think, to prevent the shipper from recovering, if the goods are lost, their apparent value according to the fraudulent representations made. The carrier's charges were based upon that value, and, if the goods were lost by a failure of duty on its part, it is reasonable and just that it should be held liable for their loss upon the same basis of value.

[6] Special plea No. 5, as construed by the defendant company in its petition for this writ of error, sets up in substance the following facts:

"(1) That the express company accorded shipments of the value of fifty dollars and over a higher degree of care than was accorded shipments of the value of under fifty dollars; that it accorded shipments of the value of fifty dollars and over unusual and extraordinary care, whereas it accorded shipments under the value of fifty dollars due care only.

"(2) That, had the carrier known the value of the shipment in question, it would have accorded it the unusual and extraordinary care that shipments of its value are accorded, and it would have been handled in a very different manner from the average run of shipments.

"(3) That, by reason of the shipper's failure to state the value in the contract prepared by the shipper, the carrier was not informed as to the nature and value of the shipment, and was deprived of the opportunity of giving it the unusual and extraordinary care that it would have given.

"(4) That the shipper had been in the hab-

it of filling out the shipping contracts himself, and, being an extensive shipper over the express company, had knowledge of the fact that valuable shipments were handled with more care than shipments of ordinary value. That, in addition to this, the said shipping contract referred to contained in it a blank space above which was written the word 'value.' That this blank space left for the value was not only a request on the part of the defendant to the shipper to insert the value, in order that it might charge a rate commensurate with the risk that it was taking, but was a request for information, in order that it might give the package the care that a shipment of its value would have been given. That, therefore, no recovery over and above fifty dollars should be allowed, for the reason that the carrier was deprived of the opportunity of giving the shipment the care that a package of greater value than fifty dollars would have been given."

The facts averred do not, in our opinion, make out a case of fraudulent representation or concealment of the value of the goods on the part of the shipper, or a refusal on his part to give their value when requested. Mere knowledge on the part of the shipper of the different degrees of care which the carrier is in the habit of exercising according to the value of the goods intrusted to it for transportation cannot change the degree of care imposed upon it by law, or place upon the shipper any higher duty than if he was ignorant of such habit or custom. It would be a dangerous doctrine to hold that the degree of care required of a common carrier was to be measured by the value of the goods shipped. We do not think that such a rule has been or ought to be established.

The court is of opinion that the trial court erred in rejecting special plea No. 4, and for that error its judgment must be reversed, and the cause remanded for further proceedings to be had not in conflict with the views expressed in this opinion.

Reversed.

(112 Va. 500)

HALL v. GRAHAM, Sheriff.

(Supreme Court of Appeals of Virginia.  
Sept. 14, 1911.)

1. VENDOR AND PURCHASER (§ 65\*)—CONSTRUCTION OF CONTRACT—PRESUMPTION.

Where a contract referred to the number of acres in a tract of land sold, the sale is presumed to be by the acre, and this presumption can be overcome only by clear proof.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 93-96; Dec. Dig. § 65.\*]

2. VENDOR AND PURCHASER (§ 31\*)—CONSTRUCTION OF CONTRACT—MUTUAL MISTAKE.

Where land surveyed by the county surveyor was sold as containing the number of

acres estimated by him, though in reality it contained a less number, neither the vendor nor the purchaser were at fault in failing to discover the deficiency, but contracted under a mutual mistake of facts.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 35-37; Dec. Dig. § 31.\*]

**3. VENDOR AND PURCHASER (§ 347\*) — MISTAKE AS TO QUANTITY—LACHES.**

Where by mutual mistake land was, in 1884, purchased and sold as containing a greater number of acres than it really did, and not until 1908 did the purchaser discover the shortage, his right to recover for the deficiency was not barred by laches.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 347.\*]

**4. LIMITATION OF ACTIONS (§ 96\*)—TIME OF RUNNING OF STATUTE.**

Where, by mutual mistake, land was purchased and sold as containing a greater number of acres than it did, limitations do not begin to run upon the purchaser's right to recover on the deficiency until his discovery of the shortage.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 96.\*]

**5. INTEREST (§ 9\*)—COMPUTATION—TIME.**

In the absence of agreement, one having the use of another's money must usually pay interest until repayment.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 20-24; Dec. Dig. § 9.\*]

**6. INTEREST (§ 46\*)—TIME OF COMPUTATION—MISTAKE—DEMAND.**

Where money was paid and received under a mutual mistake of fact, without fraud or misconduct on the part of him to whom the money was paid, interest does not begin to run until the mistake has been discovered and demand for repayment made.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 102; Dec. Dig. § 46.\*]

Appeal from Circuit Court, Pulaski County.

Action by Joseph Graham, Sheriff of Pulaski County, and as such administrator de bonis non of the estate of William T. Jordan, against A. B. Hall. From a judgment for plaintiff, defendant appeals. Reversed in part.

John S. Draper, for appellant. J. C. Wyssor, for appellee.

**BUCHANAN, J.** This suit was instituted by the appellee, as the personal representative of William T. Jordan, to recover money paid by the latter to the appellant through a mistake of fact, as is alleged.

In the year 1884 the appellant conveyed to the said Jordan a tract of land for the sum of \$4,500, which by survey made at the time was calculated to contain 90 acres, and was so described in the deed, which was with covenants of general warranty. Jordan permitted his daughter, Mrs. Mary H. Laughon, and her husband, to move upon the land in the year 1886, with the understanding that he (Jordan) intended to give it to his said daughter. Jordan died in the year 1890, leaving a will by which he gave his widow the land during her life, or as long as she

remained unmarried, with remainder to his said daughter upon the expiration of his widow's estate therein. The latter did not marry again, and died in the year 1907. In the year 1908 it was ascertained by calculation made from the courses and distances named in the deed from Hall to Jordan that there were 83½ acres of land in the tract, instead of 90 acres, as described in the deed. By subsequent survey made in the same year (1908), it was ascertained that there were only 83 acres of land in the tract, or a shortage of 7 acres.

Upon the hearing of the cause, the circuit court granted the relief prayed for, and entered a decree in favor of the complainant for the sum of \$350, with interest thereon from March 10, 1884, the date of Hall's deed to Jordan, until paid. From that decree this appeal was granted.

The objections made here to the decree are:

(1) That there is no clear proof that the sale was by the acre; or, if it was, that there is any deficiency in the land.

(2) That the presumption is that the claim asserted was abandoned or settled, and there is no evidence to rebut that presumption.

(3) That the claim was barred by the statute of limitations.

(4) That the claim is stale, and cannot be allowed without great risk of injustice to the appellant.

(5) That, if the trial court did not err in sustaining the claim, it erred in giving interest thereon until demand made, which was not until this suit was instituted.

[1] It satisfactorily appears, we think, that the tract of land described in the deed as containing 90 acres only contained 83 acres. It further appears that the sale was by the acre, and not in gross; for every sale of land where the quantity is referred to in the contract is presumed to be a sale by the acre, unless the language of the contract plainly indicates a sale in gross, and this presumption can only be overcome by clear and cogent proof. *Hull v. Watts' Adm'r*, 95 Va. 10, 27 S. E. 829; *Epes v. Saunders*, 109 Va. 99, 100, 63 S. E. 428, 132 Am. St. Rep. 904, and cases cited.

There is nothing in the deed, which is the only evidence of the contract of sale, nor in the oral evidence, which rebuts that presumption. On the contrary, that presumption is strengthened by the language of the deed, and by the fact that a survey of the land was made when Jordan purchased from Hall.

[2] It further satisfactorily appears, we think, that the deficiency in the quantity of the land was unknown until the year 1907 or 1908, when Mrs. Laughon and her husband were about to sell it. There is nothing to show that either the vendor or the vendee, or those who claimed under them,

were at fault in not discovering the deficiency earlier. The land was surveyed by the county surveyor at the time of Hall's sale to Jordan, and had remained in the possession of the latter, his widow, and daughter from that time until the latter had sold or was about to make sale of it, and the survey was no doubt regarded by all as a correct survey. Indeed, the lines and corners were properly located by the county surveyor; but his mistake was in calculating the area in the survey. Neither a vendor nor a vendee can be regarded as at fault in not having a new survey or a new calculation of the quantity of the land made under the circumstances disclosed by the record. The mistake was mutual, and made without the fault of either vendor or vendee.

[3] The court is further of opinion that there has been no such laches in the prosecution of the appellee's claim as should deprive him of the right to recover. No lapse of time, no delay in bringing suit, however long, will defeat the remedy in cases of fraud or mutual mistake, provided the injured party during all the interval was ignorant of the fraud or mistake without fault on his part. The duty of a party to commence proceedings to assert his rights can only arise upon the discovery of the fraud or mistake, and the possible effect of laches will begin to operate only from that time. *Crauford v. Smith*, 93 Va. 623, 630, 23 S. E. 235, 25 S. E. 657, and the authorities cited.

[4] Neither is the claim barred by the statute of limitations, since the suit was instituted within less than the statutory period after the discovery of the mistake. *Hull v. Watts*, supra, 95 Va. 10, 13, 14, 27 S. E. 829.

[5] The remaining question to be considered is from what time the sum due the appellant ought to bear interest. Generally, he who has the use of another's money must pay interest upon it from the time he receives it until he repays it, unless there is an agreement, express or implied, to the contrary. *Vashon v. Barrett*, 105 Va. 490, 493, 54 S. E. 705, and cases cited.

[6] Our decisions are apparently not in accord as to the time from which money should bear interest which was paid and received under a mistake of fact, in the absence of fraud or misconduct in him to whom the money was mistakenly paid. See *Ross v. McLaughlin*, 7 Grat. 86, 97-99; *Hull v. Watts*, supra, 95 Va. 15, 27 S. E. 829; *Crauford v. Smith*, supra, 93 Va. 631, 23 S. E. 235, 25 S. E. 657; *Vashon v. Barrett*, supra, 105 Va. 493, 54 S. E. 705; *Lee v. Laprade*, 106 Va. 594, 56 S. E. 719, 117 Am. St. Rep. 1021.

In the case of *Crauford v. Smith*, supra, it was held that, where money has been paid and received under such circumstances, interest will not be allowed, except from the time when the mistake was discovered and demand for repayment made. The rule an-

nounced in that case was approved and followed in the case of *Lee v. Laprade*, supra, 106 Va. 601, 56 S. E. 719, 117 Am. St. Rep. 1021; and in a note to the last-named case, reported in 10 Am. & Eng. Ann. Cas. 303, 307, numerous cases are cited to sustain the doctrine of the principal case. See, also, 16 Am. & Eng. Ency. L. (2d Ed.) 1011; 22 Cyc. 1506, 1507.

The court is of opinion that the rule as to interest paid under a mutual mistake of fact, where no fraud or improper conduct can be imputed to the party receiving the same, laid down in *Crauford v. Smith*, and reiterated in *Lee v. Laprade*, is the better rule, is sustained by courts of the highest respectability, and should be adhered to.

It follows, from what has been said, that the court is of opinion that there is no error in the decree appealed from, except as to the interest allowed on the sum decreed to be paid. The decree of the circuit court must therefore be affirmed, in so far as it ascertains the principal sum which the appellee is entitled to recover, and reversed in so far as it decrees that said sum shall bear interest from the date of the deed from Hall to Jordan, instead of from the time the writ or summons commencing this suit was issued, there having been no previous demand made for the repayment of such principal. But, as the record does not show the date when said summons was issued, the cause will be remanded, with direction to the circuit court to decree interest on said principal sum from the date of the issuing of the summons. As the party substantially prevailing here, the appellant will be decreed his costs in this court.

Reversed in part.

(112 Va. 894)

#### WRIGHT v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

#### LICENSES (§ 40\*)—OFFENSES AGAINST LICENSE LAWS.

Act March 11, 1906 (Acts 1906, c. 156) § 1, provided that no person should engage in the business of making loans on wages or salaries or on conditional sales of furniture, etc., without first obtaining a license therefor and fixed a penalty for its violation. Defendant, before the enactment of the statute, had made loans to certain railroad employees and taken an assignment of their wages as security; the dates of such assignments being left blank and defendant empowered to fill in the dates. Some of these loans were due and unsettled when the act became operative, and thereafter several of such claims were filed by defendant with the railway employer for collection. *Held*, that the statute had no retroactive effect, and that for the defendant to date and collect these pre-existing loans after the statute went into effect was no violation of it.

[Ed. Note.—For other cases, see Licenses; Dec. Dig. § 40.\*]

**Error to Corporation Court of City of Roanoke.**

Roscoe J. Wright was convicted for loaning money on security without a license, and he brings error. Reversed.

A. B. Hunt, for plaintiff in error. The Attorney General, for the Commonwealth.

**HARRISON, J.** By an act of the General Assembly approved March 12, 1906, it is provided "that no person, firm or corporation shall engage generally, regularly or collaterally to any other business, in the business of making loans on household or kitchen furniture, or household goods, or wearing apparel, or sewing machines, or musical instruments, or wages, or salaries or on conditional sales of the same without first obtaining a license therefor, which shall be in addition to the license required by law for any other business the person, firm or corporation may engage in. \* \* \* Any person, firm or corporation violating the provisions of this section shall pay a fine of not less than fifty dollars and not more than five hundred dollars for each offense." Acts 1906, p. 242.

The plaintiff in error was indicted under this statute, found guilty, and sentenced to pay a fine of \$100. To that judgment the present writ of error was awarded.

The record shows that before the statute in question was passed the plaintiff in error was engaged in the business of a private banker, with a license therefor, but that prior to the year 1906 he closed his business as such private banker, and since that date has made no loans taking as security therefor any of the things mentioned in the indictment or in the statute under which it is found. The record further shows that during the time prior to the enactment of the statute, when the plaintiff in error was lawfully engaged in the business of a private banker, he made loans to a number of parties at work for the Norfolk & Western Railway Company, and took as security therefor assignments of their wages; the dates of these respective assignments being left blank, with power given to the plaintiff in error to fill in such dates. Some of these loans were unsettled and due to the plaintiff in error at the time the act was passed, and after the statute became operative six of such claims were filed by the accused with the Norfolk & Western Railway Company for collection.

Upon these facts the court, over the objection of the accused, instructed the jury as follows: " \* \* \* That if they believe from the evidence beyond all reasonable doubt that the defendant, Roscoe J. Wright, has since February 10, 1909, engaged in the business of loaning money and

taking as security therefor orders on or assignments of wages of the person to whom the loan was made, or of any other person, they must find the defendant guilty. That the continuing to carry pre-existing loans constitutes such a loan, and that a taking of such order signed and delivered before February 10, 1909, but dated in blank, and afterwards used, or dated since February 10, 1909, is a taking of such order since February 10, 1909."

This instruction puts a construction upon the act of March 12, 1906, not contemplated or warranted by its terms and most prejudicial to the accused. The statute has no retroactive effect, and was not intended to confiscate rights of property lawfully vested in the plaintiff in error prior to its enactment. He had the same right to enforce and collect such pre-existing loans after the passage of the act as he had before its passage. The accused continued to hold the evidence of a lawful debt given him prior to the statute, because he had been unable to collect the same. He was authorized to fill in, at his pleasure, the date of these orders taken prior to 1906, and it was no violation of the statute for him to date and collect them after the statute went into effect. The statute prohibits persons from engaging in the business of making loans on wages or salaries. It was never intended to prohibit the collection of lawful loans made prior to its passage. There is no evidence that the accused was engaged in the business of making loans upon wages or salaries after March 12, 1906. On the contrary, he was merely collecting loans lawfully made prior to that date, which he had a right to do.

The statute invoked has no application to the case made by the record, and therefore the judgment complained of must be reversed, the verdict set aside, and the case remanded for a new trial not in conflict with the views herein expressed, if the commonwealth be so advised.

Reversed.

(112 Va. 607)

**SCOTT ROLLER MILL CO., Inc., v. SOWDER et al.**

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

**ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 340\*)—PROPERTY CONVEYED—CLAIM OF THIRD PARTY—EVIDENCE.**

In a controversy where assignees for the benefit of creditors filed a bill asking the aid of the court in their administration of the estate, a claimant, made a party defendant, asserted title to a part of the estate claimed by the assignees on the ground that the deed of conveyance to them did not include the prop-



erty involved. *Held*, that claimant had failed to establish his claim.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 1025-1035; Dec. Dig. § 340.\*]

#### Appeal from Circuit Court, Floyd County.

Bill by V. M. Sowder and others, as trustees of Winfield Scott for the benefit of his creditors, asking the aid of the circuit court of Floyd county in the administration of the trust, in which the Scott Roller Mill Company, Incorporated, a claimant, was made a party defendant. From a decree of the circuit court, the Scott Roller Mill Company appeals. *Affirmed*.

Scott, Buchanan & Cardwell and B. G. Howard, for appellant. C. B. & H. M. Moomaw and R. F. Tompkins, for appellees.

HARRISON, J. On the 15th day of April, 1908, Winfield Scott conveyed to V. M. Sowder, G. W. Agnew, and F. J. Agnew, trustees, all of his estate, real and personal, for the benefit of all of his creditors; the appellant company being named in the deed of assignment as one of the creditors thereby secured. The bill in this case was filed by the three trustees named in the deed, seeking the aid of the court in the administration of the trust imposed upon them.

The present controversy is over the balance of a tract of land, known as the "mill tract," containing about 20 acres. It appears that a portion of this mill tract, amount not shown by the record, was conveyed to the appellant company prior to March 23, 1908, and that by deed bearing the last-named date the balance of the tract was conveyed to that company. This last-named deed had not been recorded on the 15th day of April, 1908, when the general assignment, which embraced the land in controversy, was made and recorded.

The circuit court held that the disputed land, known as the balance of the mill tract, passed under the trust deed to the appellees, and that the Scott Roller Mill Company acquired no title thereto under its deed of March 23, 1908, because of its failure to record such deed. From that decree this appeal was taken.

It appears that by decree of July, 1908, the cause was referred to a commissioner to report the assets of Winfield Scott conveyed in the deed of trust of April 15, 1908, and his liabilities. The commissioner filed his report the following October, reporting a debt, including interest, of \$1,930.14 in favor of the appellant company. This finding was excepted to by the debtor, Winfield Scott, and thereupon the cause was recommitted to the commissioner for further inquiry with respect to the debt reported in favor of the appellant. At the following April term of the court the commissioner filed his second report, in which he reported as a liability of

Winfield Scott an account filed by the appellant in the following words and figures:

W. Scott, in a/c with Scott Roller Mill Co.,  
Dr.

1909.

March 25. To amount credited W. Scott, for twenty acres and few rods of land which company failed to get because deed was not recorded before deed of trust .....	\$500.00
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At the instance of the appellees, the cause was again recommitted to the commissioner, because his report was incomplete, in that it did not report all the matters of account between the Roller Mill Company and W. Scott. When the cause was pending before the commissioner under this last-mentioned order, the Scott Roller Mill Company, for the first time, brought before the commissioner its unrecorded deed of March 23, 1908, from W. Scott, claiming title thereunder to the land in controversy. In support of this claim appellant sought to show that the deed from Scott had been delivered to it at a meeting of the company's stockholders in the presence of G. W. Agnew and F. J. Agnew, two of the trustees in the deed of assignment, and that the trustees, at the time of the conveyance to them, knew that the 20 acres of land in controversy had been sold and conveyed to the appellant company.

The commissioner, in his third report, filed at the October term, 1909, says with respect to this new claim of the appellant that the weight of the evidence is against the contention that the deed to appellant was delivered to it before the 15th day of April, 1908, the date of Winfield Scott's assignment. This finding of the commissioner is amply sustained by the evidence, and it is also satisfactorily shown that the trustees had no knowledge of the deed from Winfield Scott to the appellant company until after the property had been conveyed to them for the benefit of Scott's creditors.

Appellant further insists that the deed from Winfield Scott to the trustees did not convey the 20 acres of land in controversy, and in support of this position it relies upon the following language of the assignment describing the property: "One piece bought of M. Scott, executor, balance of the mill tract after deducting the amount conveyed to the Scott Roller Mill Company, lying about three miles northeast of Floyd Court House," etc.

This description of the property as the "balance of the mill tract after deducting the amount conveyed to the Scott Roller Mill Company," is in effect the same description used by the same grantor in the deed under which the appellant claims. In both deeds the land is described as the balance of the tract; the grantor having in mind, no doubt, the fact that part of the mill tract had been conveyed to the Scott Roller Mill Company

some time before this controversy. There can be no question of the identity of the land conveyed by the two deeds. That they both convey the same land is shown by the undisputed evidence of Winfield Scott, the grantor in both deeds, who says: "The description of the land in the assignment fits the same land conveyed in the deed to the Scott Roller Mill Company."

Together with a large number of other creditors of Winfield Scott, the appellant company was made a party defendant to this suit. It did not, however, which would have been the proper practice, file an answer to be treated as a cross-bill, setting up its deed of March 23, 1908, and claiming title to the property. On the contrary, appellant filed an account before the commissioner, to be audited as a liability of Winfield Scott, for \$500, distinctly stating on the face of the account that it was the consideration for the deed of March 23, 1908, which it had credited to W. Scott, and was entitled to recover back because it had failed to get the land by not recording its deed before the deed of trust was recorded. This was a clear disclaimer by the appellant of any ownership of the land under the deed of March, 1908, and an assertion of its right to reimbursement of the purchase price which was allowed by the commissioner. Not until some time thereafter, when the commissioner was making his third and last report involving a settlement of the accounts between W. Scott and the appellant, did the latter bring forward this deed of March 23, 1908, and claim to be, by virtue thereof, the owner of the land in controversy.

As already seen, there were no pleadings putting in issue the present belated contention of the appellant, and, without intending to approve as proper practice the method adopted for raising the question, it is sufficient to say that upon the whole case the appellant has failed to sustain the issue raised by its assertion of title to the land in controversy, and the decree appealed from must be affirmed.

Affirmed.

(112 Va. 623)

VIRGINIAN RY. CO. v. HURT et al.

SAME v. LINKOUS et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

# 1. DAMAGES (§ 112\*)—FIRES—MEASURE OF DAMAGES.

Where part of the owners of timber negligently fired by a railroad company were infants and incapable of selling their interest without the aid of a court of equity, the deterioration in timber after the injury up to the time the court of equity could act was a proper item of damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 281-283; Dec. Dig. § 112.\*]

# 2. RAILROADS (§ 485\*)—FIRES—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action for the burning of timber, there was evidence that, if the timber could be got off the land in a few months after the fire, the damage would be very little, but that, if it remained several years, it would be practically worthless. Some of the owners of the land were infants, who could not dispose of their timber without the aid of a court of equity. There was no evidence showing when a disposition of the timber could be made by the court. Held, that an instruction allowing the jury to consider the deterioration, if any, during a reasonable time for marketing the timber after the fire, was not applicable to the evidence, and was misleading.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 485.\*]

# 3. DAMAGES (§ 174\*)—FIRES—EVIDENCE—ADMISSIBILITY OF EVIDENCE.

In an action against a railroad for an injury to timber by fire, where there was evidence that, if the timber was taken off the land within a few months after the fire, the damage to it would have been very little, but that, if it was taken off with a small force, it would be damaged 50 per cent. or more, evidence of plaintiff that situated as he was it would take him from three to four years to get the timber off the land, and that at the end of two years it would be worthless, was inadmissible, as the most that plaintiff could claim was the injury where the timber was removed within a reasonable time.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 462-467; Dec. Dig. § 174; Railroads, Cent. Dig. § 1726.]

# 4. DAMAGES (§ 112\*)—FIRES—MEASURE OF DAMAGES.

In an action for the negligent firing of timber, where all of the plaintiffs were sui juris, and the timber had a market value at the time of the fire, the measure of damages was the difference between the market value immediately before and immediately after the fire.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 112.\*]

# 5. EVIDENCE (§ 483\*)—OPINION EVIDENCE—CAUSE AND EFFECT.

In an action for the negligent firing of timber by a railroad, opinion of a witness that the fire must have been communicated from one side of the railroad to the other was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2256-2266; Dec. Dig. § 483.\*]

# 6. EVIDENCE (§ 483\*)—OPINION EVIDENCE—EXPERT TESTIMONY.

Expert testimony that, when a forest fire is out, sparks will blow long distances, is inadmissible; it being a matter of common knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2256-2266; Dec. Dig. § 483.\*]

# 7. RAILROADS (§ 481\*)—FIRES—EVIDENCE—ADMISSIBILITY.

In an action for the negligent firing of timber, where it was material to show the direction and velocity of the wind on the day of the fire, testimony as to the direction of the wind at a period in the day after the fire was ignited, and testimony by a witness who was 20 or 30 miles distant as to the direction and velocity of the wind, was admissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.\*]

Error to Circuit Court, Montgomery County.

Action by Harriet A. Hurt and others, and action by J. L. Linkous and others, against

the Virginian Railway Company. Judgment for plaintiffs in both cases, and defendant brings error. Reversed and remanded.

H. T. Hall and G. A. Wingfield, for plaintiff in error. Longley & Jordan, for defendants in error.

**BUCHANAN, J.** These were actions of trespass on the case, instituted by the defendants in error to recover damages from the Virginian Railway Company for the destruction and injury of standing trees and other property resulting from fire put out, as is alleged, by the defendant railway company's negligence.

The cases were heard together, and a verdict and judgment rendered in each against the railway company, writs of error were awarded to those judgments, and the cases were heard together in this court.

The first error assigned is to the action of the court in giving instruction No. 2 offered by the plaintiffs, and in refusing to give an instruction, also numbered 2, offered by the defendant, and in giving the latter instruction as modified by the court. The instructions, as offered, were in the following words:

**Plaintiffs' Instruction No. 2:**

"The court instructs the jury that the measure of damages to timber actually destroyed, if they believe from the evidence any was destroyed, is a fair cash value of such timber as it was at the place on the day it was destroyed; and the court instructs the jury that the measure of damages as to injured timber, if they believe any was injured, is the difference between such value of such timber before the fire and a fair cash value after the fire, taking into consideration the deterioration, if any, arising as a natural and probable result of said fire within a reasonable time for marketing the same."

**Defendant's Instruction No. 2:**

"The court instructs the jury that the burden is on the plaintiffs to show, by a preponderance of testimony, the amount of the damages claimed by them.

"In estimating the damages as to the timber alleged to have been injured or destroyed by the fire, the jury should find the difference between the value of the timber where it stood before the fire and the value of the timber after the fire; in other words, the damage suffered is the difference between the fair cash value of the timber as it stood immediately before the fire and its fair cash value as it stood immediately after the fire."

Both instructions, as offered, recognized the same rule for estimating damages for "timber destroyed," viz., its value at the time it was burned. The instructions differed as to the rule to be applied in ascertaining the damages to the timber injured. The rule as contended for by the defendant was that the true measure of damages for the injured timber was the difference in its value immediately before and immediately after the fire. On the other hand, the plaintiffs claimed, and the

court so held, that the measure of damages for such timber was the difference between the value of such timber before the fire and its value after the fire, taking into consideration the deterioration, if any, arising as a natural and probable result of the fire within a reasonable time for marketing the same.

[1] As a general rule, the damages for negligently injuring standing timber ought to be ascertained as of the date of the fire. See generally *Woodenware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *Sedgwick on Damages*, § 933; notes to *Bailey v. C., M. & St. Paul Ry. Co.*, 19 L. R. A. 653; notes to *Ball v. Simms Lumber Co.*, 18 L. R. A. (N. S.) 244.

But the facts of the particular case may be such as to take it out of the general rule. Where, for instance, there is no market value for the injured timber as it stands, or the owners of it are infants and the timber cannot be disposed of promptly, then a different rule should apply.

In these cases the evidence tends to show that there was a market for the injured timber, and that it could readily have been disposed of; but, in the case of *Hurt* and others against the defendant, a number of the plaintiffs were infants, incapable either of selling their interest in the land or the injured timber without the aid of a court of equity. Such deterioration, if any, resulting from the fire as would naturally and probably take place during the time reasonably necessary to obtain the aid of a court of equity in making disposition of the injured timber, was a proper item to be considered in estimating the damages in that case, as clearly the defendant, and not the plaintiffs, should bear such loss.

[2, 3] There was evidence tending to show that, if the timber could have been gotten off the land in a few months after the fire, the damage to it would have been very little, but, if it had to be gotten off with a small force, it would be damaged 50 per cent. or more. One of the plaintiffs was permitted to testify, over the objection of the defendant, that situated as he was it would take him three or four years to get the injured timber off the land, and that at the end of two years much of it would be worthless. Upon such evidence, and in the absence of evidence as to the time within which a disposition of the timber could probably be made through the aid of a court of equity, how could the instructions given as to the injured timber aid the jury in coming to any just conclusion? If they estimated the damages to the injured timber at some period subsequent to the date of the fire, at what period under the evidence could they fix it—at the end of three months, when the evidence tended to show that there would be little deterioration, or at the end of two years, when the evidence tended to show that the damage would be as much as 50 per cent., or at the end of three or four years, the time which

one of the plaintiffs testified it would require him to market it, and during which period much of the timber would become worthless?

The instructions given as to the injured timber were not applicable to the evidence before the jury, and could but have misled them. Besides, the evidence of one of the plaintiffs upon which those instructions were in part based, that situated as he was it would take him three or four years to get the injured timber off the land and market it, was clearly inadmissible, and the court ought to have sustained the defendant's objection to it. The question was not what he could do in removing and marketing the timber, but the most the plaintiffs could claim under their own view of the law was what would be a reasonable time within which the timber could be marketed.

We are therefore of opinion that the instructions given as to the manner of ascertaining the damages did not correctly state the law upon the evidence before the jury, and that for that error, as well as in permitting one of the plaintiffs to testify as to the time it would take him to remove and market the timber situated as he was, the judgment of the court should be reversed.

[4] It follows from what has been said that the said instructions as to the method of ascertaining the damages to the injured timber in the Linkous case were also erroneous. In that case the plaintiffs were *sui juris*, and the evidence shows that the timber had a market value at the time of the fire. The measure of damages in that case was the difference between the market value of the injured timber immediately before the fire and its market value immediately after the fire.

[5] The plaintiffs asked one of their witnesses the following question, which she was permitted to answer over the defendant's objection:

"Q. You were asked how you knew that the fire was communicated from the north side of the railroad to the south side. I will ask you if there was any other possible way for the fire to begin to burn from where you saw it? A. No, sir; I do not think that there was any other way."

This action of the court is assigned as error.

The court ought to have sustained the defendant's objection. The evidence sought and obtained was merely the opinion of the witness upon a subject where opinion evidence was clearly inadmissible. The action of the court, however, would furnish no sufficient ground for reversal, as the circumstances under which the question was asked and answered show that no prejudice could have resulted to the defendant therefrom.

[6] Another error assigned is to the action of the court in permitting one of the plaintiffs' witnesses to testify that it is a common occurrence that, when fire is out, sparks or

coals from it will when the wind is very high blow long distances from one high point to another. That this is so is a matter of common knowledge, doubtless as well known to the jurors as to the witness. Opinion evidence is not admissible touching such matters; but, if admitted, is generally mere harmless error. *Va. Iron Coal & Coke Co. v. Tomlinson's Adm'r*, 104 Va. 249, 51 S. E. 362.

[7] Errors are assigned to the action of the court in permitting witnesses Stanger and Lane to testify as stated in bills of exceptions numbered 5 and 7, respectively. The object of the evidence of these witnesses was to show the direction and velocity of the wind on the day of the fire. While Stanger testified to the direction of the wind at a later period in the day than the testimony tends to show that the fire crossed from the lands on the north side of the defendant's road to the lands on the south side, and Lane testified as to the direction and the great velocity of the wind on that day when he was some twenty or thirty miles distant, the evidence tends, we think, to sustain the plaintiffs' contention as to the direction and velocity of the wind, material facts in the case, at the time the injury occurred, and was therefore admissible for what it was worth.

The remaining assignment of error is to the refusal of the court to set aside the verdict in the case of Linkous, etc., because contrary to the evidence. As the judgment will have to be reversed and the verdict set aside for the errors hereinbefore pointed out, and the causes remanded for new trials to be had in which the evidence may be different, it will serve no good purpose to consider that assignment of error.

In each case the judgment must be reversed, the verdict in each set aside, and the causes remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

(112 Va. 649)

## WHEALTON & WISHERD v. DOUGHTY.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

### 1. NAVIGABLE WATERS (§ 36\*)—TIDE LANDS—OWNERSHIP—"GUTS."

Under Code 1904, § 1339, providing that the limits of lands lying on the shores of the sea, and the rights and privileges of the owners thereof, shall extend to low-tide mark, but no farther, the limits of marsh lying below high tide, to which the owner of the shore land is entitled, do not stop with a "gut" or channel which runs from a bay up across the marsh, in a direction more or less parallel with the shore, if such channel ebbs dry at ordinary low-water mark, but the part of the marsh to which he is entitled extends across such channel to ordinary low tide.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 36.\*]

**2. TRIAL (§ 191\*)—INSTRUCTION—ASSUMPTION OF FACTS.**

An instruction that if the jury believe from the evidence that plaintiff was in actual possession of the land, and claimed title thereto by virtue of a certain deed of partition, and defendants entered and took possession of part of it within the 15 years next preceding commencement of the action, they shall find for plaintiff, does not assume adversary possession in plaintiff of the land claiming under the deed of partition.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-435; Dec. Dig. § 191.\*]

**3. TRIAL (§ 252\*)—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE TO WARRANT.**

To give an instruction, without evidence on which to base it, diverting the attention of the jury to the question of adversary possession of plaintiff under a claim of right, is error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

**4. ADVERSE POSSESSION (§ 100\*)—LIMITS OF POSSESSION.**

While one's occupation of part of the land within the description of her deed gives her possession to all of it, it does not extend her possession to land outside its description, though claimed by her by virtue of the deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 547-574; Dec. Dig. § 100.\*]

**5. ADVERSE POSSESSION (§ 16\*)—PROPERTY SUBJECT TO PRESCRIPTION—WILD LANDS.**

Wild and uncultivated lands cannot be made the subject of adversary possession while they remain completely in a state of nature.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16.\*]

**6. ADVERSE POSSESSION (§ 16\*)—NATURE AND REQUISITES.**

Evidence merely that plaintiff's cattle had from time to time during many years roamed over the marsh in question below the shore of the sea, when not covered with water at high tide, just as they had roamed over other adjoining marsh lands, and that she had cut wild grass therefrom, and used it as dressing on her highlands, is insufficient to show adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16.\*]

**7. EVIDENCE (§ 265\*)—ADMISSIONS—CONCLUSIVENESS.**

While the fact that defendant's grantor did not claim title to certain lands, but acknowledged he was not the owner of it, and disclaimed title to it, is evidence to be considered along with other evidence in determining who was the true owner, it does not estop defendant claiming under him to claim to the true boundaries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.\*]

**8. NAVIGABLE WATERS (§ 36\*)—OWNERSHIP OF TIDE LANDS—BOUNDARIES.**

Where the division line between uplands on the shore of the sea owned by two persons is a straight line for some distance before it reaches high-water mark, such line, in the absence of a change by the parties, continues in the same course to low-water mark, as regards the tide marsh lands to which they are entitled.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

Error to Circuit Court, Northampton County.

Action by Mrs. Willietta Doughty against J. H. Whealton and another, partners as Whealton & Wisherd. Judgment for plaintiff. Defendants bring error. Reversed.

Instructions C and D, given for plaintiff, and instructions 7, 8, and 10, asked by defendant and refused, are as follows:

Instruction C: "The court instructs the jury that if they believe from the evidence that Mrs. Willietta Doughty, by virtue of partition deed with James P. Fitchett, entered upon the land in controversy, improving and cultivating a part and claimed title to the whole, she was in actual possession of the whole land within the boundaries, and what is the whole is to be determined by the limits owned or claimed."

Instruction D: "The court instructs the jury that if they believe from the evidence that Edward T. Nottingham, the grantor of Marion Scott, did not claim title to the land in question, but acknowledged the same to be in the owner of the land, at present owned by Mrs. Doughty, then they must find for the plaintiff, unless they further believe from the evidence that Marion Scott has been in open, notorious, and continuous possession thereof, claiming bona fide title thereto for more than 15 years prior to the institution of this suit."

Instruction 7: "The court instructs the jury that by statute the bounds of every man's land lying on the seaboard is extended to ordinary low-water mark, and that a drain or gut which goes bare at ordinary low water does not cut off or prevent the extension of such line, but the same is continued across and beyond such stream down to ordinary low-water mark."

Instruction 8: "The court instructs the jury that if they believe from the evidence that the division line between the upland of the plaintiff, Willietta Doughty, and those under whom she claims, and the uplands of the defendant and those under whom he claims, is a straight line for some distance before it reaches high-water mark, then the law continues such line in the same course to low-water mark, and, if the course of such line has been changed below high-water mark, the burden is upon the plaintiff to show it, but in deciding this question the jury should consider all the evidence heard in the case."

Instruction 10: "The court instructs the jury that the opinion or supposition or verbal declaration of E. T. Nottingham, through whom defendants claim, as to where his true lines were, cannot stop those claiming under him from claiming to the true boundaries, yet the jury may consider any such declaration as evidence to show what

was the true boundary of the lands of the defendants."

Otho F. Mears and Kendall & Daniel, for plaintiffs in error. Jno. E. Nottingham, Jr., and Ben T. Gunter, for defendant in error.

CARDWELL, J. Mrs. Willietta Doughty instituted this action of ejectment against J. H. Whealton and D. N. Wisherd, partners trading as Whealton & Wisherd, and lessees of Marion Scott, to recover the possession of certain marsh land described in the declaration. Upon the trial of the cause, there was a verdict and judgment in favor of the plaintiff for the 187½ acres of land sued for and \$125 damages on account of its detention. To that judgment this writ of error was awarded.

It appears that Marion Scott and defendant in error are the owners of adjoining farms in Northampton county, facing to the east on what is commonly known and designated as the "Broadwater," which covers at high tide the marshes lying between the highland and the ocean, a distance of about eight miles; that under a lease from Scott, dated February 27, 1907, plaintiffs in error entered upon the marsh lying to the east of the highland belonging to their lessor for the purpose of planting and propagating oysters thereon; that through said marshes, of which the 187½ acres in dispute here is a part, more remote from the highland deep channels run, one of which is referred to in the old deeds in evidence as "the river running down the peninsula," or "the river running along the seaside," but near the highland a great number of drains, or, as locally designated, "guts," run in irregular courses through the marshes; and that plaintiffs in error's lessor, Marion Scott, claims the disputed marsh as a part of his farm by reason of his riparian rights, while defendant in error asserts title to and possession thereof, not only by reason of her riparian rights, but by adversary possession, for the statutory period, under a claim of right thereto.

Defendant in error claims title to her farm through a deed of partition made between her and her brother, James P. Fitchett, on August 27, 1891, the land partitioned being described as "containing by estimate two hundred and fifty acres (250 a.), be the same, however, more or less, and bounded on the north by the lands of the heirs of Thomas B. Brickhouse; on the east by the Atlantic Ocean; on the south by the lands of the heirs of Edward T. Nottingham, and on the west by the lands of the heirs of John Walter Williams and James L. Nottingham, respectively." And Marion Scott is the owner of the land formerly owned by the heirs of Edward T. Nottingham referred to in said partition deed, his title thereto being undisputed in this case

[1] The boundary line between the Scott farm and that of defendant in error, marked by trees and a ditch, runs from a county road in an easterly direction until it reaches the marsh land in dispute lying in front and to the east of the farm of Scott and south of what would be a prolongation of the boundary line between the highland of his farm and that of defendant in error; and the disputed marsh land is bounded on the north by said prolonged line, on the east by the Broadwater, on the south by Magothy Bay, and on the west by that part of Scott's farm conceded to be his. Along the east boundary of Scott's highland, separating it from the marsh, is a "gut" or channel which "heads up" from Magothy Bay to or beyond the point at which the line which separates the highland of Scott and that of defendant in error reaches the "gut," and along the line separating the highlands of the two farms there is a punch-eon fence for a short distance extending to the water in the "gut," put there some years ago for the purpose, it is claimed, so to inclose the marsh land as to keep off the stock of the adjoining landowner, and to enable defendant in error to use and enjoy the marsh in question as a pasture for her own cattle. All of this marsh in dispute is covered with water at high tide, and it is not claimed that defendant in error's highland extends to the north of it, nor is there in the partition deed mentioned, or any other deed or paper writing in evidence under which she claims, a description of boundaries by which the 187½ acres of disputed marsh could be located. If, therefore, the "gut" or channel mentioned, which "heads up" from Magothy Bay to or beyond the point at which the line dividing the highlands of Scott and the defendant in error, ebbs dry for an appreciable distance south of said division line, the marsh in dispute belongs to Scott, by virtue of the statute of 1679, now section 1339, Code 1904, unless he and those under whom he claims have lost the right thereto by an adversary possession thereof for the statutory period of limitation. French v. Bankhead, 11 Grat. 160; Groner v. Foster, 94 Va. 650, 27 S. E. 493; Waverley, etc., Co. v. White, 97 Va. 176, 33 S. E. 534, 45 L. R. A. 227.

The giving by the trial court to the jury of instructions A, B, C, and D for defendant in error, and the refusal to give instructions 7, 8, 9, and 10, asked by plaintiffs in error, is assigned as error.

[2, 3] Instruction A is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff, Mrs. Willietta Doughty, was in actual possession of the land in controversy and claimed title thereto by virtue of deed of partition with James P. Fitchett, and the defendants in this action entered and took possession of

any part of the said premises within 15 years next preceding the institution of this action, then they should find for the plaintiff, unless they should further find that the defendants are the true owners of said land or were authorized by the true owner to enter thereon, and the burden is on the defendants to prove by a clear preponderance of evidence that they are the owners or were authorized by the true owner to so enter."

[4] The instruction is not amenable to the objection that it assumes adversary possession of the disputed marsh in defendant in error claiming title thereto by virtue of her deed of partition with James P. Fitchett when plaintiffs in error entered and took possession of a part of the premises, but the instruction did erroneously divert the attention of the jury to the question of adversary possession in defendant in error under a claim of right without evidence upon which to base it. The possession of defendant in error of her highland by virtue of said partition deed could not thereby be extended so as to embrace the disputed marsh, since neither in this partition deed nor in any other paper or papers offered in evidence under which she claims is there a description of boundaries which embraces or includes the disputed marsh.

"Where the claimant of title relies upon a deed of conveyance, it is well settled, both by reason and authority, that, in order to be effective as evidence of title, it must either in terms or by reference to other designation give such description of the subject-matter intended to be conveyed as will be sufficient to identify the same with reasonable certainty." Warville on Ejectment, § 295.

The words, "what is the whole is to be determined by the limits owned or claimed," used in instruction C, would be unobjectionable in a proper case, as where a plaintiff or a defendant in an ejectment proceeding was, upon reasonable grounds, contending that the land in controversy was within the description of boundaries given in his title papers, but to say that what is the whole of the demandant's land is to be determined by the limits claimed, though those limits are outside the boundaries described in his title papers or of his actual possession, finds no sanction either in reason or authority. These words quoted from instruction C were taken doubtless from the case of *Taylor v. Burnside*, 1 Grat. 191, and sanctioned in many other cases where the evidence warranted it, but, as the opinion of the court in the case named shows, the possession of the apparent owner of land who holds under color of title, having possession of part, like that of the real owner, extends to the bounds of the lands embraced in his title papers, while the possession of the intruder can extend no farther than his actual occupancy.

[5] In this case it is conceded that "wild and uncultivated lands cannot be made the subject of adversary possession while they remain completely in a state of nature." A change in their condition, to some extent, is essential. *City of Richmond v. Jones*, 111 Va. 214, 68 S. E. 181; *Harman v. Ratliff*, 93 Va. 249, 24 S. E. 1023; *Turpin v. Saunders*, 32 Grat. 36.

In 1 Cyc. p. 990, it is said that, although there are some decisions apparently to the contrary, the weight of authority sustains the rule that the mere occasional cutting of timber on land is not alone such evidence of ownership as to amount to a possession adverse to the true owner, and "the additional circumstances that the claimant \* \* \* pastured his hogs or cattle there occasionally, or did other similar acts, will not constitute actual possession;" and on page 992 it is said that the occasional or periodical entry upon land to cut wild grass is not an act manifesting a purpose to take possession as owner, and does not constitute actual possession. Among the decided cases cited in support of the text just quoted is the case of *Lambert v. Stees*, 47 Minn. 141, 49 N. W. 662, where it is held that the fact that a person cuts hay on uninclosed land, lets his cattle roam over and pasture upon it just as they pasture on adjacent uninclosed lands, and prevents people from cutting and stealing wood on the land is not sufficient to constitute adverse possession. See, also, *Wheeler v. Winn*, 53 Pa. 122, 91 Am. Dec. 186.

All the authorities agree that acts done upon land requisite to constitute adverse possession must be such as to indicate and serve as notice of an intention to appropriate the land itself, and not the mere products of it, to the dominion and ownership of the party entering, being acts of permanent improvement.

The case of *Drake v. Curtis*, 1 Cush. (Mass.) 395, is authority for the proposition that the ordinary presumptions and conclusions of law arising from possession and use can have no application in regard to open and uninclosed flats; that the constant use of such flats by one not entitled to claim or hold them as the riparian proprietor for the ordinary purposes of navigation can give no exclusive or adversary possession. In the opinion in that case by Shaw, C. J., it is said: "The rule is simple, but it is rendered complicated and difficult of application by the infinitely diversified forms which the seashore may present."

As we have seen, the marsh land in controversy in this case is not within the descriptive boundaries of defendant in error's title papers offered in evidence, and therefore, if she has title to the marsh, it must be by reason of her riparian rights under the statute law of the state, and not by reason of a prescriptive right by virtue of the statute of limitations.

In *Austin v. Minor*, 107 Va. 101, 57 S. E. 609, the property in dispute was a marsh, valuable only for hunting, fishing, and trapping, and to a limited extent as a range for hogs, one of the questions presented for decision being whether the property was capable of such enjoyment as accompanied by a claim or color of title would ultimately ripen into a good title; and the opinion by Keith, P., says that, if the tide ebbs and flows over this property, it is doubtful whether a title by adverse possession can be acquired to it, separate and distinct from the rights of the riparian owner. *Roe v. Strong*, 107 N. Y. 350, 14 N. E. 294.

[6] The evidence in this case as to adversary possession in the defendant in error of the disputed marsh is to the effect only that her cattle and those of her predecessors in title had from time to time during many years roamed over the marsh when not covered with water at high tide, just as they roamed over other marsh lands adjoining, and that she and her predecessors in title had cut wild grass therefrom (how many times and at what intervals are not stated), and hauled it away for use as manure on the highland. This evidence did not call for or warrant the giving of instruction A with respect to the question of adversary possession, and therefore such an instruction had the tendency to divert the attention of, if not to mislead, the jury as to the true question for their consideration.

For the reasons already stated, instruction C, given for the defendant in error, was also erroneous, and should not have been given.

[7] Instruction D in the form in which it was offered should have been refused. The fact that Edward T. Nottingham, the grantor of Marion Scott, did not claim title to the land in question, but in fact acknowledged that he was not the owner of it, and disclaimed title thereto, was competent evidence to be considered by the jury along with the other evidence in determining who was the true owner, and was properly admitted for the consideration of the jury; and we think that instruction 10, asked for by the plaintiffs in error and refused by the court, should have been given, and that it sufficiently presents the law upon this aspect of the case. *Sutherland v. Emswiler*, 111 Va. 507, 69 S. E. 363.

[8] The crucial question in the case is whether or not the "gut," drain, or channel which "heads up" from Magothy Bay to or beyond the line which divides the highlands of defendant in error and plaintiffs in error's lessor ebbs dry at ordinary low water for an appreciable distance from said line, and, if the jury's finding from the evidence be that said "gut," drain, or channel does so ebb dry, the law of the case is as propounded in plaintiffs in error's instructions 7 and 8, which

were erroneously refused. *Groner v. Foster*, supra; *Waverley, etc., Co. v. White*, supra.

As the judgment of the circuit court has to be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion, we deem it unnecessary to consider the other questions presented in the petition for this writ of error.

Reversed.

(112 Va. 540)

CAROLINA, C. & O. RY. v. CLINCH VALLEY LUMBER CO.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

1. PLEADING (§ 383\*)—GENERAL ISSUE—SPECIFICATION OF DEFENSE—EFFECT.

Where, with a plea of non assumpsit, defendant filed a specification of defense required by Code 1904, § 3249, the issue must be confined to the defense specified.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1295; Dec. Dig. § 383.\*]

2. CARRIERS (§ 13\*)—CHARGES—RATES OF FREIGHT.

Under the direct provisions of Code 1904, § 1294c, cl. 7, it is unlawful, after the freight rate of a railroad company has been authorized and published by the State Corporation Commission, for any person, by contract or other device, to obtain transportation at a less rate, and any contract for such reduced transportation is void.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 21-24; Dec. Dig. § 13.\*]

3. CARRIERS (§ 12\*)—CHARGES—LEASES—REGISTRATION.

While Code 1904, § 1294d, cl. 56, requires every one operating a railroad under a contract or lease to file the same in the office of the State Corporation Commission, the object is only to furnish the commission with information of the lease and its contents; and if the commission treats the filing of a verified copy as a sufficient compliance with the statute, a freight rate established in favor of the lessee should not be declared invalid because there was not a strict compliance with the statute.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 12.\*]

Error to Circuit Court, Wise County.

Action by the Carolina, Clinchfield & Ohio Railway against the Clinch Valley Lumber Company. There was judgment for defendant, and plaintiff brings error. Reversed and remanded.

Bond & Bruce, for plaintiff in error.  
Vicars & Peery, for defendant in error.

WHITTLE, J. The principal question for decision in this case is whether an alleged agreement between the general manager of the plaintiff in error and the defendant in error for a flat rate of \$10 per car for hauling the lumber of the defendant in error from Dante to Fink, and \$5 from intermediate points (based on the minimum car weight of 30,000 pounds), when such rates were less than the schedule of charges



for the same service established by the State Corporation Commission, is valid and binding upon the railway company.

The Lick Creek & Lake Erie Railroad Company owned and operated a railroad from Dante to its junction with the Norfolk & Western Railway at Fink. The company filed with the Corporation Commission a tariff of freight rates, which was approved by it, and became effective December 24, 1903, and remained in force until November 1, 1908. On January 1, 1907, that road leased its line of road to the plaintiff in error, a corporation then operating as the South & Western Railroad Company (now, by charter amendment, the Carolina, Clinchfield & Ohio Railway). On April 9, 1907, a verified copy of the lease was filed with the Corporation Commission, and the former schedule of rates was continued, covering the period of the transactions out of which this litigation arose.

From January 1, to March 17, 1907, the defendant consigned its cars through to their ultimate destinations, where the entire freight was collected and the plaintiff's part, 3½ cents per hundredweight on lumber from Dante to Fink and 3 cents from intermediate points, was paid by the connecting carrier. About the last-named date the defendant changed its method of shipment, and consigned its cars to itself at Fink, and, having paid the flat rate to that point, reconsigned them to customers. The plaintiff at that time had not installed scales, and consequently had no means of ascertaining the actual weight of lumber shipped other than through connecting carriers.

[1] This action of assumpsit was brought to recover the difference between the flat rates, based on minimum car weight, and the schedule rates, founded on the actual weight of the lumber. The defendant pleaded non assumpsit, and filed with its plea a specification of defenses under section 3249 of the Code. As ground of defense it relied on the alleged agreement between the parties for the minimum car load rates, without regard to the actual weight of the lumber hauled; so that, under the authorities, the defense must be confined to that single issue. *Oeters v. Knights of Honor*, 98 Va. 201, 35 S. E. 356; *City of Richmond v. Leaker*, 99 Va. 6, 37 S. E. 348.

[2] The validity of the supposed contract was denied by the plaintiff, but the circuit court refused to give an instruction that it was unlawful for the defendant to willfully and knowingly obtain from the agents of the plaintiff, by contract or other means or device, transportation at less than the freight rate of the plaintiff authorized, prescribed, and published by the State Corporation Commission.

The evidence tended to show the existence, by lawful authority, of such a rate, and the court erred in refusing the instruction. The trend of decision condemns agreements of this character as contrary to public policy and void, and the rule of decision thus established has been carried into statute in this state. Code 1904, § 1294c, cl. 7.

[3] The circuit court also excluded from the consideration of the jury the lease from the Lick Creek & Erie Railroad Company to the plaintiff, on the ground that the statute (Code 1904, § 1294d, cl. 56) requires every person or corporation operating a railroad in the state, under a contract or lease, to file the same in the office of the State Corporation Commission within 30 days after such contract or lease is executed. The plaintiff filed a verified copy of the lease on April 9, 1907.

The manifest object of the requirement is to furnish the Corporation Commission with information of the existence of the lease and its contents. By the Constitution of the state and the laws passed in pursuance thereof, the Corporation Commission is clothed with judicial, legislative, and executive functions, and possesses wide powers and discretion in the matter of establishing, regulating, and controlling freight and passenger rates. In the instant case it has seen fit to treat the filing of a verified copy of the lease as a sufficient compliance with the statute, and has received and acted upon the same accordingly. In these circumstances, a construction of the statute which would strike down a freight rate thus established and accepted by the plaintiff and the public would be to sacrifice substance to form. The substantial purpose of the statute was accomplished as effectually by filing the verified copy of the lease as it would have been by filing the original paper, and the discretion exercised by the Corporation Commission in that regard should be sustained.

For these reasons the judgment, which was adverse to the plaintiff, must be reversed, and the case remanded for further proceedings not in conflict with this opinion.  
Reversed.

(112 Va. 574)

HURT & HURT v. BLANKENSHIP et al.  
(two cases).

(Supreme Court of Appeals of Virginia.  
Sept. 14, 1911.)

1. JUDGMENT (§ 393\*) — VACATION — SUFFICIENCY OF EVIDENCE—INFANCY.

Evidence on a motion to set aside a judgment on the ground of the judgment debtor's infancy when it was rendered held not to show, when considered as on demurrer thereto, that he was an infant when the judgment was ren-

dered or the note on which it was based was executed.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 393.\*]

2. JUDGMENT (§ 393\*)—VACATION—INFANCY—BURDEN OF PROOF.

The burden of proof is upon one seeking to vacate a judgment against him on the ground of infancy when it was rendered to show his infancy by clear and satisfactory proof.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 393.\*]

Appeal from Circuit Court, Tazewell County.

Action by Hurt & Hurt against Harman Blankenship and another, and suit by Hurt & Hurt against Harman Blankenship and another. From an order in the legal action vacating judgment rendered therein, plaintiffs appeal; and from a decree dismissing a petition for subrogation in the chancery suit an appeal was taken. Reversed.

J. Powell Royall and S. D. May, for appellants. Henson & Bowen, for appellee.

HARRISON, J. These two suits, the first at law and the second in chancery, from the circuit court of Tazewell county, were heard together by this court; the subject-matter in controversy being so involved in both as to make that the most convenient method of considering the question to be determined.

It appears that on November 22, 1905, Harman Blankenship bought from Hurt & Hurt a stock of merchandise, the consideration for which was his negotiable note for \$530, payable 12 months after date, and indorsed, as an accommodation indorser, by his sister, Ida Blankenship. The note not being paid, Hurt & Hurt brought suit and obtained judgment thereon in May, 1907, against the maker and indorser, each of whom had been duly served with process. In June, 1907, Hurt & Hurt brought a chancery suit against these judgment debtors to enforce against their lands, respectively, the lien of their judgment. In this chancery cause process was duly served upon each of the defendants. After this bill was filed, Ida Blankenship, the sister, sold and conveyed her land, mentioned therein, to the plaintiffs in consideration of an assignment to her of their judgment against her brother and thereupon secured a decree in the pending chancery cause subrogating her to all of the rights of the judgment creditors with respect to such judgment. To her petition asking for this subrogation her brother was made a party defendant, and duly served with process. The cause was then referred to a commissioner to take an account of the lands of Harman Blankenship and the liens thereon. Notice of this account was duly served upon the defendant, after which the commissioner took the required account, reporting other liens, and, in favor of Ida Blankenship, the judgment asserted

in the bill, the right to which she had been subrogated. This report, to which no exception was taken, was ratified and confirmed and a personal decree given against Harman Blankenship in favor of his sister for the amount of the judgment and costs, together with a decree nisi for the sale of the land reported as subject to the lien of such judgment. Three months after all of these proceedings were had with respect to this judgment, in each of which Harman Blankenship was made a party defendant and duly served with process, he appeared for the first time by a guardian ad litem and next friend with an answer, in which he claims that at the time of the rendition of the judgment involved in this litigation he was an infant of tender years and incapable of understanding and protecting his interests, and that the judgment was rendered without the appointment of a guardian ad litem to defend his interests as required by law. There was also filed at the same time an exception to the report of the commissioner, which had been confirmed, asserting in support thereof the claim of infancy set up in his answer. More than a month after this appearance in the chancery cause, Harman Blankenship gave his sister notice that he would move the court, on the law side thereof, to vacate and set aside her judgment, on the ground that he was an infant when the note sued on was executed, and when the judgment thereon was obtained.

A number of defenses to this motion were interposed, which it is not necessary to mention. Upon the trial, the parties submitted the matter in controversy to the determination of the court. After hearing the evidence, which included the record in the chancery cause, the court, upon the issue of infancy, held that Harman Blankenship was an infant when the judgment in controversy was obtained and vacated the same and set it aside. Subsequently the court in the chancery cause held that Ida Blankenship was entitled to no relief therein, her judgment there asserted having been vacated and annulled, and dismissed her petitions, both original and amended. From the common-law order vacating the judgment and from the decree dismissing the petitions of Ida Blankenship, these proceedings are now before this court.

[1, 2] Viewed from the standpoint of a demurrer to the evidence, the testimony fails to satisfactorily or sufficiently establish the claim of Harman Blankenship that he was under 21 years of age either when the judgment in question was obtained, or when the note upon which it was based was executed. The burden of proof was upon the plaintiff, in the motion to vacate the judgment, to establish his claim of infancy. The only evidence offered in support of such claim was that of plaintiff's brother, Oscar, and

himself, both shown to be interested in defeating the judgment. Neither of these witnesses profess to know with certainty the age of Harman Blankenship. Neither has ever seen any record of his age, and both admit that what they state with respect to his age was heard from other members of the family, whose names are not mentioned. The testimony of Harman Blankenship is that he did not know his age; that members of his family had told him that he was born about the 25th of March, 1888, or 1889; that he was either 20 or 21 years of age when testifying. This witness admits that for several years he had traded and done business as an adult; that the note upon which the judgment was rendered was given to Hurt & Hurt for a stock of goods; that he purchased these goods as an adult, and sold the same as such, and also purchased goods from wholesale firms; and that after merchandising at Big Creek, in Tazewell county, he carried on a mercantile business at Raven, in the same county. The testimony of Oscar Blankenship is that he did not know his brother's exact age; that he had never seen any record of it; that his information from the family was that Harman was born about the 25th of March, 1888, or 1889; that witness was 38 years of age; that his father died in the fall of 1889, and that Harman was then 8 or 18 months of age; that Harman was a married man and had five brothers, none of whom were present to testify with respect to his age but himself; that Harman Blankenship had for many years been conducting business for himself; that he had sold witness a stock of goods, or exchanged the same with him, in the year 1907, for the tract of land now sought to be sold in the pending chancery cause; and that he now holds the title bond of Harman Blankenship for said land.

It was admitted on the trial that the defendants could prove that the plaintiff Harman Blankenship told Hurt & Hurt at the time the note in question was executed that he was then 21 years of age, and that he told W. B. Spratt about the same time on two different occasions that he was then 21. This evidence is confirmed by the testimony of the plaintiff, who says that he purchased the goods for which the note was given as an adult, and sold the same as such.

In this case Harman Blankenship seeks, under the claim of infancy, to escape responsibility for his admittedly just obligation, and to impose the burden of that obligation upon his sister, who has, as his surety, been compelled to sell her land to meet his debt. To accomplish this, he must adduce clear and satisfactory proof that he was, as now claimed, an infant when the obligation in question was assumed. Tak-

ing the plaintiff's evidence as a whole, it leaves the mind not only in grave doubt as to the truth of the claim, but with a decided inclination to the conclusion that the present claim of infancy is an afterthought. The evidence for the plaintiff on this issue is uncertain and inconclusive, and, when it is considered in connection with the fact that he represented himself to be of age when he executed the note, that he purchased the stock of goods for which it was given as an adult, and had sold them as such, and had for a number of years carried on for himself the mercantile business, that he had important land transactions with his brother, Oscar, during the time he now claims to have been an infant, all of which statements and conduct are wholly irreconcilable with the present pretension with respect to his age, and when all this is considered together with the plaintiff's long and unexplained delay in making this defense of infancy, notwithstanding the numerous opportunities afforded at law and in equity when he should have set it up, the conclusion cannot be avoided that the plaintiff has failed to establish that he was an infant, either when the judgment sought to be vacated was rendered or when the note upon which it was based was executed.

The order in the common-law case, vacating the judgment, now belonging to Ida Blankenship, must therefore be set aside and the motion to vacate overruled, and the decree in the chancery cause, dismissing the original and amended petitions of Ida Blankenship, must be reversed and the cause remanded to the circuit court for further proceedings, enforcing the lien of the judgment in favor of Ida Blankenship against the land of Harman Blankenship in the proper order of its priority.

Reversed.

(112 Va. 617)

# SMITH v. SMITH.

(Supreme Court of Appeals of Virginia.  
Sept. 14, 1911.)

## 1. WILLS (§§ 548, 597\*)—CONSTRUCTION—ESTATES CREATED—FEE SIMPLE.

Testator directed that all his real estate be equally divided between his three sons, and that, if one or more should die leaving no issue, their share should fall back to the survivor, and they "to pay unto my four daughters hereinafter named the sum of \$100 to be paid twelve months after the death of my wife." Held, that the three sons took a fee-simple estate with an additional limitation over, that, if any of them should die leaving no issue, his or their share should go to his or their surviving brothers or brother, and that the estate of the last surviving brother, if he should die leaving no issue, would not be defeated and go to his sisters, but would vest absolutely in him; there being no gift over.

[Ed. Note.—For other cases, see Wills, Dec. Dig. §§ 548, 597.\*]

## 2. DEEDS (§ 8\*)—PROPERTY SUBJECT TO CONVEYANCE—CONTINGENT INTERESTS.

Under Code 1904, § 2418, which provides that any interest in real estate may be disposed of by deed, that an estate may be made to commence in futuro by deed, and that any estate which would be good as an executory devise or bequest is good if created by deed, devisees of fee-simple estates, with an additional limitation over that, if one or more of them should die leaving no issue, his or their share, as the case might be, should go to the surviving devisees or devisee, have the right to convey all their title in the lands devised, both present and contingent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 16; Dec. Dig. § 8.\*]

## 3. DEEDS (§ 124\*)—ESTATES CREATED—FEE SIMPLE.

Where an estate was devised to three brothers in fee simple, with an additional limitation over that, in the event of one or more of them dying without issue, his or their shares should go to the survivor, and by deeds of partition among themselves they relinquished their interest in the tract devised, with covenants of general warranty and recitals that the land conveyed was an undivided tract set apart to them by will, and that the object of the covenants was to make deeds of partition to each one and to grant described parts. *Held*, that under Code 1904, § 2438, relating to the construction of deeds, and section 2439, fixing the effect of certain words of release, that the language and warranty in the deeds was effectual to invest the grantee in each of those deeds with the absolute fee-simple title to that part of the land devised covered by the respective deeds.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 344-355; Dec. Dig. § 124.\*]

Appeal from Circuit Court, Giles County.

Action by J. B. Smith against W. L. Smith. Judgment for plaintiff, and defendant appeals. Affirmed.

W. B. Snidow, for appellant. Harman & Pobst, for appellee.

BUCHANAN, J. The questions involved in this case depend upon the construction of the second clause of the will of George Hetherington and the effect of deeds of partition between his devisees under that clause of his will. That clause is as follows:

"Secondly. I direct that all my real estate in this county (Giles) and also all the land I own in Mercer county, W. Virginia, be equally divided between my three sons (Augustus, Giles B. and Newton C.) and in event that one or more should die leaving no issue, in that event that their share shall fall back to the surviving ones, and that they are to pay unto my four daughters hereafter named the sum of one hundred dollars, to be paid twelve months after the death of my wife."

The testator's three sons sold and conveyed the land devised them, which lies in the state of West Virginia, and no question as to their interest in it is involved in this case. The land devised, lying in Giles county, was divided into two parts. The eastern portion was conveyed on June 25, 1885, by Augustus S. and his wife and Giles B. and his wife to Newton C., and the western por-

tion was conveyed by Augustus S. and his wife and Newton C., who has never married, to Giles B. No part of the Giles county land was conveyed to Augustus S.; he receiving from his brothers a money consideration in lieu of his interest in the land. These deeds contain substantially the same provisions. The granting clause of the deed from Augustus S. and Giles B. to Newton C. is as follows:

"Witnesseth: That the parties of the first part doth relinquish their title, right and interest in a certain tract or parcel of land containing 160 acres, more or less, lying and being in the county of Giles, Virginia, on the waters of the Bear spring, to Newton C. Hetherington, with covenants of general warranty. The interest here intended to be conveyed is one third part of 287 acres of land, to each one of which the late George Hetherington, the father of Augustus S. & Giles B. Hetherington, the grantors of the first part, died seized. The above land to be conveyed is an undivided tract land which was set apart by will to Augustus S., Giles B. and Newton C. Hetherington by their father, and the object of these covenants is to make deeds of partition to each one, and the parties of the first part grant to Newton C. Hetherington the east end of aforesaid tract, embracing the old homestead buildings & bounded as follows."

Newton C. conveyed the land thus acquired by him, with the English covenants and the covenant of general warranty, to John B. Smith, the appellee, in the year 1906. The latter conveyed the said land with like covenants to W. L. Smith, the appellant, in the year 1909. The vendee not having paid the deferred purchase-money notes, this suit was instituted to enforce the collection thereof.

It was agreed by the parties to the suit that, if John B. Smith, the complainant, had by his deed invested W. L. Smith, the appellee, with an absolute, indefeasible fee-simple title to the land involved, then the purchase-money lien was to be enforced; but, if the complainant had not conveyed such title, then the sale and conveyance were to be set aside, and the parties placed in statu quo.

The trial court was of opinion that the defendant, the appellant, had acquired under his conveyance from the complainant, the appellee, an absolute and indefeasible fee-simple title, and entered a decree subjecting the land to the payment of the unpaid purchase-money notes. From that decree this appeal was granted.

As before stated, the correctness of that decree depends upon the construction of the will of George Hetherington and the effect of the said deeds of partition between his devisees.

[1] The court is of opinion that under the will of George Hetherington his three sons, mentioned in the second clause thereof, took

a fee-simple estate, with a conditional limitation over, viz., that, if one or more of them should die leaving no issue, his or their share, as the case might be, should go to his surviving brothers or brother. And the court is further of opinion that the estate of the last surviving brother, if he died leaving no issue, would not be defeated and go to his sisters, as insisted by the appellant, but would vest absolutely in him; there being no gift over.

"It is quite true," as was said by the Master of the Rolls, in *Maden v. Taylor*, 45 L. J. Ch. 572, "that the last liver does not survive himself, but he survives all the rest, and in that sense he is the survivor." In that case the devise was to trustees in trust for four nieces for their respective lives, as tenants in common, and on the death of them to the children of the person so dying, and on the death of any without issue, then to the "survivor or survivors." "Does any one," said the Master of the Rolls in discussing the question, "doubt that a gift to the survivor of ten people of a sum of money or an estate, with no previous gift at all, vests the sum of money or the estate absolutely in the last liver?"

In *R. Don v. Schenk*, 8 N. J. Law, 29, the testator had disposed of his lands as follows: "I give unto my son R. all my real estate excepting such part as I give and grant to my two daughters as hereinafter mentioned." After making a devise to his said daughters, he says: "My will is that if any of my children should happen to die without issue alive, that such share or dividend shall be divided by the survivor of them." It was held that R. took a fee-simple estate, defeasible on condition that he had no issue at his death and his sisters survived him. When the sisters died, he surviving them, the condition became impossible, and the estate then became an absolute fee-simple estate in R. See, also, *Anderson v. Brown*, 84 Md. 261, 35 Atl. 937; *Jarman on Wills* (6th Ed.) 651; 30 Am. & Eng. Enc. L. (2d Ed.) 751, 752; 37 Cyc. 642; 2 Redfield on Wills, 376, 377.

[2, 3] The court is further of opinion that under the provisions of sections 2418, 2438, and 2439, of the Code, the devisees under the second clause of the will had the right to convey and relinquish all their right, title, and interest in the lands devised, both present and contingent, and that the effect of the language and the warranty in the deeds of June 25, 1885, was to invest the grantee in each of those deeds with the absolute fee-simple title to that portion of the land devised covered by the respective deeds. See *Young v. Young*, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863; *Wilson, Trustee, v. Langhorne, etc.*, 102 Va. 631, 47 S. E. 871.

Having reached the conclusion that Newton C. Hetherington, under his father's will and the deed of his brothers to him, executed June 25, 1885, acquired an absolute, indefeasible fee-simple title to that portion of the land devised covered by his deed, it follows that a like title was acquired by the appellant from his grantor, the appellee, that there is no error in the decree appealed from, and that it must be affirmed.

Affirmed.

(112 Va. 612)

SHOEMAKER v. CHAPMAN DRUG CO.  
et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

1. FRAUDULENT CONVEYANCES (§ 107\*)—CONFIDENTIAL RELATIONS—FAMILY RELATIONS.

A sale of land by a father to his son will not be set aside as a fraud upon his creditors merely because of the family relation.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 347-350; Dec. Dig. § 107.\*]

2. FRAUDULENT CONVEYANCES (§ 61\*)—INSOLVENCY.

A grantor's insolvency will not render a sale invalid, unless it was made to hinder, delay, and defraud his creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 138-158; Dec. Dig. § 61.\*]

3. FRAUDULENT CONVEYANCES (§ 271\*)—EVIDENCE—SUFFICIENCY.

Fraud is never presumed, and fraud in a conveyance should not be assumed on doubtful evidence or circumstances of mere suspicion.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 796-798; Dec. Dig. § 271.\*]

4. FRAUDULENT CONVEYANCES (§ 271\*)—EVIDENCE—BURDEN OF PROOF.

Where a conveyance is attacked as fraudulent, the burden is upon the plaintiff, but, having established a prima facie case of fraud, the burden shifts, and the defendant must establish the bona fides of the transaction.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 796-798; Dec. Dig. § 271.\*]

5. FRAUDULENT CONVEYANCES (§ 300\*)—CONSIDERATION—RECITALS IN DEED.

In a suit by creditors to set aside a conveyance as voluntary and fraudulent, recitals in the deed that the consideration has been paid are not sufficient to establish that fact.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 897; Dec. Dig. § 300.\*]

6. FRAUDULENT CONVEYANCES (§ 301\*)—EVIDENCE—SUFFICIENCY—KNOWLEDGE OF GRANTEE.

In a suit by creditors to set aside a deed as fraudulent, evidence held insufficient to show that the grantee was party to the fraudulent intent of the grantor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 904-907; Dec. Dig. § 301.\*]

7. DEEDS (§ 200\*)—DELIVERY—EVIDENCE.

While a deed is presumed to have been delivered at the time of its date or acknowledgment, the actual time of delivery may be shown.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 601; Dec. Dig. § 200.\*]

Appeal from Circuit Court, Russell County.

Suit by James H. Shoemaker against John Shoemaker and others for partition. Upon the petition of the Chapman Drug Company and others a deed from Isaac Shoemaker to his son Bona Shoemaker was set aside, and Bona Shoemaker appeals. Reversed.

Routh & Routh, for appellant. S. B. Quillen, Finney & Wilson, and Burns & Kelly, for appellees.

WHITTLE, J. This is an appeal from a decree setting aside a deed from Isaac Shoemaker to his son, Bona H. Shoemaker, as voluntary and fraudulent. The deed is dated December 14, 1908, and for the consideration of "\$1,000.00 in hand paid" the grantor conveyed to the grantee his one-sixth undivided share in lands inherited from his brother, James Shoemaker, deceased.

At the date of the deed, a suit was pending in the circuit court of Russell county to sell these lands for partition among the heirs, and they were subsequently sold for that purpose. The appellant filed his petition in the suit, asserting title to one-sixth of the purchase money under his deed. The appellees (creditors of Isaac Shoemaker, whose debts were contracted prior to December 14, 1908, but whose judgments were subsequently recovered) likewise intervened by petitions in the principal suit, and attacked the deed as voluntary and made with intent to hinder, delay, and defraud petitioners in the collection of their debts, and also that the grantee participated in the fraud. These allegations were denied, and upon the issues thus raised by the pleadings and evidence the circuit court annulled the deed, and directed an account of liens upon the share of Isaac Shoemaker in the land fund.

The circuit court held that the proof showed confidential relations between the grantor and grantee, which cast upon the latter the burden of proving the bona fides of the transaction.

[1] Conceding the relationship of the parties and the insolvency of the grantor, these conditions do not of themselves constitute badges of fraud, and relieve the creditors from the burden of proving the charges of fraud set forth in their pleadings.

In *Johnson v. Lucas*, 103 Va. 36, 48 S. E. 497, it was held that relationship was not a badge of fraud, and that there was no rule of law which forbade persons standing in near relations of consanguinity or affinity from dealing with each other. But it was said as fraud is generally accompanied by secret trust, that transactions between near relatives and persons occupying confidential relations toward each other where fraud is charged should be more closely scrutinized. *Burwell v. Burwell*, 103 Va. 314, 49 S. E. 68.

[2] So of insolvency, that condition does not deprive the owner of the right to sell his property, unless the sale is made with intent to hinder, delay, and defraud creditors. *Fer-*

*guson v. Daugherty*, 94 Va. 308, 26 S. E. 822. [3] Fraud, it is true, may be proved either by direct or circumstantial evidence but "it is not to be assumed on doubtful evidence or circumstances of mere suspicion. It must be clearly and distinctly proved. The law never presumes fraud, but the presumption is always in favor of innocence and honesty." *New York Life Ins. Co. v. Davis*, 96 Va. 737, 739, 32 S. E. 475, 44 L. R. A. 305.

In *Redwood v. Rogers*, 105 Va. 155, 53 S. E. 6, it is said: "The charge of fraud is one easily made, and the burden of proving it rests on the party alleging its existence. It may be proved, not only by positive and direct evidence, but by showing facts and circumstances sufficient to support the conclusion of fraud. But, however shown, the proof must be clear and convincing, and such as to satisfy the conscience of the chancellor, who should be cautious not to lend too ready an ear to the charge." See, also, *Wheby v. Moir*, 102 Va. 875, 47 S. E. 1005; *Harrisonburg Co. v. Nat. Furn. Co.*, 106 Va. 302, 55 S. E. 679.

[4] Yet, when a prima facie case of fraud has been shown, the settled rule is that the burden shifts, and the defendants must establish the bona fides of the transaction. *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Engleby v. Harvey*, 93 Va. 445, 25 S. E. 225; *American N. & T. Co. v. Mayo*, 97 Va. 182, 33 S. E. 523.

[5] Moreover, in a suit by creditors to set aside a deed as voluntary and fraudulent, the recitals in the deed that the consideration has been paid are not sufficient to establish that fact, and the burden of proving such payment rests upon the grantee. *Knight v. Capito*, 23 W. Va. 639; *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847.

[6] If it be admitted that the circumstances are sufficient to show an intent on the part of Isaac Shoemaker by the sale to his son to hinder, delay, and defraud his creditors, nevertheless there is no evidence to fix notice of such intention upon the son.

The facts of this case may be summarized as follows: At the time of the transaction, Bona H. Shoemaker was living separate and apart from his father, and is not shown to have had personal knowledge of the demands against him. He was 29 years of age and unmarried; and he was a lumber inspector, and had been engaged in that occupation for 6 years, earning from \$60 to \$65 per month, and with no expense except for his clothes. He paid the entire purchase price for his father's share, \$300, on February 16, 1909, and the residue March 3d following and put his deed to record March 19, 1909; and it is not pretended that \$1,000 was not a fair price for the property.

In the decree under review, importance is attached to the recital in the deed that the purchase money was paid in hand, while, in fact, no money passed at that date. This is a common expression in deeds prepared

in the country, and the unfavorable inference, which might otherwise be drawn from that circumstance, loses its significance in light of the evidence, which shows that the deed was not delivered on the day of its execution. [7] A deed is supposed to take effect from delivery, and though, as a general rule, it is presumed to have been delivered at its date or acknowledgment, it is always competent to show the actual time of delivery. 1 Devlin on Deeds, § 178. It is a fair inference from the evidence that the deed was not delivered until after payment of the purchase money.

Considering the evidence in the light of the well-settled principles of law applicable thereto, we are of opinion that the appellees have failed to sustain the charge of fraud with sufficient clearness and certainty to entitle them to a decree setting aside the deed.

For these reasons, the decree appealed from must be reversed, and the petitions of the appellees dismissed.

Reversed.

(112 Va. 580)

JOHNSON et al. v. McCOY.†

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

**1. EJECTMENT (§ 15\*)—TITLE TO SUPPORT ACTION—CLAIM FROM COMMON SOURCE.**

Where both parties in ejectment claim title from a common source, plaintiff need not prove his title beyond the common grantor.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. § 15.\*]

**2. LOST INSTRUMENTS (§ 23\*)—EVIDENCE—SUFFICIENCY.**

One claiming title under a lost or destroyed document must prove its former existence, contents, and loss or destruction by strong and conclusive parol evidence.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 51-57; Dec. Dig. § 23.\*]

**3. DEEDS (§ 90\*)—CONSTRUCTION.**

In construing a deed, the court should place itself in the position of the parties when it was executed, and read it as a whole.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-248; Dec. Dig. § 90.\*]

**4. DEEDS (§ 93\*)—CONSTRUCTION—INTENTION OF PARTIES.**

The intention of the parties to a deed, as shown by the instrument, prevails, unless contrary to a rule of law.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.\*]

**5. DEEDS (§ 100\*)—CONSTRUCTION—SURROUNDING CIRCUMSTANCES.**

The circumstances surrounding the execution of a deed may be considered in determining the intention of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 100.\*]

**6. DEEDS (§ 26\*)—CONSTRUCTION—GRAMMATICAL ERRORS.**

As a rule, bad grammar will not vitiate a deed, where the meaning of the parties is clear.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 50-52; Dec. Dig. § 26.\*]

**7. DEEDS (§ 95\*)—CONSTRUCTION—PUNCTUATION.**

If the true meaning of a deed is apparent from its language, its meaning will not be changed by punctuation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 238-254; Dec. Dig. § 95.\*]

**8. DEEDS (§ 97\*)—CONSTRUCTION.**

Where a deed is inartificially drawn and contains no formal parts or clauses, technical rules of construction applicable to repugnant stipulations should not be applied.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.\*]

**9. DEEDS (§ 129\*)—CONSTRUCTION—ESTATE CONVEYED—LIFE ESTATE.**

A deed recited that it was between the heirs of S. of the first part and M. of the second part, and that for the consideration of each of one part of the estate of S. the party of the first part granted unto the party of the second part the described tract of land, "with covenants of general warranty, unto the said M. during her life time, then at her decease to" her son. M. was S.'s widow, and, when the deed was executed, she and her son named in the deed were living together on the tract, and all of the other heirs had by deed of partition received their share of S.'s land, so that, unless the son named took a remainder under the deed, he would receive none of his father's estate. Held, that M. took a life estate in the land, with remainder to the son named in fee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 360-365, 416-435; Dec. Dig. § 129.\*]

Error to Circuit Court, Buchanan County.

Action by John C. McCoy against P. L. Johnson and another, committee for Samuel M. Smith. Judgment for plaintiff, and defendants bring error. Reversed and remanded for new trial.

Greever & Gillisple and M. O. Litz, for plaintiffs in error. Chase & Daugherty and S. M. Coulling, for defendant in error.

WHITTLE, J. In this action of ejectment the defendant in error was plaintiff, and the plaintiffs in error were defendants in the lower court. [1] The theory of the plaintiff is that both parties claim the land sued for from a common source, Asheville H. Smith, and hence it was unnecessary for him to trace title beyond the common grantor. *Bolling v. Teel*, 76 Va. 493; *Chesterman v. Bolling*, 102 Va. 471, 46 S. E. 470; *Casselman v. Bialas*, 112 Va. —, 70 S. E. 479.

Plaintiff's chain of title is under a deed from Justus to himself, dated August 8, 1907, and a deed from Matilda Smith to Justus, dated July 31, 1906. He also endeavored to show that Asheville H. Smith devised all of his real estate to his wife, Matilda, and, moreover, that a tract of 75 acres, which includes the disputed land, was conveyed to her in fee simple by the heirs at law of her late husband by deed dated September 23, 1889.

The defendants controvert both propositions. They deny that Asheville H. Smith devised his lands to his wife, and insist that upon a correct interpretation of the deed of September 23, 1889, Matilda Smith took

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

a life estate only in the land, with remainder to her son, Samuel M. Smith, in fee. Matilda was dead at the date of the deed from Justus to McCoy, and therefore, if she only had a life estate in the land, McCoy took nothing by his deed.

The elder Smith left a will, which was admitted to probate, and, along with other court records in Buchanan county, was destroyed by fire in 1882. The evidence touching the contents of the will is, however, entirely too vague and uncertain to afford a safe guide to the court in determining what disposition the testator made of his property. Much of the testimony on that point was hearsay, and the witnesses who either claim to have read the will themselves or to have heard it read by others speak from memory after the lapse of half a century, and give their opinions as to the legal effect of the instrument rather than its precise language.

[2] It is settled law that, where a plaintiff claims title under a lost or destroyed paper, "the proof of its former existence, contents, and loss or destruction must be strong and conclusive before the court will permit a title to be established by parol evidence." *Carter v. Wood*, 103 Va. 68, 43 S. E. 553.

The circuit court erred in overruling defendants' motion to exclude the evidence in support of the contention that the testator devised his lands to his wife.

The only other assignment of error which demands our attention involves the construction of the deed of September 23, 1889. The circuit court denied defendants' prayer for an instruction, that the deed conveyed a life estate to Matilda Smith with remainder to Samuel M. Smith in fee, and, in lieu thereof, told the jury that the former took a fee simple under the deed.

Before undertaking to interpret this deed, reference to some of the elementary principles of construction may be helpful. [3] The expositor, as was said by a learned judge (Mr. Justice Sanderson in *Walsh v. Hill*, 38 Cal. 481, 487), should place himself in the position "occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it."

[4] It is also a cardinal rule in the construction of all writings that the intention of the parties, when it can be obtained from the instrument itself, will prevail unless counteracted by some positive rule of law. 2 Devlin on Deeds, § 836. And when such intent is apparent, and not repugnant to some rule of law, it must prevail over mere technical terms, "for the intent \* \* \* is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect. \* \* \* If the deed contains a clause decisively showing the intention of the parties, ambiguities and inconsistencies in other clauses of the deed will not defeat such intention."

Section 837. [5] The circumstances connected with the transaction and the situation of the parties are of value, and may always be considered in arriving at their intention. Section 839.

[6] "Grammatical construction is not always to be followed, and it has been said that neither false English nor bad Latin will avoid a deed when the meaning of the party is apparent." Section 843.

[7] Again, it has been held that punctuation "is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail; but the court will first take the instrument by its four corners in order to ascertain its true meaning. If that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it." Mr. Justice Baldwin, in *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed. 624.

In the light of these fundamental principles, let us approach the construction of the deed in question. Omitting merely formal parts, it reads as follows:

"This deed, made this 23 day of September, 1889, between \* \* \* heirs at law of Asheville H. Smith, deceased, of the first part, and Matilda Smith of the second part \* \* \* witnesseth: for the consideration of each of one part of the estate of the said A. H. Smith, the party of the first part does grant unto the party of the second part all the following parcel of land, containing 75 acres, \* \* \* with covenants of general warranty, unto the said Matilda Smith during her life time, then at her decease to Samuel M. Smith her son."

At the time of this conveyance Matilda Smith and her son Samuel were living together on the 75 acres of land. All the other heirs of Asheville H. Smith, by deed of partition, had received in severalty their shares of the lands of their father; and, unless this deed is to be construed as conveying a life estate to the mother with remainder to the son, Samuel will take no part of the estate.

We think the deed, though evidently prepared by an illiterate person, bears internal evidence of the fact that it constitutes part of a general scheme for the partition of the lands of the elder Smith among his widow and heirs. The consideration shows that such was its purpose. To give full effect to the intention of the parties in one deed, it was necessary that Samuel M. Smith should occupy the dual relation of grantor and grantee in the same instrument—of grantor to make perfect his mother's life estate in the land, and of grantee to receive from his co-heirs his share of the inheritance. [8] The deed is inartificially drawn. It contains no formal, well-defined clauses, and should not be controlled by technical rules of construction applicable to repugnant stipulations. It is composed practically of only one sentence, the granting clause, with a covenant of general warranty parenthetically introduced, followed by a comma and a capital. But the



original granting clause applies as unmistakably to the remainder to the son, after the death of the mother as it does to the life estate of the latter. The grant to Matilda Smith, in the beginning of the sentence, is not of a fee simple, and consequently is not repugnant to the qualifying language which follows and limits the estate granted to an estate for her life.

As was said in *Pack v. Whitaker*, 110 Va. 122, 126, 65 S. E. 496, 498, "there is no repugnancy between the granting and the habendum clauses, since the former does not in terms grant a fee-simple estate."

[9] In conclusion, we are of opinion that upon a fair construction of the deed Matilda Smith took a life estate in the seventy-five acres of land, with remainder to Samuel M. Smith in fee.

It follows from these views that the judgment of the circuit court must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed.

(112 Va. 598)

# ROANOKE RY. & ELECTRIC CO. v. CARROLL.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

## 1. STREET RAILROADS (§ 93\*)—INJURIES TO PERSONS ON TRACK—DUTY ON SEEING PERSONS ON TRACK.

A motorman is not obliged to stop his car merely because he sees a pedestrian approaching the track, as it is reasonable to assume that he will stop and wait for the car to pass, and not attempt to cross immediately in front of it.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195-200, 203; Dec. Dig. § 93.\*]

## 2. NEGLIGENCE (§ 83\*)—"LAST CLEAR CHANCE."

The doctrine of the last clear chance rests upon the principle that there is something in the plaintiff's condition or situation to admonish the defendant that he is not able to protect himself. It is the doctrine of prior and subsequent negligence, or remote and proximate cause, and presupposes the intervention of an appreciable interval of time between the prior negligence of the plaintiff and the subsequent negligence of the defendant. It applies notwithstanding the contributory negligence of the plaintiff when the defendant knows, or by the exercise of ordinary care ought to know, of plaintiff's danger, and fails to do something which it has power to do to avoid the injury, or when the plaintiff is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot and the defendant can prevent a resulting injury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 115; Dec. Dig. § 83.\*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4006.]

## 3. STREET RAILROADS (§ 103\*)—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

Where the evidence in an action for personal injuries showed that the accident occurred instantaneously with plaintiff's stepping

upon defendant's street railroad track, and makes it clear that, if his danger was discovered or might have been discovered, it was not possible to have stopped the car in time to have avoided a collision, the last clear chance doctrine does not apply.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 219; Dec. Dig. § 103.\*]

## 4. TRIAL (§ 267\*)—INSTRUCTIONS—MODIFICATION BY COURT.

In an action against a street railroad for injuries to a person on its track, the court's modification of defendant's instructions as to contributory and concurrent negligence by appending the last clear chance doctrine to the instructions is error, as the instructions were intended to present defendant's theory of the case, and should have been given without qualification.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 668-672; Dec. Dig. § 267.\*]

## 5. STREET RAILROADS (§ 93\*)—CARE IN OPERATION OF ROAD—CARE AT CROSSING.

Where the view of the street railroad crossing is obstructed, it imposes upon the railroad the reciprocal duty of using special precautions, depending upon the particular location and circumstances, to avoid accident.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 195-200; Dec. Dig. § 93.\*]

## 6. STREET RAILROADS (§ 98\*)—CARE OF PERSON CROSSING TRACK—VIEW OF CROSSING OBSTRUCTED.

Where the view of a street railroad crossing is obstructed, it imposes upon a person crossing the track the reciprocal duty of using a higher degree of caution, depending upon the particular location and circumstances, to avoid injury.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 204-208; Dec. Dig. § 98.\*]

## 7. STREET RAILROADS (§ 93\*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

An accident, by which plaintiff sustained injuries while crossing the track of a street railroad at the intersection of streets adjacent to a square, is so near a crossing as to bring it within the law applicable to crossing cases.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 93.\*]

## 8. STREET RAILROADS (§ 118\*)—ACTIONS FOR INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

An instruction in an action for injuries sustained on a street railroad crossing, which denies a recovery to plaintiff if he failed to use ordinary care and caution at the time of and prior to the accident, is erroneous because of its omission to state that the assumed failure of the plaintiff to exercise ordinary care, must have efficiently contributed to the injury.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 118.\*]

## 9. STREET RAILROADS (§ 117\*)—CONTRIBUTORY NEGLIGENCE—LOOKING AND LISTENING.

It is not negligent as a matter of law for a person to go upon a street car track without looking and listening.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 248-250; Dec. Dig. § 117.\*]

## 10. TRIAL (§ 243\*)—INSTRUCTIONS—SELF-CONTRADICTORY INSTRUCTIONS.

Requested instructions in an action for injuries on a street car track, that it was not negligence for a person to go upon the track without looking and listening, but that the law required that a person must use due care and must look and listen before going on the track, especially where the approach is partially ob-

structed, is self-contradictory, and properly refused.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 243.\*]

11. TRIAL (§ 260\*)—INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN.

The refusal of requested instructions as to questions dealt with and covered in instructions already given is proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Error to Corporation Court of City of Roanoke.

Action by John O. Carroll against the Roanoke Railway & Electric Company and the City of Roanoke. Action discontinued as to the City of Roanoke. Judgment for plaintiff, and defendant Roanoke Railway & Electric Company brings error. Reversed and remanded for new trial.

Plaintiff's first instruction was given as follows:

"The court instructs the jury that a street car running and operating its cars on the streets of a city must use greater care and diligence to prevent injury to persons and property than is required of them in running and operating their cars in less frequented and populous localities, and so in certain localities in the city greater precautions may be necessary than in others; for example, if a car is being run past an obstruction in the street and near to its tracks so that objects or persons on the other side of it are hidden from view, it is required of the street car company to resort to special precautions, depending upon the particular locality and the circumstances, to avoid accidents, and any neglect of any such precautions as are proper under the peculiar surroundings and circumstances of the locality constitutes negligence, for which the street car company is liable in damages, unless the plaintiff by the exercise of ordinary care on his part could have prevented the accident, and the burden is on the street car company to prove such absence of ordinary care on the part of the plaintiff."

Defendant's eighth instruction, which read,

"The court instructs the jury that, even though they may believe from the evidence that the approach to the track which defendant's car was approaching was partially obstructed by a pile of lumber, yet that fact did not lessen the care and caution required of plaintiff in attempting to cross, but, on the contrary, imposed on him a higher degree of caution"

—was modified and given as follows:

"The court instructs the jury that, even though they may believe from the evidence that the approach to the track on which defendant's car was approaching was partially obscured by a pile of lumber, yet that fact did not lessen the care and caution re-

quired of plaintiff in attempting to cross, but the existence of such obstruction should be considered by the jury in ascertaining what is reasonable care on the part of a person crossing said track."

The following instructions requested by defendant were refused:

"(2) The court instructs the jury that, while it is not negligence as a matter of law for a traveler to go upon a street car track without looking and listening, it is a settled principle of law that one who approaches a street railway track must use due care, and ordinary due care means that he must look and listen, and especially is this so where the approach to the track is partially obstructed.

"(3) The court instructs the jury that if they shall believe from the evidence that the plaintiff attempted to cross defendant's track at a point where its cars frequently passed to the knowledge of plaintiff, and where a view of the tracks was partially obstructed by a pile of lumber near the track, then it was the duty of the plaintiff to look and listen before attempting to cross the track, and if the jury shall believe from the evidence that he failed to look and listen, and that his failure so to do either caused or contributed proximately to his injury, then he was guilty of contributory negligence, and there can be no recovery in this case, though the jury may believe from the evidence that the defendant was negligent

"(4) The court instructs the jury that, though they may believe from the evidence that the defendant company was negligent, still the plaintiff cannot recover in this case if they shall also believe from the evidence that he failed to exercise ordinary care and caution at the time of and prior to the accident, and by ordinary care is meant that degree of care, caution, and prudence which an ordinary prudent and cautious man would exercise under like circumstances."

"(15) The court instructs the jury that if they believe that the collision in which the plaintiff was injured occurred in the market or public square, and not at the crossing at the east side of said square, then the duties imposed by law upon the defendant as to the manner of approaching crossings with its cars do not apply to this case.

Hall, Woods & Jackson, for plaintiff in error. Hairston, Hairston & Willis and Scott, Altizer & Watts, for defendant in error.

WHITTLE, J. This action was brought by John O. Carroll against the Roanoke Railway & Electric Company and the city of Roanoke, demanding damages in the sum of \$50,000 for personal injuries sustained by him through the alleged joint negligence

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the defendants. The negligence imputed to the city was that it permitted lumber to be piled in the street so near the track of the Railway & Electric Company as to partially shut out the view of approaching cars. The case was discontinued as to the city, and therefore we need not concern ourselves about its alleged complicity in the accident.

The salient facts of the case lie within narrow limits. The scene of the accident was the intersection of Nelson street and Campbell avenue, adjacent to Market Square. The street runs north and south, and the avenue east and west. The defendant maintains a double track along Campbell avenue, over which it operates a system of electric cars. The north track is used for west-bound cars, and the south tracks for cars going east. At the time of the accident the view of a pedestrian approaching Campbell avenue from the north (along the route traveled by the plaintiff) of cars coming from the east was partially obstructed by a building in course of erection near the northeast corner of Campbell avenue and the Market Square, and a pile of lumber 8 feet high, 9 feet wide, and 14 feet long, extending along the avenue to the outer edge of the sidewalk, and to within 44 inches of the defendant's northern rail. The view was, furthermore, obstructed by a large sand box and an upright engine connected by belting with a concrete mixer. After passing the lumber pile, the eastwardly view along the avenue was clear. A car station is located one square east from the corner of Nelson street and Campbell avenue on the south side of the avenue.

The plaintiff was 43 years old, and in possession of all his faculties. He was working in the Norfolk & Western Railway Company's shops in the city, and lived at Midway, on the defendant's line between Roanoke and Vinton. He had lived in the vicinity of Roanoke for about 14 years, and knew that the defendant maintained a double track along Campbell avenue, over which its cars frequently passed; and he occasionally used the cars in going from the city to his home. The accident occurred about 9:30 o'clock on the night of July 17, 1909, but the square was lighted by electricity. The plaintiff crossed Market Square diagonally in the direction of the junction of Nelson street and Campbell avenue. He thought the Vinton car had passed that point, and was hurrying to catch it at the station. The course mapped out in his mind for that purpose was along the north side of Campbell avenue, but, as he approached the corner, he discovered that the sidewalk was obstructed by the lumber pile, whereupon he determined to cross over to the south side. The evidence tended to show that the point from which he attempted to cross was about 15 feet west of the lumber, the southern line of which, as marked, was 44 inches from the northern

rail of the track, and the distance from that rail to the outer edge of the running board of the car was 23 inches, which left a clear space of only 21 inches between the running board and the lumber pile.

Plaintiff admits that he did not look to see whether a car was coming immediately before going on the track (though it was in evidence that an approaching car would have been visible for a distance of over 40 feet from the point at which he attempted to cross), but looked straight ahead. To quote his language: "I stepped into the track, and the car hit me just like that [snapping his hands together], and knocked me a distance; and, before I could recover myself, it was on me and dragged me. It didn't knock me senseless, though."

As the result of the accident he lost both legs above the knees, and the jury awarded him \$12,000 damages.

Conceding in the outset (as must be done, viewing the case from the standpoint of a demurrer to the evidence by the defendant) that the charges of negligence against the company, namely, excessive speed, failure of the motorman to have his car under control, to give the proper crossing signals, and to keep a lookout, were proved, the defendant nevertheless denies liability on the ground that the plaintiff was himself guilty of contributory negligence. In other words, the theory of the defendant is that the case was one of concurrent negligence.

On the other hand, the plaintiff contends that the charge of contributory negligence was not sustained, but insists that, if it had been proved, the evidence for the defendant warranted the application of the doctrine of the last clear chance.

The evidence relied on for that purpose is the testimony of a civil engineer, who gave estimates of how far the plaintiff could have seen a car coming along the north track from the east, at distances of 10, 20, 30, and 40 feet, respectively, from the track, from a point 15 feet west of the lumber pile, the argument of counsel in that regard being that, if the plaintiff might have seen the car, the motorman could likewise have seen the plaintiff in time to have stopped the car and avoided the collision.

[1] The obvious answer to that contention is that ordinarily a motorman rests under no obligation to stop his car merely because he sees a pedestrian approaching the track. The foot man is in a place of safety. He has absolute control of his movements and can stop instantly, and it is reasonable to assume that he will stop and wait for the car to pass, and not attempt to cross immediately in front of it. *Backus v. Norfolk & Atl. Ter. Co.*, 112 Va. —, 71 S. E. 528, and cases cited. It would be impossible to operate street cars in a city on any other theory.

[2] There have been numerous cases involving the doctrine of the last clear chance decided by this court, and the underlying prin-

ciple pervading all of them is that there is something in the plaintiff's condition or situation to admonish the defendant that he is not able to protect himself.

In *Southern Railway Company v. Bailey*, 110 Va. 833, 67 S. E. 365, 27 L. R. A. (N. S.) 379, the doctrine is stated in the syllabus as follows: "The doctrine of the 'last clear chance' applies, notwithstanding the contributory negligence of a plaintiff, when the defendant knows, or by the exercise of ordinary care ought to know, of plaintiff's danger, and it is obvious he cannot extricate himself from it, and fails to do something which it has power to do to avoid the injury; or when the plaintiff is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot, and the defendant can, prevent the injury. The plaintiff must show that at some time, in view of the entire situation, including his own negligence, the defendant was thereafter culpably negligent, and that such negligence was the latest in succession of causes. In such case the plaintiff's negligence is not the proximate cause of the injury. But this doctrine has no application to a case where both parties are equally guilty of neglect of an identical duty, the consequences of which continue on the part of both to the moment of the injury and proximately contribute thereto."

The doctrine is one of prior and subsequent negligence, or remote and proximate cause, and presupposes the intervention of an appreciable interval of time between the prior negligence of the plaintiff and the subsequent negligence of the defendant. Where the negligence of both continues down to the moment of the accident and contributes to the injury, the case is one of concurring negligence, and there can be no recovery.

[3] The testimony given by the plaintiff himself shows that the accident occurred instantaneously with his stepping upon the track, and it is clear that after his danger was discovered, or might have been discovered, it was not possible to have stopped the car in time to have avoided the collision. The case in that aspect is ruled by that line of decisions of which *Richmond Traction Co. v. Martin*, 102 Va. 209, 45 S. E. 886, is a type. The trial court, therefore, erred in giving an independent instruction involving the doctrine of the last clear chance.

[4] It also erred in appending that principle to the defendant's instructions 6, 7, 10, and 12. Even if the doctrine had been applicable, the instructions which the court modified were intended to present the defendant's theory of the case, and they ought to have been given without the qualification. *N. & W. Ry. Co. v. Stone*, 111 Va. 730, 734, 69 S. E. 927.

[5-6] The defendant's objection to that part of plaintiff's instruction No. 1 which told the jury that, if the view of the cross-

ing was obstructed, it imposed upon the defendant the duty of using special precautions, depending upon the particular location and circumstances, to avoid accident, may be considered in connection with the ruling of the court in modifying defendant's instruction No. 8. The two instructions were counterparts of each other, and both ought to have been given. *Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *A. & D. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590; *A. & D. R. Co. v. Ironmonger*, 95 Va. 625, 629, 29 S. E. 319; *Southern Ry. Co. v. Jones*, 106 Va. 412, 56 S. E. 155; *Southern Ry. Co. v. Hansbrough*, 107 Va. 733, 60 S. E. 58. The obligation of the plaintiff and defendant with respect to the duty imposed upon them was reciprocal, and the principle might well have been incorporated in one instruction. The suggestion that it imposes upon the parties a higher degree of responsibility than ordinary care is without merit. Ordinary care is a relative, flexible term, dependent upon the facts and circumstances of each case. Of course, when the view at a crossing is clear and unobstructed, the degree of vigilance resting upon the parties is not so great as where it is obstructed. What might be common prudence in the one case would be gross negligence in the other. It was this principle that the instructions were intended to impress.

The court refused to give defendant's instructions 2, 3, 4, and 15. These will be briefly considered in inverse order.

[7] No. 15 was rightly refused. The accident happened too near the crossing as to bring it within the influence of the rules applicable to that class of cases.

[8] Instruction No. 4 was amenable to objection, because it omitted to state that the assumed failure of the plaintiff to exercise ordinary care must have efficiently contributed to the injury. *Washington, etc., R. Co. v. Vaughan*, 111 Va. 785, 795, 69 S. E. 1035.

[9, 10] Instruction No. 2 initially told the jury that it was not negligence as a matter of law for a person to go upon a street car track without looking and listening (*Bass v. Norfolk, etc., R. Co.*, 100 Va. 1, 40 S. E. 100), but concluded with the proposition that the law requires that such person must use due care, and that ordinary care means that he must look and listen before going on the track, especially where the approach is partially obstructed. The instruction is self-contradictory, and ought not to have been given.

So, with instruction No. 3, it told the jury that, if the view of the approaching car was partially obstructed by a pile of lumber near the track, then it was the duty of the plaintiff, as a matter of law, to look and listen before going on the track. The jury ought rather to have been told in both instructions that the circumstances upon which they are predicated must be considered by them in determining whether the

plaintiff had exercised ordinary care. [11] It may also be noted that the questions dealt with in these last two instructions are covered by defendant's instructions 6 and 7.

For the foregoing errors, the judgment complained of must be reversed, and the case remanded for a new trial.

Reversed.

(112 Va. 620)

**WAINWRIGHT et al. v. BANKERS' LOAN & INVESTMENT CO.**

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

**1. LANDLORD AND TENANT (§ 76\*)—LEASES—ASSIGNMENT.**

Where a lease recited that the premises were to be used for hotel, billiard room, and saloon, and the lessees agreed not to use the building for any other purpose or sublet the building or any portion for any other purpose without the consent of the lessor, it was assignable.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 76.\*]

**2. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.**

Where a lessee's defense to an action for rent was that the lease had been terminated by notice given by the assignee of the lease, the refusal of an instruction that the lease was assignable was prejudicial error.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1066.\*]

**Error to Circuit Court of City of Roanoke.**

Action by the Bankers' Loan & Investment Company against W. H. Wainwright and another. There was judgment for plaintiff, and defendants bring error. Reversed.

A. B. Hunt and Woods & McNulty, for plaintiffs in error. Hall, Woods & Jackson, for defendant in error.

**WHITTLE, J.** This writ of error brings under review a judgment for \$945, recovered by the defendant in error against the plaintiffs in error for alleged arrearages of rent arising out of a contract of lease of the Academy Hotel in Roanoke city.

The lease bears date April 2, 1907, and demised the premises to the defendants for the term of five years, determinable at the option of the lessee in certain contingencies before the expiration of the term. Among other provisions, the lease stipulated that the property should be used "for hotel, billiard and pool room, and saloon," and the defendants covenanted not to use the building for any other purposes, "or to sublet said building, or any portion thereof, to be used for any other purpose without the consent" of the lessor. The agreed rental was \$154 per month for the first 11 months ending with the license year, \$167 per month for the second year, and \$189 per month for the residue of the term, for the payment whereof

the lessees bound themselves jointly and severally.

The lease also stipulated that in the event a license could not be obtained for the sale of liquor, or, if obtained, that the right to conduct a barroom should cease, the lessees, at their option, might abrogate the contract within 60 days after the end of the license year, provided the failure to procure license was not due to the default, neglect, or misconduct of the lessees in the manner of conducting the premises as a saloon or hotel, by giving immediate notice to the lessor of the failure to obtain such license, or to continue the lease under the contract, except the right to conduct the saloon, until the end of the term, in which latter event there should be an abatement of the rent equal to 25 per cent. of the monthly installments accruing after the expiration of the license year. The lease further stipulated that the lessees should immediately notify the lessor of any objection that might be raised to the granting of such license, and that the lessor should have the right to employ counsel at the expense of the lessees to assist in making application for and in attempting to procure the same. There were other covenants in the lease which do not demand special notice.

The defendants took possession of the property in May, 1907, and sublet the hotel portion, conducting personally the barroom as partners, until February 14, 1908, when Wainwright sold his interest to Ayres. Ayres continued the business, paying the rent to Turner & Turner, local agents for the plaintiffs at Roanoke, until July 17, 1908, when he assigned one-half of his interest to G. K. Moore. Ayres and Moore then continued the business jointly until the latter part of March, 1909, when Ayres assigned his interest to Moore.

At the April term, 1909, of the corporation court, Moore made application for a barroom license for the license year commencing May 1, 1909, and ending April 30, 1910, but license was denied; the evidence tending to show that the court had determined to refuse all liquor licenses in that section of the city. Thereupon Ayres and Moore on April 30, 1910, united in giving notice to the lessor of their election to terminate the tenancy by registered letter addressed to the home office of the plaintiff in New York, and by delivering a copy to the local agents in Roanoke. During the month of May following, Clark, the president, and Turner & Turner, the local agents, informed Ayres that they would not accept the surrender of the property, but would hold the original lessees responsible for the entire rent.

The misunderstanding between the parties growing out of the foregoing facts, and others which need not be specifically mentioned, culminated in the litigation which resulted in the judgment complained of.

[1] The controlling assignment of error involves the ruling of the trial court in the matter of giving and refusing instructions.

The court refused the prayer of the defendants to instruct the jury that the lease was assignable; and, as corollary to that interpretation of the contract, at the instance of the plaintiff, told the jury that the application of Moore, the assignee of the lease, for a barroom license, and the refusal of the court to grant such license, was not a sufficient compliance with the covenant of the lease to authorize the abrogation of the contract and surrender of the premises by the lessees.

It is settled law that, in the absence of express prohibition, all leases are assignable. The general doctrine is stated in Taylor's Landlord and Tenant (7th Ed.) § 402, as follows: "The power of assignment is incident to the estate of every lessee, unless he has been restrained by the terms of his lease. A covenant, however, not to assign or underlet the premises, without the express permission of the landlord, \* \* \* is frequently inserted in a lease."

In section 403, the learned author observes: "Covenants of this description (not to assign or underlet) are construed by courts of law with the utmost jealousy, to prevent the restraint from going beyond the express stipulation."

So in 2 Minor on Real Property, § 1226, after stating the general rule that every estate and interest in lands and tenements may be assigned, it is said "that if, in leases for life or years, it is intended to restrict or bar the power of assignment, it must be done by special and precise stipulations."

In 1 Minor on Real Property, § 417, it is stated that "such restrictions are not favored by the law and are strictly construed."

The language employed in this instance is plain and unambiguous, and leaves no room for construction. The premises are to be used "for a hotel, billiard and pool room, and a saloon," and the lessees "agree not to use said building for any other purpose, or to sublet said building, or any portion thereof to be used for any other purpose without the consent" of the lessor. The manifest intentment of this covenant is that the lessees may sublet the premises without the consent of the lessor for the purposes specified; and it was not contended in argument that the assignment to Moore was a violation of the restrictive covenant.

[2] The error in the ruling of the trial court that the assignment to Moore was invalid was fundamental. It permeated practically all of the subordinate questions involved, and cut up by the roots the several defenses sought to be interposed by the defendants.

There was no contention that the assignment relieved the original lessees, Wain-

wright and Ayres, from personal liability to pay rent, and to see that all covenants imposed upon them by the contract were performed. But they did contend that the assignment to Moore was valid, and that, in certain contingencies, he had the right to give notice and terminate the tenancy. In these contentions the defendants were plainly within their rights under the contract. They introduced evidence tending to show that they and their subtenants had discharged all the obligations imposed upon them by the terms of the lease, that the contingency had arisen which authorized its abrogation, and that due notice of their election to terminate the tenancy had been given. The court ought, therefore, to have held as matter of law that the various assignments of the lease were lawful; and pertinent issues raised by the evidence (though controverted by the plaintiff) should have been submitted to the determination of the jury upon proper instructions.

It follows from these views that the judgment of the circuit court must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had therein not in conflict with the views expressed in this opinion.

Reversed.

(112 Va. 591)

# NORTH BRITISH & MERCANTILE INS. CO. v. NIDIFFER.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

## 1. EVIDENCE (§ 269\*)—DECLARATIONS OF THIRD PERSONS.

In an action on a fire policy transferred to plaintiff, in which defendant claimed that the fire was caused by plaintiff or with his consent, evidence of declarations by the original insured, about a month before the fire, that there would shortly be a big fire, which would burn up the block, and of his inquiry as to who owned the nearby buildings, and whether they were insured, was not admissible as against plaintiff, in absence of evidence connecting him with the declarations, though it appears that plaintiff owed declarant a balance on the price of the property purchased; declarant not being a party thereto.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 269.\*]

## 2. INSURANCE (§ 308\*)—FIRE INSURANCE— COMPLIANCE WITH CONDITIONS.

An insured is only required to make a reasonable and substantial compliance with the conditions of a fire policy in order to sue thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 700, 701; Dec. Dig. § 308.\*]

## 3. INSURANCE (§ 669\*)—FIRE INSURANCE—AC- TIONS—INSTRUCTIONS—AMOUNT AWARDED.

An instruction, in an action on a fire policy, that if the jury believe that plaintiff should recover they should assess the value of the property "as of the time of the fire, and find for plaintiff three-fourths of the said value," could not have misled the jury to fix any other value than the actual cash value of the property on

the day of the fire, though it might have been well to have directly so instructed.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 669.\*]

**4. INSURANCE (§ 552\*)—FIRE INSURANCE—PROOF OF LOSS.**

Misstatements in the proof of loss, or insured's examination under oath, would not prevent recovery on a fire policy, unless they were intentionally made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1358; Dec. Dig. § 552.\*]

**5. APPEAL AND ERROR (§ 1064\*)—FIRE INSURANCE—INSTRUCTIONS—PROOF OF LOSS—EFFECT OF MISSTATEMENTS.**

In an action on a fire policy transferred to plaintiff by the original insured, there was evidence that plaintiff, in making his proof of loss and in his examination under oath, based his estimate of the value of the destroyed articles upon invoices shown him by the original insured when he purchased the goods, a month before the fire, and that some of the articles were excessively valued, and others shown in the proof did not exist, and the evidence made it a jury question whether plaintiff, in making proof of loss, had reason to and did believe that the invoices were correct. The court instructed that, if plaintiff in his proof of loss or examination adopted any statement of any one which was false, without attempting to know or investigate the truth of such matters, "and without any grounds for adopting said statement," he became responsible therefor as false, requiring a finding for defendant. *Held*, that, while it would have been better to have used the word "reasonable" before "grounds," it was not affirmative error to modify the instruction by inserting the quoted words; it not appearing that defendant was prejudiced thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4221-4224; Dec. Dig. § 1064.\*]

Error to Circuit Court, Wise County.

Action by M. D. Nidiffer against the North British & Mercantile Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bond & Bruce and Geo. W. St. Clair, for plaintiff in error. W. S. Cox and Morton & Parker, for defendant in error.

**BUCHANAN, J.** M. D. Nidiffer brought his action of assumpsit against the North British & Mercantile Insurance Company on a policy of insurance issued by that company to J. W. Hill and transferred by the latter to the plaintiff. There was a verdict and judgment in the trial court against the insurance company, and to that judgment this writ of error was awarded.

The errors assigned are based upon the action of the court in excluding evidence, in giving and refusing instructions, and in overruling the motion to set aside the verdict of the jury because contrary to the law and the evidence.

[1] The evidence excluded tended to show that J. W. Hill, to whom the policy was originally issued, had said, about a month before the fire which destroyed the property insured, that there would be a big fire before long, which would burn up the block, and inquired of the witness, who owned property near by,

whether or not she was insured. One of the grounds of defense relied on was that the origin of the fire was known to the plaintiff and was originated by his acts, or that the property was destroyed with his consent by some one in privity with him. To sustain that contention it is claimed that the rejected evidence was admissible, upon the ground that Hill was interested in the policy to the extent of \$500, balance of the purchase price due him on the insured property which he had sold to the plaintiff.

Hill was no party to the action, and his declarations as to what would happen to the property insured ought not to prejudice or affect the rights of the plaintiff, to whom the property and the policy had been transferred, whether theretofore or thereafter, in the absence of evidence connecting the plaintiff in any way with what Hill said about the burning of the property. There being no such evidence, the court properly rejected the alleged declarations of Hill.

The giving of instructions Nos. 1 and 2, asked for by the plaintiff, is assigned as error.

Those instructions are as follows:

(1) "The court instructs the jury that if they believe by a preponderance of the evidence that the plaintiff has fairly and reasonably complied with the terms of the policy of insurance, and if they further believe that the policy was issued to J. W. Hill and regularly transferred to the plaintiff, and that the property was afterwards destroyed by fire, then the plaintiff is entitled to recover."

(2) "The court further tells the jury that if they believe that the plaintiff is entitled to recover they shall assess the value of the property as of the time of the fire, and find for the plaintiff three-fourths of said value in a sum not to exceed \$1,000."

The objection made to instruction No. 1 is that a fair and reasonable compliance with the terms of the policy of insurance on the part of the plaintiff was not sufficient to entitle him to recover, but such right depended upon a literal compliance with the provisions of the policy.

[2] The general rule in this state is that, in an action on a policy of insurance against fire, all that can be required of the plaintiff is a reasonable and substantial compliance with the conditions of the policy. See *Home Ins. Co. v. Cohen*, 20 Grat. 312; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575, 581-583, 44 Am. Rep. 177; *North British & Mer. Ins. Co. v. Edmundson*, 104 Va. 486, 52 S. E. 350.

There is nothing in this case, so far as we can see, to take it out of the general rule, or which shows that instruction No. 1 did not properly state the law applicable to the case.

[3] The objection made to instruction No. 2 is that it does not restrict the jury in assessing the value of the property destroyed

to its actual cash value at the day of the fire, as provided by the policy, but left it to them to assess the property at the excessive value placed upon it by the plaintiff. While it might have been better to have told the jury that in assessing the damages, if any, they were to be governed by the actual cash value of the property destroyed at the time of loss, we do not think that the jury could have been misled by the language used, in fixing any other than a cash value upon the property destroyed at that date.

The defendant offered ten instructions. Seven of them were given as offered. Three—Nos. 5, 6, and 7—were modified by the court and given. The action of the court in not giving instructions Nos. 5 and 6 as offered is assigned as error.

Instruction No. 5, as offered, was as follows: "The court instructs the jury that all inquiry by the defendant company as to the articles destroyed and the value of same, for which the plaintiff seeks to recover in this action, was material; that both in the proof of loss and examination under oath of plaintiff the defendant had a right to have the truth from plaintiff, whatever plaintiff's intention might have been, and if you believe from the evidence that the plaintiff stated, either in the proof of loss or examination under oath, that more articles were destroyed than he had in the building, or stated that he had a greater number of articles than he actually had, and that same were burned, then that is false swearing within the meaning of the policy, and you must find for the defendant."

[4] The instruction as offered denied the right of the plaintiff to recover if he had made misstatements, either in his proof of loss or in his examination under oath, no matter how innocently made. The modification made in the instruction by the court told the jury that such misstatements or mistakes would not deprive him of the right to recover, unless they were made intentionally or knowingly. The modification made in the instruction was clearly right. See *Va. Fire & Marine Ins. Co. v. Hogue*, 105 Va. 355, 366, 54 S. E. 8, and authorities cited.

[5] Instruction No. 6, as amended by the court, is as follows: "The court instructs the jury that if you believe from the evidence plaintiff in his proof of loss or examination under oath adopted any statement of any one which was false without attempting to know or investigate the truth of such matters for himself, *and without any grounds for adopting said statement*, he thereby became responsible for such statement as false within the meaning of the

policy and you must find for the defendant."

The instruction as offered did not contain the words in italics.

There was evidence tending to show that the plaintiff, in making his proof of loss and in answering questions under oath, based his estimate of the values of the articles destroyed upon invoices shown him by Hill when he (plaintiff) made his purchase about one month before the property insured was destroyed by fire. There is also evidence tending to show that some articles were excessively valued and that others never had any existence. The contention of the defendant was, and is, that the plaintiff had no right to adopt Hill's invoices or statements, which were incorrect, without investigating the truth of their contents. The contention of the plaintiff, on the other hand, was, and is, that he purchased the property only a short time before the fire upon the faith of such invoices; that he considered Hill a man of truth and integrity, and did not scrutinize his statements as carefully as he would have scrutinized those of a stranger; and that, even if there were mistakes, which is denied, in his proof of loss or in his answers under oath, such mistakes were not intentionally or recklessly made.

Whether or not the plaintiff, in making his proof of loss or his answers under oath, had reason to believe, and did believe, the said invoices and statements to be correct, was a question for the jury under all the facts and circumstances of the case. *Va. Fire & Marine Ins. Co. v. Hogue*, 105 Va. 355, 54 S. E. 8. The modification made in the instruction was to submit that question to the jury, and, while it would have been better to have used the word "reasonable" before the word "grounds," we do not think that under the facts and circumstances disclosed by the record the defendant could have been prejudiced by the language of the court.

The remaining assignment of error to be considered is to the action of the court in refusing to set aside the verdict as contrary to the law and the evidence.

As we have seen, no error of law was made by the court to the prejudice of the defendant in submitting the case to the jury, and, as the evidence was conflicting upon all the material questions involved in the case, we are of opinion, without a detailed discussion of the evidence, that the court did not err in refusing to set aside the verdict of the jury.

The judgment complained of must therefore be affirmed.

Affirmed.



(112 Va. 566)

**HOWARD et al. v. HOWARD et al.**

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

**1. EVIDENCE (§ 63\*)—PRESUMPTION OF SANITY.**

All men are presumed of sound mind; the burden being upon one asserting it to show the contrary.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 83; Dec. Dig. § 63.\*]

**2. DEEDS (§ 72\*)—UNDUE INFLUENCE.**

The undue influence sufficient to set aside a deed must destroy the grantor's free will in executing it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 190-199; Dec. Dig. § 72.\*]

**3. DEEDS (§ 196\*)—UNDUE INFLUENCE—BURDEN OF PROOF.**

The burden of showing such undue influence as will avoid a deed is upon the person asserting it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 588; Dec. Dig. § 196.\*]

**4. DEEDS (§ 211\*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.**

Evidence held not to show undue influence in the execution of a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 641; Dec. Dig. § 211.\*]

**5. DEEDS (§ 211\*)—MENTAL CAPACITY—SUFFICIENCY OF EVIDENCE.**

Evidence held not to show that a grantor was mentally unsound when he executed the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 638-640; Dec. Dig. § 211.\*]

**6. EVIDENCE (§ 568\*)—OPINIONS—MENTAL CAPACITY—WEIGHT.**

The evidence of witnesses present when a deed was executed is more reliable in proving mental incapacity than the opinion of witnesses based on facts which may not result from mental unsoundness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2394; Dec. Dig. § 568.\*]

**7. DEEDS (§ 68\*)—CAPACITY OF GRANTOR—OLD AGE.**

The law prescribes no age limit beyond which one is incapacitated from executing a valid deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68.\*]

**8. WILLS (§ 47\*)—TESTAMENTARY CAPACITY—SENILE FAILURE OF MEMORY.**

Testamentary capacity is not destroyed by failure of memory incident to old age.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 94; Dec. Dig. § 47.\*]

**9. DEEDS (§ 68\*)—CAPACITY OF GRANTOR.**

A deed executed by a grantor of legally sound mind will not be set aside because the disposition of property made therein is unwise.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 68.\*]

**Appeal from Circuit Court, Russell County.**

Suit by W. N. Howard and others against Joseph Howard and others to set aside a deed. From a decree for complainants, defendants appeal. Reversed, and bill dismissed.

H. A. Routh and J. C. Gent, for appellants. Finney & Wilson, for appellees.

**HARRISON, J.** By deed dated January 21, 1909, Hiram Howard, since deceased, conveyed to the appellants Joseph Howard, Henry Howard, and Amanda Howard, several tracts of land lying adjacent to each other, containing in the aggregate about 165 acres, upon which the grantor resided, reserving to himself an estate in the land conveyed for and during the term of his natural life. The three grantees in this deed were the children of Hiram Howard by his second marriage; the last two named being under 21 years of age. The bill in this case was filed in the circuit court of Russell county by the appellees, six children of Hiram Howard by his first marriage, asking to have set aside the deed of January 21, 1909, to the appellants, upon the ground that the grantor was mentally incapable of making the deed, and upon the further ground that undue influence had been exerted over him. In response to the prayer of the bill, the circuit court set aside and annulled the deed in controversy, and from that decree this appeal has been taken.

It appears that Hiram Howard and all of his children lived upon the most cordial and amicable terms; the case being free from the bickerings usually found in such controversies. It further appears that Hiram Howard, though at the advanced age of 89 when he died, had lived an active and frugal life, nothing appearing of either mental or physical weakness until about 8 or 9 months before the deed in controversy was executed, when he was afflicted with "aphasia," involving some difficulty in his power of speech. It further appears that at the time of the execution of the deed the grantor was living at his home on the land in controversy, with his wife and her three children, the appellants, while the appellees, his six children by a former marriage, had more than 20 years before all married and left the home of their father, each having acquired an independence of greater value, to be inferred from the evidence, than that possessed by the father. On the other hand, the appellants, the three children by the second marriage, two of whom were under age and without education, were living at home, carrying on the work of the farm, and aiding in promoting the care and comfort of their father in his old age. In this situation and surroundings Hiram Howard made the deed of January 21, 1909, conveying his real estate to the appellants, reserving a life estate for himself.

[1] The general rule is well settled that all men are presumed to be of sound mind, the burden being upon him who alleges the contrary to establish such allegation. *Burton v. Scott*, 3 Rand. 399; *Miller v. Rutledge*, 82 Va. 867, 1 S. E. 202; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

The evidence furnishes no ground for the contention that this case comes within the terms of an exception to the general rule, which casts upon the defendants the burden of showing that the grantor was mentally capable of making the deed in question. Under the facts of this case, to say that mental incapacity must be presumed until capability is proved would be to say that insanity is the natural state of the human mind. *Burton v. Scott*, supra, 3 Rand. 400.

[2, 3] The allegation that undue influence, causing him to make the deed, was exerted over the grantor is without any evidence to sustain it. Before undue influence can be made the ground for setting aside a deed or will, it must be sufficient to destroy free agency on the part of the person executing the instrument. It must amount to coercion—practically duress. It must be shown to the satisfaction of the court that the party had no free will, but stood in vinculis; and the burden in such a case, as in a case where fraud is charged, is always on him who charges undue influence. *Jenkins v. Rhodes*, 106 Va. 564, 56 S. E. 332; *Hoover v. Neff*, 107 Va. 441, 59 S. E. 428; *Wood v. Wood*, 109 Va. 470, 63 S. E. 994.

[4] The only fact pointed out in support of the charge of undue influence is that some years before the deed was made, when Hiram Howard was having his will prepared, his wife said to him that "she thought he ought to give her and the children all the land, that the land ought not to be divided between the first children." This remark did not influence her husband, for he proceeded to execute the contemplated will dividing his land between all of his children. The remark was not more than legitimate suggestion, which is permissible, and furnishes no warrant for the charge that undue influence was exerted.

[5] The evidence also fails to sustain the charge that Hiram Howard was mentally incapable of disposing of his land on the 21st day of January, 1909, when the deed in question was executed by him. A large number of witnesses were introduced on both sides of this issue, speaking of the mental capacity of the grantor both before and after the execution of the deed. None of appellees' witnesses saw the grantor the day the deed was executed, and practically all of them admit that they could not speak as to his mental condition at that time. This evidence is more than offset by the testimony of numerous friends and neighbors of the grantor, who show that he was capable of making the deed. This character of evidence is, however, always very unsatisfactory and inconclusive. It consists of mere opinions of witnesses who have in the most transient and casual way seen the person whose mental capacity is assailed, and whose conclusions with respect to the subject of inquiry rest upon no substantial basis.

[6] The testimony of witnesses who were

present at the factum is more to be relied on than the opinion of other witnesses based on facts, which may be proved and yet not be the result of unsoundness of mind. *Beverly v. Walden*, 20 Grat. 147; *Porter v. Porter*, 89 Va. 118, 15 S. E. 500.

There were present on the occasion of the execution of the deed in this case six witnesses, including the justice who took the acknowledgment. They were intelligent friends and near neighbors of the grantor, who saw him frequently. They all speak of his mental condition when the deed was executed, and, after hearing and observing him with a view of ascertaining his mental condition, they all agree that he was of sound mind and capable of disposing of his property. The weight of this evidence has not been met or overcome by any other evidence in the record, and it must be accepted as establishing the fact that the grantor was mentally capable of making the deed in controversy at the time it was executed.

Criticism is made of the fact that these witnesses were summoned to be present at the factum by the appellants, without the solicitation or knowledge of the grantor. The unfavorable appearance sought to be drawn from this circumstance is answered by the fact, shown of record, that the witnesses were present at the suggestion and under the advice of the attorney who prepared the deed. The sequel shows the wisdom of that advice and the course pursued in response to it. In the case of *Porter v. Porter*, supra, one of the witnesses to the will voluntarily summoned several other witnesses to test the soundness of the mind of the testatrix, and we find no intimation in that case that such a course suggested any impropriety on the part of those who adopted it.

It is relied on as a suspicious circumstance by the appellees that the deed was not read to the grantor at the time of its execution. The evidence shows that the contents of the deed had been made known and explained to the grantor before it was executed, and the justice who took the acknowledgment and several of the other witnesses at the factum testify that it was suggested that the deed be read, when the grantor said that it was not necessary, that he understood its terms. It further appears that some days after the deed was executed it was read over to the grantor, and that he expressed his satisfaction with it, saying that he had fixed up his business now and was satisfied. This evidence as to the knowledge of Hiram Howard of the contents of the deed is undisputed. That it was, under such circumstances, unnecessary to read it at the time of its execution, is sustained by the case of *Montague and Wife v. Allan's Ex'r*, 78 Va. 592, 49 Am. Rep. 384, where it is held that to be satisfied that the testator knew the contents of the will when it was executed was all that was necessary.

In the year 1903 Hiram Howard made and executed a will by which he gave his lands to be equally divided between all of his children by his first and second marriages. After the testator's death this will was proven and admitted to record. Comment is made upon the fact that this will shows the purpose of the testator, when it was written, with respect to the division of his lands; and upon the further fact that it was not destroyed when the deed was made. That men may and constantly do change their minds with respect to the disposition of their property is a sufficient answer to the fact that Hiram Howard changed his between the years 1903 when the will was made and 1909 when the deed in controversy was executed. As a legal proposition, it was not necessary that the will should have been destroyed when the deed was made. That it was not destroyed is sufficiently accounted for by the fact that it disposes of the testator's personal property, which the deed does not do, and it was necessary to preserve the will to that end.

[7, 8] Stress is laid by appellees upon the great age of the grantor, as tending to sustain the allegation of mental incapacity. The law prescribes no limit in point of age beyond which a person cannot dispose of his property. A man 89 years of age is often as capable of making a deed or will as at any other period of his life. The greatness of his age is not proof of mental incapacity. *Spencer v. Moore*, 4 Call, 423. Nor is testamentary capacity destroyed by mere failure of memory incident to old age. *Montague v. Allan's Ex'r*, supra.

It is shown that Hiram Howard had been a strong man physically and mentally; that he had lived a careful and moral life; and that, apart from the ordinary infirmities of age, the only affliction he suffered with at the time the deed was made was one of a physical nature which did not affect his mind in any such way as to destroy his capacity to make the deed.

[9] The unequal disposition by the grantor of his land among his children is relied on as indicating mental incapacity. Courts cannot measure the size of people's capacities, nor examine into the wisdom and prudence of men in disposing of their property. If a man be legally compos mentis, be he wise or unwise, he is the disposer of his own property, and his will or deed stands as a reason for his actions. *Greer v. Greer*, 9 Grat. 330.

Hiram Howard was living at his home with his wife and his three children by her, two of whom were under age. They lived upon terms of reciprocal affection and confidence. This young family shared his toils and burdens, and did what they could to make the evening of the father's life one of peace and comfort. The six children by his

first marriage had for many years been settled in homes of their own, and had prospered. The land disposed of by the deed is valued at from \$7,000 to \$8,000. Taking the highest valuation, it would give the nine children, if divided equally, \$888.88 each. Divided among the three beneficiaries of the deed, each would have \$2,666.66. The father had doubtless considered this question, and concluded that the small sum to each arising from an equal division would not justify him in leaving his wife and infant children helpless and without a home. Certainly, to many, the final disposition made by the grantor of his land would commend itself, not only as wise, but as a most natural and proper disposition under the circumstances. Be that as it may, it was his disposition, and cannot be disturbed.

Upon the whole case, we are of opinion that the circuit court erred in setting aside and annulling the deed in controversy, dated January 21, 1909. The decree appealed from must, therefore, be reversed, and this court will enter such decree as the circuit court ought to have entered, dismissing the bill filed by the appellees, with costs in favor of the appellants.

Reversed.

(112 Va. 635)

# WAMPLER v. HARRELL et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

## 1. DEEDS (§ 211\*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

Evidence held not to show undue influence in the execution of a deed to the grantor's nephew.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 641; Dec. Dig. § 211.\*]

## 2. JUDGMENT (§ 708\*)—CONCLUSIVENESS—PERSONS CONCLUDED.

In an action to set aside a deed on the ground of mental incapacity, the record of a suit brought some years before by the grantor against others than defendant involving her mental incapacity was not admissible in evidence, defendant not being a party to the former suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. § 708.\*]

## 3. EVIDENCE (§ 568\*)—OPINION EVIDENCE—MENTAL CAPACITY—WEIGHT.

The evidence of persons present when a deed is executed is more reliable in determining mental capacity than the opinions of other witnesses based on facts which may not result from mental unsoundness.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 568.\*]

## 4. DEEDS (§ 68\*)—"MENTAL CAPACITY" OF TESTATOR.

No particular degree of mental capacity is essential to enable one to execute a deed, the test being whether the grantor had at the time sufficient mental capacity to understand

the nature of the transaction, and assent thereto.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4475.]

#### 5. WILLS (§ 31\*)—"MENTAL CAPACITY"—TEST.

The test of whether testator had sufficient mental capacity to execute a valid will is whether at the time he understood the nature of the transaction, and intelligently assented to the provisions of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 66-68; Dec. Dig. § 31.\*]

#### 6. DEEDS (§ 211\*)—MENTAL CAPACITY—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to show that a grantor had sufficient mental capacity to execute a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 638-640; Dec. Dig. § 211.\*]

#### 7. WILLS (§ 55\*)—MENTAL CAPACITY OF TESTATOR—SUFFICIENCY OF EVIDENCE.

Evidence held to show that testator was mentally competent when a will was executed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.\*]

#### 8. DEEDS (§ 211\*)—FRAUD—SUFFICIENCY OF EVIDENCE.

Evidence held not to show that the consideration for a deed was so grossly inadequate as to show fraud in its procurement.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 643; Dec. Dig. § 211.\*]

#### 9. DEEDS (§ 212\*)—VACATING—SUFFICIENCY OF EVIDENCE.

Evidence in a suit to set aside a deed given for support of grantors held, to show that defendant had done everything that could reasonably be expected in complying with his obligations under the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 650; Dec. Dig. § 212.\*]

Appeal from Circuit Court, Wythe County.

Suit by Pollie Harrell and another against D. H. Wampler. From a decree for complainants, defendant appeals. Reversed, and bill dismissed.

El. Lee Trinkle and W. B. Kegley, for appellant. W. S. Poage, for appellees.

**HARRISON, J.** The controlling question in this case involves the mental capacity of Sallie Worrell and Pollie Harrell to make and execute a certain deed dated the 27th day of March, 1907, by which they conveyed their real estate to their nephew, D. H. Wampler, and of Sallie Worrell to make the will left by her when she died in July, 1907.

It appears that at the time of the transactions now called in question these two old people were living together, as they had done for many years prior thereto, upon a small tract of land containing in the aggregate 49 acres, situated about two miles from Rural Retreat, in the county of Wythe. Of this tract Pollie Harrell was the owner of 20 acres and Sallie Worrell the owner of the remaining 29 acres. They were sisters, and had both been mar-

ried, but the husband of each was dead. Pollie Harrell had grandchildren, but Sallie Worrell was childless and without descendants. They were both over 75 years of age and feeble. They were of plain and simple habits of life, uneducated, and had spent practically all of their lives in the community where they resided at the time of the execution of the papers in controversy, very much alone, seeing and mixing with but few people. They made their living while they were able to perform their usual work by weaving, raising fowls, selling eggs and butter, and renting out their little farm to croppers. They did their own marketing, made their own trades with their croppers and others, looked after the division of the crops, and generally performed all of the labors about their home. A brother, George Wampler, owned a small tract of land adjoining their land, and had assisted them in looking after their affairs, doing work for them which they could not personally perform. These modest surroundings and this uneventful simple life constituted the daily routine of these two feeble old people, whose mental capacity is the subject of this inquiry.

It appears that prior to March 27, 1907, when the deed under consideration was executed, these two old people, with a view of aiding two of their nephews, sons of their brother George Wampler, in the purchase of a threshing machine, became their indorsers for \$1,875, and gave a deed of trust on their little farm to secure that sum. This enterprise of the nephews proved a failure, and resulted in leaving an unpaid balance of about \$1,000, secured by deed of trust on the farm, without any other source of payment but these women. This heavy incumbrance coming in their old age and enfeebled condition was naturally a great source of anxiety and trouble to them, leaving them in constant fear of having their home sold to satisfy the debt. On March 24, 1907, three days before the deed in question was executed, George Wampler, the brother to whom they had looked for assistance, died, thus increasing their anxiety and helpless condition. At this time their nephew, D. H. Wampler, the appellant, who lived about 68 miles distant, in the state of Tennessee, and who had come to attend his uncle's funeral, was at the home of his old aunts paying them a visit. This nephew had spent a considerable part of his early life with these aunts, and had visited them after settling elsewhere. It was while on this visit that the deed of March 27, 1907, was made and executed by the aunts conveying to D. H. Wampler their land upon the terms and conditions therein set forth. Those terms were that the nephew should, in consideration of the

49 acres of land, pay all liens and debts to which the land was subject, and should maintain and support the two grantors and their sister, Ann Wampler Miller, during their lifetime. The deed provides that as a further consideration for the land conveyed the grantor should pay to the grandchildren of Pollie Harrell whatever was left of her part of the property after considering her support and deducting her part of the liens and debts binding the whole land. Provision is made for the appointment of a disinterested committee of three persons to value the land of Pollie Harrell as a basis for the settlement with her grandchildren. This committee was selected by the grantors, and at their instance made a prompt report, estimating the value of Pollie Harrell's 20 acres at \$40 per acre. This report was attached to the deed as a part thereof before it was recorded, the three members of the committee who made and signed it acknowledging the same before the notary who was present at the execution of the deed. The members of this commission are shown to be men of fine judgment and the highest standing.

After this deed was made and recorded, and before July 12, 1907, Sallie Worrell made and executed a will by which she gave to her nephew, D. H. Wampler, the appellant, her personal property, providing that the legatee should pay her sister, Ann Wampler, \$25 and her nephew, G. W. Wampler, \$10, within six months of the time of her death. Soon after this will was executed Sallie Worrell died, and it was duly proven and admitted to record on July 12, 1907. The death of Sallie Worrell within a few months after the execution of the deed in controversy seems to have made the impression upon Pollie Harrell and Ann Wampler Miller that the appellant had gained some advantage under the deed. This idea, the record very clearly indicates, was instigated by the sister, Ann Wampler Miller, who was secured a support for life under the deed. She is shown to be a very turbulent spirit, and her dissatisfaction and agitation continued until the bill in this case was filed by herself and Pollie Harrell, one of the grantors in the deed, seeking to annul the same, and also to have declared null and void the will left by Sallie Worrell, upon the ground that she and her deceased sister were both of unsound mind, and therefore incapable of making either a deed or a will.

[1] There is no direct evidence adduced to sustain the charge that undue influence was exerted over these aunts by their nephew, the appellant, nor are there any circumstances tending to support the charge. On the contrary, the execution of both the deed and the will appears to have been wholly voluntary acts on their part, uninfluenced

by suggestion from any quarter. The record furnishes a sufficient reason moving the grantors to make the deed of March 27, 1907. They were old and feeble, and were in urgent need of some one competent to manage their affairs and look after their comfort. Their brother, George Wampler, upon whom they had depended for help, had just died, and they had no near relative in the community in whom they could place confidence. In this dilemma their nephew, the appellant, who had lived with and been nurtured by them, and for whom they must have felt some affection, appeared in their home, and they at once turned to him for the help they so much needed at that time, and determined through him to make certain provision for their support during their remaining years.

[2] The appellees seek to inject into this case, as evidence, the record of a suit brought some years before by Sallie Worrell, which they claim involved her mental capacity. The transactions involved in that suit have no bearing upon the case at bar, and cannot be looked to for any purpose. The appellant was not a party to that suit, and is in no way bound by the proceedings therein or its results. The present cause must be decided upon its own merits, and not upon the results of a long-past litigation, the record of which the appellant had never seen.

In this case, as in most cases of its kind, an array of witnesses have been introduced for and against the competency of these old people to make and execute the instruments involved in this controversy. The preponderance of this evidence is, we think, in favor of their competency. Such evidence is, however, at best, very unsatisfactory, and furnishes a very inadequate basis for a reliable conclusion. It consists largely of opinions of persons having little acquaintance with those whose mental capacity is questioned, the conclusions reached having no substantial basis for support in either fact or reason. [3] Hence it is that the testimony of those who were present at the factum is chiefly regarded, and held to be more reliable than the opinion of other witnesses based on facts which may be proved, and yet not be the result of unsoundness of mind. *Beverly v. Walden*, 20 Grat. 147; *Howard v. Howard*, 72 S. E. 133, decided at the present term of this court.

In this case there were present at the execution of the deed of March 27, 1907, besides the grantor and grantee, three witnesses: Dr. W. W. Buck, who had been up to his retirement from practice for years the family physician of these people, and had known them well practically all of his life; James F. Huddle, a farmer living within a mile of the grantors, who had known them well for more than forty years; and E. M. Davis, cashier of a bank at Rural Retreat, and the notary who took the acknowledgment

to the deed, who had known the grantors for many years.

The witnesses to the will of Sallie Worrell were Dr. Buck and Dr. E. W. Peary, who succeeded Dr. Buck as the family physician of these old people after the retirement of the former from practice. The evidence is full as to the intelligence, integrity, and high standing of these witnesses in the community. They were entirely disinterested, and express the emphatic and unqualified opinion that Pollie Harrell and Sallie Worrell were of sound mind and entirely capable of making both the deed and the will now in controversy. Dr. Buck prepared both the deed and the will, and says that the entire terms of each were fully discussed by Pollie Harrell and Sallie Worrell and recorded in accordance with their directions, free from the suggestion or influence of any one. It further appears from this evidence that before these papers were signed they were again carefully read over and fully explained to these parties, who stated in each case that it was all right, and what they wanted to do. These witnesses do not claim that these old people were possessed of any unusual intelligence, but their evidence is full and clear that they were capable of understanding, and that they did fully comprehend the nature of both these transactions, which were their free and voluntary acts, uninfluenced by any suggestion or persuasion from outside sources.

[4, 5] No particular degree of mental acumen is to be prescribed as the measure of one's capacity to execute deeds or wills. The test is whether the party had at the time of the execution of the instrument sufficient mental capacity to understand the nature of the transaction he was entering into, and to assent to its provisions. *Greer v. Greer*, 9 Grat. 330; *Beverly v. Walden*, supra.

[6, 7] Measured by this test, the mental capacity of Pollie Harrell and Sallie Worrell is shown to have been fully equal to making and executing the deed and will involved in this controversy.

[8] It is contended on behalf of the appellees that the consideration for the deed in question is so grossly inadequate as to show fraud in its procurement. This contention is wholly without merit. The deed shows on its face ample consideration. It shows that Pollie Harrell, who is now uniting in this attack upon her own mental capacity and that of her deceased sister, received every dollar her property was worth at the time, the value being ascertained in the manner suggested and insisted upon by her, which was a usual and proper method of arriving at such value. The witnesses introduced by both parties are practically united in the opinion that the consideration for the deed was ample, most of them saying that appellant had assumed more than they would

have been willing to do for the same consideration.

[9] It is further contended on behalf of appellees that appellant has failed to perform the obligations assumed by him under the deed. This is a mere recital in the bill, and does not appear to be a ground relied on for setting aside the deed. So far from basing their complaint upon the failure of appellant to comply with his covenants, they show that they did not wish him to comply or to be permitted to comply, since they pray for an injunction to restrain appellant from entering upon or taking possession of the land, thus showing their purpose to put it beyond his power to comply. This contention is, however, not sustained by the record. On the contrary, it satisfactorily appears that appellant has done all that he could reasonably be expected to do in compliance with his contract. He arranged for the cultivation of their land, for having firewood hauled and cut, and for furnishing flour and other necessities. He furnished them with a cow to provide them with milk and butter, furnished fertilizer for the farm, had the necessary fencing on the place done, and arranged with the tenant to turn over to them all that was raised on the place for their support and maintenance. He arranged with physicians to give them such medical attention as they should need, and for his notification should his presence be needed. He sent his daughter to live with them and to look after their personal comfort, who remained with them until the pestiferous Ann Miller made conditions so disagreeable that she could no longer stay. In the last illness of Sallie Worrell appellant came with his wife, spending some weeks in the home, and gave to his aunt the personal attention that she needed, and, when she died, gave her decent burial and paid her funeral expenses. Since the death of Sallie Worrell, through the misguided feeling and violence of Ann Miller, appellant has been forced to keep away from the home, and has been unable to render them any personal service, either by himself or by members of his family. He has, however, continued, through the tenant employed by him, to furnish them their support. He has sent them money at different times, through other parties, which sums they, under advice of counsel, refused to accept. It further appears that appellant has received nothing from the use of the place; on the contrary, it has been an expense to him ever since the deed was made. It is true that appellant has not paid off the mortgage on the place, and he was wise not to do so pending this litigation. He was so advised by his attorney, and he made an arrangement with the creditor not to press the collection until after this suit was determined. This arrangement has been fully carried out, and appellees have suffered no inconvenience therefrom.

If failure to perform covenants were

ground for setting aside the deed, as to which we express no opinion, the evidence and circumstances disclosed by this record wholly fail to sustain the contention that appellant has not complied with his contract.

For these reasons, the court is of opinion that the decree of the circuit court declaring null and void the deed of March 27, 1907, and the will of Sallie Worrell, probated July 12, 1907, is erroneous, and must therefore be reversed; and this court will enter such decree as the circuit court ought to have entered, dismissing the bill filed by the appellees, with costs in favor of the appellant.

Reversed.

BUCHANAN, J., absent.

(112 Va. 536)

KENT et al. v. DOBYNS et al.  
(Supreme Court of Appeals of Virginia.  
Sept. 14, 1911.)

1. EASEMENTS (§ 8\*)—PRIVATE WAY—EXCLUSIVENESS OF POSSESSION—PRESCRIPTION.

To claim a private way by adverse possession, the user must be exclusive in the sense that it does not depend for its enjoyment on similar rights in others, though others may also acquire a right of user of the way by prescription.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 33; Dec. Dig. § 8.\*]

2. EASEMENTS (§ 5\*)—PRIVATE WAY—PRESCRIPTION.

To establish a private way by prescription, the use must be adverse, under a claim of right, and not permissive, exclusive, continuous, uninterrupted, and with the owner's knowledge and acquiescence, and must continue for at least 20 years.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 13, 20–22; Dec. Dig. § 5.\*]

3. ESTOPPEL (§ 98\*)—ESTOPPEL BY CONDUCT—USER OF PRIVATE WAY.

Defendant herein applied to have a certain way from his land over those of complainant's grantor established as a public road, and the court's order confirming the denial of the application recited that defendant had a sufficient road over the same location proposed as a public road, and that complainant's grantor, upon being examined, declared that he had given defendant permission to use the road, and had no intention of revoking it. Held, that the declaration of complainant's grantor would not estop complainant from asserting that defendant only used the road by permission and revoking his license to do so.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. § 98.\*]

4. LICENSES (§ 53\*)—USE OF LAND—REVOCA-TION.

A license to use a private way across land is revocable at the pleasure of the licensor.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 116–120; Dec. Dig. § 58.\*]

5. LICENSES (§ 58\*)—REVOCA-TION.

If an oral permission for the use of land as a way would, if under seal, have created an easement, equity may regard it as an equitable easement and irrevocable upon part performance by the licensee by expenditure of money or otherwise.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 58.\*]

Appeal from Circuit Court, Pulaski County.

Suit by T. M. Dobyns and another against J. Howe Kent and others. From a decree in part for complainants, defendants appeal. Affirmed.

Jno. S. Draper and Jos. C. Wysor, for appellants. W. B. Kegley and E. Lee Trinkle, for appellees.

WHITTLE, J. This appeal is from a decree perpetually enjoining the appellants from using a roadway from J. Howe Kent's residence through the farm of appellees to the Giles turnpike. The bill, moreover, prays that the defendants be restrained from the use of another road from J. Howe Kent's to what is known as the mountain land, extending in part over the plaintiff's property.

With respect to the latter route, the court adjudged the appellants, J. Howe Kent, Mrs. E. K. Hudson, and Mrs. Ellen G. Bell, entitled to the right of way, and denied the injunction, and that ruling is made the ground of cross-error by the appellees.

The appellants assert title to a private road to the Giles turnpike by prescription, by adjudication of a court of competent jurisdiction, and by estoppel.

The general principles of law applicable to this class of easements are well settled, and have received careful consideration by this court. For such easement to arise by prescription the user must be with the knowledge and acquiescence of the owner. It must be adverse, continuous, and uninterrupted for at least 20 years, and along a definite line of travel. It will not arise simply from permission of the owner, for it has been repeatedly held that the use of land of another for any length of time merely by permission will not ripen into title. [1] Nor must the use of the way be in common with other people. It is not essential, however, in order to satisfy the latter principle, that the claimant shall be the only one to enjoy the right of way, since other persons may likewise acquire a prescriptive right to use it. Nevertheless, claimant's right must be exclusive in the sense that it does not depend for its enjoyment upon similar rights in others. 14 Cyc. 1145, et seq.

[2] In Reid v. Garnett, 101 Va. 47, 48, 43 S. E. 182, Judge Buchanan summarizes the law on the subject as follows: "In order to establish a private right of way by prescription over the lands of another, the use and enjoyment thereof by the claimant must be shown to be adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it is claimed (Gaines v. Merryman, 95 Va. 660, 666, 29 S. E. 738; Washb. Easem. [3d Ed.] side p. 86); and such use and enjoyment must continue for a period of at least 20 years (Cornett v. Rhudy, 80 Va. 710)."

To the same effect is the more recent case of *Williams v. Green*, 111 Va. 205, 68 S. E. 253.

Tested by these well-settled criteria, the evidence, so far from being sufficient to establish a private right of way in the appellants, plainly shows that its use was by permission of Joseph Cloyd, the former owner, and was not exclusive in its character. They neither claimed nor possessed the exclusive right to use the road, but enjoyed it in common with any one else who chose to travel it. The record also discloses that the Cloyds and Kents owned large boundaries of contiguous lands. For generations the two families had been allied by ties of consanguinity, affinity, and friendship; and the permissive use of the roadway in question was the result of those relations, and in no sense founded on adverse claim.

The remaining contentions (namely, that appellants are entitled to the right of way by adjudication of a court of competent jurisdiction and by estoppel) both rest upon an order of the circuit court of Pulaski county on appeal from an order of the county court denying the application of Joseph G. Kent (the father of J. Howe Kent) to establish the road in dispute as a public road. The order reads as follows:

"*Jos. G. Kent, Appellant, v. Joseph Cloyd, Appellee.*

"Upon appeal from an order of the county court of Pulaski county refusing to establish a public road.

"The court having heard and maturely considered the evidence in this cause, and it appearing that the appellant has a sufficient and convenient road over the same location proposed for a public road applied for, and the appellee Joseph Cloyd, over whose land the road now passes, being examined as a witness, having declared that he had given permission to the said Kent and all others interested in said road to use the same at any and all times, and that he had no intention to revoke that permission, the court is of opinion that there is no error in the order of the county court, and affirms the same with costs to the appellee."

[3] It thus affirmatively appears from the order that Kent was using the road by permission of Cloyd, and not by virtue of any title or claim of title in himself, and this permissive use was the basis of the court's refusal to open a public road. If the appellant was not satisfied with the result of the litigation and the limitations placed upon his rights by the order, his remedy was by appeal. There was certainly nothing in the declaration of Joseph Cloyd, as incorporated in the order, to operate an estoppel. It was a frank, open avowal of the rights of himself and Joseph G. Kent with respect to the road, and was in no way calculated to mis-

lead the latter or otherwise to injuriously affect his rights. The parties stood in the relation of licensor and licensee towards each other, and the statement that Cloyd had no intention to revoke the permission (a declaration which he kept in good faith during his lifetime) in no way affected the rights or changed the relations of the parties. [4] The license remained a license, and was revocable at the pleasure of the licensor. 2 Min. Inst. (3d Ed.) 27, 28; Bigelow on Estoppel (4th Ed.) 557; 25 Cyc. 645.

Upon the second branch of the case, as we have seen, the circuit court decreed that J. Howe Kent, Mrs. E. K. Hudson, and Mrs. Ellen G. Bell, children of Joseph G. Kent, were entitled to a right of way over the 300-acre tract of land sold by Baskerville, trustee and commissioner, to Joseph Cloyd. This was an ancient roadway, passing originally wholly through the lands of Joseph G. Kent, and connecting his residence with the mountain land. When the intervening 300-acre tract was offered for sale at public auction, the auctioneer announced that the private right of way was reserved, and the land was sold and purchased subject to that reservation.

[5] In 1 Minor on Real Property, § 136, the author, in discussing the revocation of licenses, observes: "It seems, however, to be admitted that if the transaction be one which, if it were under seal, would create an easement, it being classed as a license merely because it is oral, upon a part performance thereof by the licensee by the expenditure of money or otherwise, a court of equity may regard it as an equitable easement, and therefore irrevocable."

This proposition is in accordance with the authorities cited in the notes, and sustains the decision of the learned circuit court.

Upon the whole case, we are of opinion that the decree appealed from is without error, and it must be affirmed.

Affirmed.

BUCHANAN, J., absent.

(112 Va. 552)

HOWARD v. GOSE et al.

(Supreme Court of Appeals of Virginia.  
Sept. 14, 1911.)

1. APPEAL AND ERROR (§ 1019\*) — REVIEW —  
REPORT OF REFEREE.

The report of a commissioner appointed in receivership proceedings is *prima facie* correct, and an order confirming it will not be reversed if the evidence is conflicting, unless the commissioner's finding is clearly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008-4010; Dec. Dig. § 1019.\*]

2. RECEIVERS (§ 203\*) — STATEMENT OF ACCOUNT—REFERENCE.

Where a commissioner appointed to take a receiver's account reported that he charged the



receiver with all sums received and credited him with all expenditures made by him, and it does not appear that the account could have been itemized and stated in detail, as directed by the decree ordering the account, or that a recommittal would be beneficial, the report was properly confirmed, though it did not state the receiver's account in detail.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 406; Dec. Dig. § 203.\*]

### 3. RECEIVERS (§ 193\*)—ACCOUNTING—CREDITS.

Upon the accounting of a receiver for the purchaser of lumber, who had become insolvent, the receiver should be credited with the amount of a rebate made for lumber sold by him under a guaranteed inspection, necessitated by a shortage in the lumber sold; the inspection having been made by the receiver's agent.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 384; Dec. Dig. § 193.\*]

### 4. RECEIVERS (§ 192\*)—ACCOUNTING—COST OF SETTLING.

A receiver did not make any account until a rule to show cause why he had not done so, in answer to which he filed a statement showing a much less balance in his hands than was due from him, whereupon the court ordered a reference to have a correct account made. *Held*, that the receiver should be charged personally with the expense of taking the account, crediting him with the amount paid for the commissioner's statement; the fund in his hands being chargeable only with the reasonable expense for stating the receiver's account, in answer to the rule to show cause.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 383; Dec. Dig. § 192.\*]

### 5. RECEIVERS (§ 198\*)—COMPENSATION.

Where, though the receiver did not keep accurate accounts, it was not shown that he did not act in good faith and manage the receivership properly, he will be allowed the usual compensation of 5 per cent. of the amount passing through his hands.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 392-396; Dec. Dig. § 198.\*]

#### Appeal from Circuit Court, Russell County.

Suit by C. T. Howard, administrator, against W. H. Gose and others. From a decree confirming the commissioner's report in receivership accounting proceedings, complainant appeals. Amended and affirmed.

W. W. Bird, for appellant. Routh & Routh and S. B. Quillen, for appellees.

**BUCHANAN, J.** The errors assigned in the petition for appeal are based upon the action of the court in passing upon exceptions to a commissioner's report, settling the accounts of J. E. Duff, as receiver in the cause.

In the year 1905, Jack Carter entered into an agreement with W. H. Gose and J. J. Campbell, by which he sold them a certain boundary of timber for the sum of \$3,000. Of this sum \$1,000 was paid in cash, and the residue was to be paid in 18 months from the date of the contract. A lien was reserved upon the timber to secure the payment of the deferred purchase price. The vendees were to have two years within which to remove the timber from the land. After re-

moving the larger and more valuable part of it, the purchasers became insolvent and unable to complete their contract. The rights of the vendor being endangered by litigation by other creditors, he, in July, 1906, brought this suit, by which the vendees were enjoined from further disposition of the timber or unsold lumber manufactured therefrom, and by consent of parties the said Duff was appointed receiver and directed "to take charge of the tan bark, manufactured lumber and fallen logs mentioned in the bill, and make the best available sale he can of such properties as are ready for market, and \* \* \* to proceed to manufacture all unmanufactured logs and timber mentioned and described in the contract between the complainant, Jack Carter, and W. H. Gose and J. J. Campbell as speedily as possible and make sale of the same to the best advantage of all parties in interest."

At the July term, 1907, the receiver not having made any report of his action, upon motion of the complainant a rule was awarded against him to show cause why he had not made and filed a report of his doings as receiver, returnable to the next term of the court. Before the November term of the court following, the defendant Gose had died, and at that term an order to revive the cause in the name of his personal representative was made. In February, 1908, the receiver filed a settlement of his accounts, made by the commissioner of accounts of the court. This report was excepted to by the complainant; but without passing upon the exceptions the court, upon motion of the complainant, directed one of its commissioners to cause the receiver to come before him and make a full and complete settlement of his receivership accounts.

Upon the coming in of that report, the complainant filed 12 exceptions and the receiver 4, all of which, except the complainant's exception numbered 11 and the receiver's exceptions numbered 1, 3, and 4, were overruled, and a decree entered, amending and confirming the commissioner's report. From that decree this appeal was taken by the complainant's personal representative.

The appellant insists that the court erred in not sustaining each and all of his exceptions to the commissioner's report, and in not overruling all the exceptions of the receiver.

[1] The appellant's exceptions to the commissioner's report, numbered 2, 3, 4, 5, 7, and 9, are upon matters of fact found by the commissioner. The evidence upon those matters is conflicting. While this court will, upon such matters, where the evidence is returned with the report, review and weigh the evidence, and if not satisfied that the commissioner has reached a right conclusion overrule his finding or findings, yet, except as to errors apparent on its face, the report

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is prima facie correct, and where the evidence is conflicting this court will not reverse the action of the trial court overruling an exception to the report and confirming it, unless the finding of the commissioner is clearly erroneous. *Hall v. Hall*, 104 Va. 773, 775, 776, 52 S. E. 557, and cases cited.

After a full examination of the evidence upon the matters involved in the said exceptions, we cannot say the findings of the commissioner, approved and sustained by the trial court, upon the questions involved in the said exceptions, are clearly erroneous.

[2] Appellant's exception numbered 1 is that the account of the receiver, as stated by the commissioner, is not itemized and stated in detail, as directed by the decree ordering the account.

The commissioner did not state the account by items and in detail, as directed, but he says in his report that it was impossible for him to so state it, from all the evidence before him, including the receiver's books, invoices, and statements filed. He reports that he charged the receiver with all sums or amounts which the evidence showed he had received as receiver, and credited him with all expenditures in the performance of his duties which the evidence showed he was entitled to. It does not appear that a more detailed statement of the account could have been made, or that anything could have been gained by recommitting the report. We are therefore of opinion that exception No. 1 was properly overruled by the trial court.

Exception No. 6 to the commissioner's report was because the commissioner had credited the receiver with \$70 a month for five months and \$35 a month for seven months, paid to C. L. Fletcher, whom he had employed as foreman to aid him in the performance of his duties as receiver.

By the terms of the decree appointing the receiver, he was authorized to employ such labor as was necessary to carry out the directions of the court in manufacturing and disposing of the timber and lumber, etc., which came to his hands as receiver. It appears that the services rendered by Mr. Fletcher were necessary, and that the compensation paid him therefor was not more than his services were reasonably worth.

[3] The court is further of opinion that the trial court properly sustained exception No. 1 of the appellee to the commissioner's report, and allowed him an additional credit for \$161.66 on account of rebate for lumber sold the Clinch Valley Lumber Company upon a guaranteed inspection. The evidence shows that on inspecting the lumber Mr. Fletcher was the agent of the receiver, and not the agent of the lumber company, and that upon inspection by that company there was a shortage and rebate to that extent. Not to credit the receiver with that sum would be to charge him with money which he was not entitled to and did not receive.

Exception No. 8 to the commissioner's re-

port is that the commissioner failed "to report the profits realized by the Clinch Valley Lumber Company on lumber sold by the receiver to it, as called for by the complainant, the said receiver being president of and a large stockholder in the Clinch Valley Lumber Company, to which he sold the greater part of said lumber."

A large part of the lumber was sold to the Clinch Valley Lumber Company, of which he was president and in which he was a stockholder; but the evidence shows that that company paid as much for the lumber as any one else would pay, and that Mr. Fletcher was authorized by the receiver to sell the lumber to any one else who would pay more for it. The receiver testifies that the lumber was handled through his company as a matter of convenience, and because in that way he was able to realize more for it than he could otherwise have done, and that he does not think that his company realized any profit upon its purchases beyond the necessary expense of shipping and handling it. It does not appear from the evidence that the Clinch Valley Lumber Company made a profit upon the lumber sold it, and the evidence tends to show that the appellant was benefited, rather than prejudiced, by such sales. Under the facts disclosed by the record, the trial court properly overruled that exception (No. 8) to the commissioner's report.

Exception No. 10 is because the "commissioner fails to charge the receiver with 142 logs containing 25,000 feet of merchantable lumber, left by the receiver in the woods unmanufactured and now spoiled and wasted."

It appears that the logs in question were scattered over the boundary of timber land—some 300 acres. The evidence is conflicting as to the quantity of lumber the logs would have made, their quality or condition, the difficulty of getting them to a sawmill on account of their location, and whether or not it would have cost more to have manufactured and marketed them than they were worth. The commissioner, upon all the evidence, did not think that the receiver should be charged with anything on account of these logs, and we cannot say that the trial court erred in approving his finding.

The appellant's assignment of error, based upon his exception No. 12, and cross-error assigned by appellee, based on his exception No. 4, may be considered together, as they both involve the question as to who should pay the costs of settling the receiver's account.

[4] The receiver failed to make any report of his doings to the court until a rule was awarded against him to show cause why he had not done so. When, in answer to that rule, he did file a statement of his account, it was inaccurate, and showed a much less balance in his hands than was really due from him. If the receiver had kept an ac-

curate and itemized account of his transactions as receiver, as he ought to have done, he could have made an accurate statement of his account in answer to the rule to show cause, and thus have rendered unnecessary the reference ordered by the court and the costs attending it. The court is therefore of opinion that no part of the costs or expenses attending the taking of the account ordered by the court should be charged to the complainant or the fund in the hands of the receiver, except what would have been a reasonable charge for stating his account in answer to the rule to show cause. The commissioner of accounts having charged him \$9.75 for making that statement, the court is of opinion that the receiver should be credited with that sum (\$9.75) on his account as receiver, and be charged personally with the costs and expense attending the taking of the account ordered by the court.

The appellee assigns as cross-error the action of the court overruling his exception No. 2, filed to the commissioner's report, for refusing to allow him the sum of \$127.68 as interest on money advanced by him in performing his duties as receiver. The commissioner reported that he did not allow that item of interest, because the evidence did not show that he had really made such advances as entitled him to the interest claimed. The refusal of the commissioner was approved by the trial court, and properly so, as it seems to us.

[6] The court is further of opinion that the trial court properly allowed the receiver compensation for his services. While he did not keep his accounts as carefully as he might have done, there is nothing in the record to show that he did not act with good faith in the performance of his duties and manage the trust with reasonable success. The amount allowed, 5 per cent. upon the fund which passed through his hands, was the usual, and we think a reasonable, allowance for his services, and the trial court properly so held.

The court is further of opinion that there was no error to the prejudice of the appellee in decreeing interest upon the balance found in the hands of the receiver from the 23d of February, 1909.

It follows from what has been said that there is no error in the decree appealed from, except in the matter of costs in taking and settling the account ordered by the court. Instead of crediting the receiver with \$75 on that account, the court ought only to have credited him with \$9.75 and rendered a personal decree against him for the residue. The decree will be amended in that respect, and as amended affirmed, with costs to the appellee as the party substantially prevailing.

Amended and affirmed.

(112 Va. 536)

BROWN et al. v. BALDWIN et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 111\*)  
—LOCATION OF SCHOOL—ACTION.

Where a municipality, to secure the location of a state normal school, agreed to furnish a site, and it appeared that the site finally selected would cost no more than the one first proposed, citizens were not sufficiently interested to invoke the equitable remedy of injunction to prevent the selection of the second site, for their burdens of taxation could not be increased.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 265-268; Dec. Dig. § 111.\*]

2. OFFICERS (§ 82\*)—SUBJECTS OF RELIEF—LEGAL REMEDY.

The validity of the appointment, election, or tenure of public officers cannot be questioned by a proceeding for an injunction; the questions being of a purely legal nature, cognizable only by courts of law.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 114; Dec. Dig. § 82.\*]

Appeal from Circuit Court, Montgomery County.

Suit by H. M. Brown and others against W. T. Baldwin and others. From a decree for defendants, complainants appeal. Affirmed.

Longley & Jordan and J. C. Wysor, for appellants. Johnson & Roop, H. C. Tyler, Woods, Jackson & Smith, R. E. Byrd, and Scott, Buchanan & Cardwell, for appellees.

HARRISON, J. Upon the application of eight citizens and taxpayers of the city of Radford an injunction was awarded in this case, enjoining and restraining the board of trustees of the Radford Normal School from entering into a contract for the purchase of certain property within the city of Radford, known as the "Heth property," as a site for such school, and enjoining and restraining the finance committee of the city council of Radford from paying for such site, upon the ground that the act creating the Radford Normal School makes the selection of the "Adams site," mentioned therein, obligatory, and leaves the board of trustees appointed under the act without discretion as to the physical location of the school, and upon the further ground that the board was an illegal body, without lawful existence or power to act until their appointment by the Governor had been ratified by the Senate of Virginia.

The act creating the Radford Normal School does not, as contended by appellants, confine the board of trustees to the Adams site as a location for the school establishment; on the contrary, under the facts disclosed by the record, we are of opinion that the board had the power to select, in its discretion, a site within the corporate limits of the city of Radford.

The controlling question, however, raised by the record, involves the right of appellants to come into a court of equity for the purposes of this suit.

[1] It clearly appears from the record that the appellants have no such interest in the location of this school in the city of Radford as gives them the right to invoke the aid of a court of equity in their effort to determine that location. Citizens can sue in equity to restrain a municipal corporation from creating an unauthorized debt or illegally expending the money of the municipality. *Lynchburg & R. St. Ry. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951; *Roper v. McWhorter*, 77 Va. 214. This principle, however, has no application to the present case, in which no unauthorized debt has been created by the city and no illegal expenditure of its money is contemplated. The record shows that the city must pay \$20,000 for either of the sites mentioned. It can, therefore, make no difference to the appellants, as taxpayers, which site is selected. The burden of taxation upon them will be the same in either case. It is clear that appellants have no interest in the selection of the site for this school differing from that of the general public, nor have they or the citizens generally the right to require the selection of the Adams site. The Radford Normal School, when established, will be in no sense a municipal institution of the city of Radford. It is purely a state institution, administered for the benefit of the whole state by one of its own instrumentalities, a board of trustees, which is given full power and authority to determine the location of the

school within the corporate limits of the city of Radford.

[2] Not only have the appellants no interest which permits them to ask for relief in equity in the matter of selecting a site for this normal school, but their attack upon the title of the trustees, as such, is unavailing as a ground for maintaining this proceeding to enjoin and restrain the trustees from discharging their public duties.

The law upon this subject is well settled, and is sufficiently stated in *High on Injunctions* (4th Ed.) § 1312, where the learned author says: "No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence, is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office; such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum for determining disputed questions of title to public offices. \* \* \* Thus equity will not interfere by injunction to restrain persons from exercising the functions of public offices on the ground of the illegality of the law under which these appointments were made, but will leave that question to be determined by a legal forum."

We are of opinion that the decree appealed from, dissolving the injunction awarded in this cause and dismissing the bill filed by the appellants, is plainly right and must be affirmed.

**Affirmed.**

(90 S. C. 153)

**McCLARY v. ATLANTIC COAST LUMBER CORPORATION et al.†**

(Supreme Court of South Carolina. Oct. 2, 1911.)

**1. LOGS AND LOGGING (§ 3\*)—TIMBER DEED—CONSTRUCTION.**

A deed to the timber on certain land, after conveying title thereto with certain easements, provided that the grantee, its successors or assigns should have 10 years beginning from the time when they should begin cutting and removing the timber, in which to cut and remove the same, and that, in case it was not cut and removed before the expiration of that period, they should have such further time as they might desire, but in that event should pay interest on the original purchase price annually. *Held*, that such deed, though a valid conveyance of the fee, passed a qualified or determinable fee only; the grantee and assigns being required to commence the removal of the timber within a reasonable time, as viewed by the parties when the contract was signed.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

**2. INJUNCTION (§ 173\*)—TEMPORARY INJUNCTION—VACATION.**

Where, in a suit to set aside a timber deed, complainant prayed and obtained a temporary injunction restraining defendant from cutting timber pendente lite, and such injunction was essential to the assertion and preservation of plaintiff's legal right, if established as alleged in the complaint, it was error for the court to set aside such injunction on insufficient counter affidavits.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 173.\*]

Appeal from Common Pleas Circuit Court of Williamsburg County; James W. De Vore, Judge.

Suit by Samuel M. McClary against the Atlantic Coast Lumber Corporation and another. From a decree dismissing the bill and dissolving an injunction pendente lite, plaintiff appeals. Reversed and remanded, with directions.

Walter Hazard and Lee & Fishburne, for appellant. Willcox & Willcox and Kelly & Hinds, for respondents.

**RUCKER, A. A. J.** This is an action against the defendant above named, commenced by service, respectively, on February 7, 1911, and February 17, 1911, upon the defendants. The object of the complaint was to have declared null and void a certain lumber deed, which in terms was as follows:

"State of South Carolina, County of Williamsburg.

"This deed and contract, made by and between S. M. McClary, of the county of Williamsburg and state of South Carolina, party of the first part, hereinafter called the first party, and the Atlantic Coast Lumber Corporation, a corporation chartered under the laws of the state of Virginia, the principal office of which is in the city of Norfolk in said state, party of the second part, hereinafter called the second party, witnesseth: That the said first party, for and in consid-

eration of the sum of two hundred dollars (\$200.00) cash in hand paid by the said second party to the said first party, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto the said second party, its successors or assigns, all the timber of every kind and description, both standing and fallen, of twelve (12) inches stump diameter and upwards twelve inches from the ground at the time of cutting on all that certain pieces, parcel or tract of land known as \_\_\_\_\_, situated in Sumter township in the county of \_\_\_\_\_ and state of South Carolina, containing two hundred and seventy-five (275) acres, more or less, and bounded and described as follows, to wit: On the north by the public road leading from Kingstree to Mayesville and lands of W. V. Brockington; on the east by lands of Robertson and Taylor; on the south by Black river, and on the west by lands of W. V. Brockington, exception being made to the following described timber, which is not conveyed in this deed, to wit: All other timber except the pine, the intention being to convey nothing but the pine timber situated on the above described premises. And the said first party further reserves the right to use any timber from the aforesaid tract or tracts of land for ordinary plantation purposes connected with the said land, this reservation, however, not to include the right to clear the said land of any of it.

"This deed further witnesseth: That the party of the first part does hereby also grant, bargain, sell and convey to the party of the second part, its successors or assigns, a permanent and exclusive right of way eighty (80) feet wide upon and across the tract or tracts of land described as aforesaid, and on all contiguous lands, to be selected and located by the said second party, its successors and assigns, whenever and wherever so desired, to be used for a permanent railroad or tramway, or for any permanent branch railroad or tramway, together with the following exclusive rights and privileges, to be exercised at any and all times during the continuance of this contract, at the pleasure of the said second party, its successors or assigns, namely, to enter freely upon the said above described tract or tracts of land, to have and enjoy all necessary and convenient rights of way, to be located by the said second party, its successors or assigns, over said lands and contiguous lands, for ingress or egress, at any and all times, for men, teams and vehicles; to cut and make roads over said lands; to build, construct, maintain and operate railroads, tramways, cart and wagon ways across said lands on such routes as may be selected by the said second party, its successors or assigns; to establish and maintain stables

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and other fixtures or buildings on the said lands; and to do any and all other things that may be necessary or convenient for the cutting, handling, hauling and removing of the timber, as aforesaid, from the above described tract or tracts of land, and for the transportation of any other timber and articles of every kind and description that the second party may desire to transport over the said roads or any of them, with the right to cut and use all such small timber and brush as may, in the judgment of the second party, its successors or assigns, be required to build, construct and maintain the aforesaid railroad, tramways, cart and wagon ways, roadways and buildings, fixtures and structures, during the continuance of this contract, for the removal of timber hereinbefore conveyed; and together also with the right of the second party, its successors or assigns, to remove at its or their pleasure, at any time during this contract, or at or after its termination, all rails, buildings, structures, fixtures and other property it or they may have placed on said land.

"To have and to hold all and singular the aforesaid timber situate on aforesaid tract or tracts of land, except that above reserved, unto the said party of the second part, its successors or assigns, and to have and to hold the aforesaid permanent and exclusive rights of way unto the said second party, its successors or assigns forever. And the said first party for himself or themselves, and for his or their heirs, executors and administrators, do covenant with the said second party, its successors or assigns, as follows:

"First. That the said first party will warrant and forever defend all and singular the title to the timber upon the aforesaid premises, and also the title to said permanent and other rights of way, and other rights and privileges hereby granted, unto the said second party, its successors or assigns, against himself, his heirs and all other lawfully or otherwise claiming or to claim the same or any part thereof.

"Second. That the said second party, its successors or assigns, shall have, and the same is hereby granted to it or them, the period of ten (10) years, beginning from the time that the said second party, its successors or assigns, begins the cutting and removing of the aforesaid timber from the tract or tracts of land above described, in which to cut and remove the said timber from the said lands; and that in case the said timber is not cut and removed before the expiration of said period, then that the said second party, its successors or assigns, shall have such additional time therefor as it may desire, but, in the last mentioned event the said second party, its successors or assigns, shall during the extended period pay interest on the original purchase price above mentioned, year by year in advance at the rate of six (6) per cent. per annum.

"Third. The said first party further agrees that the timber cut by the said second party, its successors or assigns, for the purpose of opening, clearing, building and constructing of the railroads, tramways, etc., as hereinbefore provided for, shall in no way whatsoever affect the time granted for the cutting and removing the timber conveyed under this deed from the tract or tracts of land aforesaid.

"Fourth. That the first party shall and will promptly pay all taxes that are now due or that hereafter may become due on the said land and timber. The said second party, for itself, its successors or assigns, covenants with the said first party, his heirs, administrators and assigns, that the said second party, its successors and assigns, shall and will promptly pay all damage done to growing crops in the selection and location of the rights of way above provided for; also any damage that may accrue to the said party by reason of any negligence on the part of the agents and employees of the second party, its successors and assigns, during the continuance of this contract, said damage to be assessed and ascertained by two disinterested persons, one to be chosen by each of the parties to this contract, and in case they disagree, the two so chosen to select a third, and the decision of any two of the persons so selected shall be made in writing and shall be final and binding upon all the parties hereto.

"All the covenants, stipulations and agreements herein assumed or undertaken by either party to this contract shall be binding upon their respective heirs, executors, administrators, successors or assigns, and all benefits and advantages herein provided for either of said parties shall accrue to their respective heirs, executors, administrators, successors or assigns, as the case may be.

"Witness our hands and seals this 18th day of August, A. D. eighteen hundred and ninety-nine (1899). S. M. McClary. [L. S.] Atlantic Coast Lumber Company, [L. S.] by R. L. Montague, Secretary. [L. S.]

"Signed, sealed and delivered in presence of S. McB. Scott. H. G. Askin. L. M. Overton. H. K. Weaver."

This contract was signed by the plaintiff and the defendant, Atlantic Coast Lumber Company, on the 18th day of August, 1899. The complaint attacks the deed upon the following grounds, as being against public policy, in that it requires the grantor to pay taxes for an indefinite period on the timber conveyed, and also for indefiniteness and uncertainty, in that no fixed or certain time was therein provided for the commencement of the cutting and removing of the timber thereby conveyed, and also asking that the said deed and contract should be construed as requiring the grantee and its assigns to commence the cutting and removal of the said timber within a reasonable time, and that the said time should be decreed to have

elapsed and expired prior to the entry of the defendant, Atlantic Coast Lumber Corporation (which is the successor of the Atlantic Coast Lumber Company), and that the defendant should be adjudged to have forfeited and lost all right under the said deed by reason of the expiration of a reasonable time, and that the said deed be ordered canceled.

There was a further allegation in the complaint for the sum of \$2,500 damages caused by cutting of a part of the timber on the land in dispute, and a petition for a permanent injunction against the defendant, Atlantic Coast Lumber Corporation, for entering on the land and cutting and removing any of the said timber. The record further discloses that certain affidavits were submitted, together with the papers and the deed, to Judge John S. Wilson, who, on the 3d day of February, 1911, issued a rule to show cause, and granting a temporary restraining order, to be returnable before the Honorable J. W. De Vore at chambers, at Sumter, S. C., on February 9, 1911. By consent of counsel, however, the case was not then heard, but did come up before Judge De Vore at Kingstree, S. C., on February 24, 1911, at which time the defendant put in various affidavits and its answer, wherein it affirmed that it acquired all the rights of the Atlantic Coast Lumber Company under the deed, and denied that this deed was void for any of the reasons set forth in the complaint, and that it had forfeited its rights thereunder; and further answering it alleged, by way of affirmative defense, that subsequent to the execution of the deed to the Atlantic Coast Lumber Company that the said lumber company, under the authority of its board of directors, borrowed \$1,000,000 through the Colonial Trust Company, and that such holders of the evidence of indebtedness were bona fide purchasers without notice, and that they were entitled to be protected as such, and that the plaintiff herein was estopped as against such bona fide purchasers. Upon the showing thus made before him, Judge De Vore dismissed the temporary injunction granted by Judge Wilson, and refused to grant a permanent injunction, and held that the deed in question was not subject to any of the objections urged by the plaintiff, and that the defendants were the owners in fee of the timber upon the land. Due notice of the intention to appeal was given, and it now comes to this court upon exceptions, which are in turn simplified by appellant's counsel to the following three propositions of alleged error: (1) Was there error on the part of the circuit judge in dissolving the temporary restraining order, and in refusing the interlocutory injunction? (2) Was there error on the part of the circuit judge in holding that the timber deed in question vested an absolute unlimited estate in fee simple, and that the clause fixing time limit could not operate

to qualify or restrict the estate thus granted, so as to require the grantee to cut and remove the timber within a reasonable time? (3) Was there error on the part of the circuit judge in holding that the deed is not void as being against public policy, (a) in that it tends to retard the growth of agriculture, and (b) in that it requires the grantor and his privies in estate to pay taxes indefinitely upon both the land and the timber?

[1] For purposes of convenience, we will consider the alleged errors as summarized in the reverse order, and we find that most of the questions raised are disposed of by the recent case of Flagler v. Atlantic Coast Lumber Corporation, 89 S. C. 328, 71 S. E. 849, where this court held in effect, first, that a deed such as this is, in all essential respects, carried with it the necessity on the part of the grantee of commencing the work of removal within a reasonable time from the date of the grant; this intention being found from the language of the grant itself. It is to be remembered that in this case there is in the grant itself, on page 12 thereof, and prior to the habendum clause, the expression in reference to the grantee, "to be exercised at any and all times during the continuance of this contract," and, again, and also before the habendum clause, the same language occurs, "at any time during this contract, or at or after its termination," the right to remove by the defendant of certain property. Both of these clauses in the deed, and prior to its habendum clause, indicate an intention on the part of the party of a time limit to the contract itself. Further on it is stated in the second covenant, on page 14 of the case, that the lumber is granted for a period of 10 years "beginning from the time that the said second party, its successors or assigns, begins the cutting and removing of the aforesaid timber," etc. Construing similar provisions to be found in the case of Flagler v. Atlantic Coast Lumber Corporation, we said: "It is contended by the respondent that this language is plain, simple, and unambiguous, simply meaning that when the owner of the timber commences cutting that he must finish within 10 years; but the obstacle in the way of the adoption of this view is that it presupposes that the grant was for an indefinite period, and there is nothing in the grant to show when the removing and the cutting of the timber is to begin. So it would follow that there is nothing to prevent the grantee from indefinitely holding the land and its original condition: For, while it is admitted that the work of cutting and removing must be done within the period of 10 years from the date of commencing, it is maintained that it lies solely within the discretion of the grantee to determine when he will commence." And the court concluded that this could not have been the intention of the parties. And the general rule was announced to be as fol-

lows, after the examination of the authorities, page 346 of 89 S. C., page 855 of 71 S. E.: "Suffice it to say that we are of the opinion that, both by the inherent reason of the thing, as well as by authority, the parties had in view some time for the commencing of the removing of the timber, which intention was not embodied in the terms of the contract; that the law will presume and will enforce that such commencing of the removing of the timber shall be within a reasonable time from the date of the contract."

It was further laid down in that case that what constituted a reasonable time would not be passed upon by this court, unless first passed upon by the circuit judge. The circuit judge in this case, as in that, has not passed upon what would constitute a reasonable time, and for the reasons herein set out at length it follows that the court erred in holding in effect that the defendant respondent could commence removing this timber at their will, and that such right would continue to exist as long as any trees were living which were in existence at the time of the making of the contract. but, on the contrary, should have held that, whilst unquestionably the title granted by McClary would convey to the defendant's assignor the fee to such timber, it was a qualified or determinable fee, subject to be defeated by the failure upon the part of the grantee to exercise the rights granted him within a reasonable time. We say again, as we said then, that what constitutes a reasonable time is a question to be determined upon the merits of each case, and its ascertainment rests upon what was the situation of the parties at the time of the making of the contract, and for this purpose it follows that this case must be remanded in order that the parties to this suit may introduce evidence showing the facts surrounding the contracting parties, in order that the court may determine what was a reasonable time, as viewed by the situation of the parties when the contract was signed.

[2] The appellant insists that the court below was in error in refusing to grant the permanent injunction asked for, and in dissolving the temporary injunction granted by Judge Wilson, and asks this court to review that action. The question by this exception is not without grave difficulties. The facts are that upon a showing made ex parte, before Judge Wilson, a restraining order is obtained and a rule to show cause why an injunction should not be granted during the pending litigation, returnable before Judge De Vore, when the return is made, including the answer of the defendant, accompanied by various affidavits. Upon the merits as shown, the circuit judge dissolved the restraining order and refused to grant the injunction, from which action the plaintiff duly appealed. Counsel for respondent insists

that the position taken by counsel for the appellant is new, and was not urged before the trial judge, and that for this reason should not now be considered under cases cited. It is impossible for this court to pass upon such a question. The question of an injunction was certainly before the trial court, as shown by the records and the second paragraph of the judge's decree. Whether the reasons then assigned are the same as those now urged, we have no means of ascertainment, and it could not be assumed that they are different, even if a difference of reasoning were material, which we do not assert to be the case. In this case no injunction was granted. The recent case of Crawford v. Atlantic Coast Lumber Corporation, 77 S. C. 81, 83, 57 S. E. 670, 671, seems to be in point. There a temporary injunction was granted by Judge Dantzler, and subsequently dissolved by Judge Gary, the case being, as this is, a timber case, and the injunction prayed for was to restrain the cutting of timber, as here. Judge Gary based his order of dissolution upon the ground that "an inspection of the complaint shows that it is general in its allegation, showing that irreparable damage would arise, or such damages as could not be fully compensated for in an action at law. Further, there is no allegation of the insolvency of the defendant." And this court, speaking through Mr. Chief Justice Jones, said: "Where the action is for the sole purpose of an injunction, and a temporary injunction is essential to the assertion and preservation of a legal right, if established as alleged in the complaint, it is error of law to refuse or set aside a temporary injunction"—citing *Alderman & Sons Co. v. Wilson*, 69 S. C. 159 [48 S. E. 85]. The Chief Justice proceeded to state that the temporary injunction did not work automatically, even if the complaint stated a cause of action, but that the trial judge must consider the showing made by the defendant, and then, reverting to the facts in that case, found that no showing at all was made by the defendant, and the complaint having stated a cause of action held that the circuit judge erred in dissolving the injunction, and reversed this order and restored the injunction. In that case, as in this, the injury sought to be prevented was the cutting of the timber; there, as here, the temporary injunction was set aside, and appeal to this court had; the only difference between the two cases was that in that case no showing was made by the defendant, whilst in this case the showing made under the deed by the defendant was insufficient. In principle, is there any difference between no showing and an inadequate one? In some cases possibly there may be, but not under the classes of cases now being considered; for, as the Chief Justice held in the Crawford Case, *supra*: "The injury complained of in this case is the threatened destruction of the timber and trees on the



plaintiff's land, a permanent injury to the substance of their estate, and falls within the class of injuries generally deemed in equity to be irreparable." So despite the discretion wisely vested in the circuit court, when by his construction of the timber deed he necessarily denied the injunction, that construction being erroneous, the injunction became an essential part of the plaintiff's rights, and the injunction is therefore restored, pending the determination of the question of a reasonable time, hereinbefore remanded to the circuit court for determination.

(39 S. C. 508)

COOGLER et al. v. CROSBY et al.

(Supreme Court of South Carolina. Oct. 2, 1911.)

**1. JUDGMENT (§ 495\*)—PRESUMPTIONS—JURISDICTION—PROCESS.**

The entire absence of proof of service in the record of a judgment of a court of general jurisdiction is not to be taken as conclusive evidence that no service was made, and the court before which the judgment roll is offered in evidence must presume that proper proof of service was submitted to the court rendering the judgment, under the rule that all presumptions must be indulged in favor of the jurisdiction of the court of general jurisdiction; and to avoid such a judgment for want of jurisdiction the jurisdictional defects must affirmatively appear of record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.\*]

**2. JUDGMENT (§ 490\*)—WANT OF JURISDICTION—REMEDY.**

Where the record of a judgment in a court of general jurisdiction does not show service, it is not for that reason void on its face; and the only remedy of the party claiming not to have been served is by direct proceedings to have the judgment set aside.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 928-928; Dec. Dig. § 490.\*]

**3. WILLS (§ 524\*)—CONSTRUCTION—CHILDREN.**

A devise of a certain tract of land to three separately named persons and the children of each passed title to the persons named and their children living at the death of the testator to the exclusion of after-born children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1116-1127; Dec. Dig. § 524.\*]

Appeal from Common Pleas Circuit Court of Fairfield County.

"To be officially reported."

Action by Anna Coogler and others against Sallie Crosby and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

A. D. Martin and Graham & Sturkie, for appellants. A. S. & W. D. Douglas, for respondents.

WOODS, J. The main question involved in this action for partition is whether the circuit court ruled correctly in holding that the plaintiffs were bound by a former judgment and sale of the land in pursuance thereof, under which the defendants, who are respondents in the appeal, claim.

[1] The alleged fatal objection to the validity of the former judgment and to its admission in evidence was that there was not found in the record the requisite proof of service on some of the plaintiffs, who were then infants. The record did not contain the affidavit or official certificate of service required by law; but it does contain petitions, duly signed, for the appointment of guardians ad litem for the infants, reciting the service on the infants, the answer of the guardians ad litem on behalf of the infants, and the judgment of the court of common pleas, directing a sale of the land, dated September 23, 1880. "All presumptions must be indulged in favor of the jurisdiction of a court of general jurisdiction. To avoid such a judgment for want of jurisdiction, the jurisdictional defects must appear affirmatively on the record." Ex parte Gray, 48 S. C. 566, 26 S. E. 786. The entire absence of proof of service is not to be taken as conclusive evidence that no such service was made; on the contrary, the court before which the judgment roll is offered in evidence must presume that the court, on the hearing of the case in which the judgment was rendered, had before it proper proof of the service of the summons, or it would not have rendered the judgment. Ex parte Pearson, 79 S. C. 302, 60 S. E. 706; Voorhees v. Jackson, 10 Pet. 449, 9 L. Ed. 490.

[2] In such case the judgment is not void on its face, and the only remedy of a party claiming not to have been served is by a direct proceeding to have the judgment set aside. The rule on the subject is thus well stated by Mr. Justice Jones, in Clark v. Neves, 76 S. C. 484, 57 S. E. 614, 12 L. R. A. (N. S.) 298: "When it appears affirmatively on the face of the record that an infant has not been served with summons, the infant is not bound by the proceedings. Bailey v. Bailey, 41 S. C. 337 [19 S. E. 669, 728, 44 Am. St. Rep. 713]. If the record is silent as to such jurisdictional matters with respect to a court of general jurisdiction, it will be presumed that what ought to have been done was done; but, when the record discloses the manner in which service on infants was attempted to be made, there is no presumption that they were served in any other way. Rice v. Bamberg, 59 S. C. 505 [38 S. E. 209]."

[3] The other point made by the appeal involves the construction of the following devise in the will of Jessie Wirick: "I give, devise, and bequeath to Simon Mobley and his children, Shadrac Countee and his children, Hilliard Countee and his children forever the balance of the Alston or Martin tract and what is known as the Adam Wirick-Piney Woods tract and the Taylor tract." Contrary to the contention of appellants, the law is settled that the persons named and their children living at the

death of the testator took the land to the exclusion of their children born after the death of the testator. *Myers v. Myers*, 2 McCord, Eq. 214, 16 Am. Dec. 648; *Robinson v. Harris*, 73 S. C. 469, 53 S. E. 755, 6 L. R. A. (N. S.) 330.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(156 N. C. 88)

### LOVE v. HARRIS.

(Supreme Court of North Carolina. Sept. 27, 1911.)

#### 1. FRAUDS, STATUTE OF (§ 116\*)—AGENCY OF AUCTIONEER—SIGNING MEMORANDUM OF SALE.

An auctioneer is the agent of both the buyer and seller, and the buyer by bidding authorizes him to make the memorandum of sale, so as to bind the buyer as to the terms of sale stated in the memorandum.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 258, 259; Dec. Dig. § 116.\*]

#### 2. FRAUDS, STATUTE OF (§ 115\*)—SIGNING.

The buyer's name need not be "subscribed" to the auctioneer's memorandum of sale in order to satisfy the statute of frauds; it being sufficient if it appears in the body of the memorandum, and the memorandum shows an intention to bind the buyer.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 250; Dec. Dig. § 115.\*]

#### 3. FRAUDS, STATUTE OF (§ 106\*)—MEMORANDUM OF SALE—SUFFICIENCY.

An auctioneer's memorandum of sale constituted a valid contract of sale, where it was made at the time of the sale upon the written notice of sale; the notice being an offer to sell the property and describing it, and the memorandum being an acceptance of the offer upon the terms contained therein, and containing the buyer's name in its body.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 210, 211; Dec. Dig. § 106.\*]

#### 4. AUCTIONS AND AUCTIONEERS (§ 7\*)—RE-SALE—NEW ADVERTISEMENT.

Upon the refusal of the purchaser at an auction sale to comply with his bid, the property may be resold, before the bidders disperse, without a new advertisement, or may thereafter be resold, if newly advertised.

[Ed. Note.—For other cases, see *Auctions and Auctioneers*, Cent. Dig. §§ 20-24; Dec. Dig. § 7.\*]

#### 5. SPECIFIC PERFORMANCE (§ 25\*)—PURPOSES OF RELIEF—ENFORCING BIDS.

A valid bid at an auction sale may be enforced against the bidder by a suit in equity.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. § 25.\*]

#### 6. MORTGAGES (§ 372\*)—FORECLOSURE—REFUSAL TO SELL—ACTION BY BIDDER—ILLEGAL SALE.

Where a second bidder for land at foreclosure sale, under a power, took no title because of the auctioneer's want of authority to sell without readvertisement, he could not recover damages from the mortgagee for failure to sell pursuant to his bid, irrespective of whether the

first bidder acquired title under his bid and deed from the mortgagee.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 372.\*]

#### 7. MORTGAGES (§ 372\*)—FORECLOSURE—ACTING WITHOUT AUTHORITY—KNOWLEDGE OF THIRD PERSONS.

Where the bidder at a second auction sale in foreclosure, under a power, which was invalid because the bidders at the first sale had dispersed and the second sale was not advertised, knew of those facts when he bid, he cannot recover damages from the mortgagee on the ground that he was misled to his injury by the mortgagee's assumption of power to sell, since he was charged by his knowledge of the facts with notice of the mortgagee's want of power to sell; an agent not being liable in damages for acting without authority, if the person dealing with him knows of the facts depriving him of authority.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 372.\*]

Appeal from Superior Court, Pasquotank County; Justice, Judge.

Action by W. T. Love against Caleb Harris. From a judgment for defendant, plaintiff appeals. Affirmed.

J. Heywood Sawyer, for appellant. E. F. Aydlott, for appellee.

WALKER, J. This action was brought to recover damages of the defendant for failure to comply with a bid made by the plaintiff at a sale, under a power contained in a mortgage to him. On January 9, 1905, Richard Harris and wife executed to the defendant, Caleb Harris, a mortgage on land, to secure the payment of a certain indebtedness, with power of sale in case of default by the said Richard Harris in the payment of the debt. On December 21, 1909, the mortgagor having failed to pay the debt, the defendant advertised the land for sale, under and by virtue of the power vested in him by the deed of mortgage, and on January 22, 1910, he sold the same through an auctioneer, J. O. Spence, at public outcry, and one Cader Jennings, who was and is solvent, bid the sum of \$1,500 for the land, and it was struck off to him at the said price. The auctioneer immediately made, on the back of the notice of sale, the following entry: "Sold to Cader Jennings for \$1,500, Jan. 22, 1910." After the sale had been completed and after the bidders had dispersed, the said Jennings refused to comply with his bid, and stated to the auctioneer, in the presence of the defendant, that he was bidding for Elijah Harrell; that he did not want the land himself; and that he would have to sell it again. Under the advice of a friend, the auctioneer sold the land again on the same day, after the bidders had dispersed, the defendant being present at the sale, and also the said Cader Jennings, and the plaintiff became the purchaser at the price of \$1,175; there being only a few persons at the sale and no new advertisement of the sale having been made. The defendant refused to make title to the plaintiff and executed a

deed for the land to Cader Jennings, who, in the meantime, had agreed to abide by his purchase. Out of the money paid by Jennings, the defendant retained a sufficient amount to pay his debt and expenses of sale, and paid the balance over to the mortgagor, whose consent was never given to the second sale. The plaintiff now sues to recover the difference between the real value of the land—that is, \$1,500, the amount bid by Jennings—and the amount bid by himself at the second sale. When the plaintiff bought at the second sale, the auctioneer made the same kind of entry on the notice as he had done when Jennings bid; that is, an entry to the effect that he had sold the land to the plaintiff on the said day for the sum of \$1,175. At the close of the evidence for the plaintiff, the defendant demurred thereto and moved to dismiss, or for judgment as of nonsuit, under the statute. The motion was allowed. Judgment was entered for the defendant, and the plaintiff appealed.

[1] We are of the opinion that the judge correctly decided the case. When a sale is made at auction, the auctioneer is the agent both of the vendor and the vendee. It has been said that, until the fall of the hammer, he is the agent of the vendor, but when the property is struck off to the purchaser by the auctioneer he then becomes the agent of the vendee. The vendor employs the auctioneer to make the memorandum of sale, and the buyer, by bidding, sanctions the authority of the officer to do so. He, therefore, has the power to sign the memorandum, so as to bind the vendee to the terms of the sale. 1 Reed, *Statute of Frauds*, §§ 315 and 316, and cases cited in the notes. The principle is recognized in the case of *Mayer v. Adrian*, 77 N. C. 83, where it was assumed that the auctioneer has the right to sign the memorandum for the vendee, though in that case it was held that the memorandum was not sufficient, as it was not physically attached to the written notice or offer of sale; nor did it in any way refer to that paper, so as to constitute, with it, a complete memorandum, showing the names of the parties and the terms of the contract of sale. See, also, the case of *Gwathney v. Cason*, 74 N. C. 5, 21 Am. Rep. 484, where it is said that an auctioneer is authorized by the bidder to sign his name to the memorandum or contract of sale.

[2, 3] It is not necessary that the vendee's name should be subscribed to the memorandum, but it is sufficient if it appears in the body of the instrument, and the intention is manifested thereby to bind the vendee by the instrument. Mr. Smith, in his work on *Contracts* (7th Ed.) at marginal page 93, states the law very clearly in regard to this matter, when he says: "There is a third point common to all the five contracts mentioned in the fourth section; it is with regard to the signature. The words are, you will recollect, '*signed by the party to be charged therewith, or some other person thereunto by him law-*

*fully authorized.*' The signature, it is obvious, is most regularly and properly placed at the foot or end of the instrument signed; but it is decided in many cases, that, although the signature be in the middle or beginning of the instrument, it is as binding as if at the foot, although, if not signed regularly at the foot, there is always a question whether the party meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But, when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied; there being a note in writing showing the terms of the contract, and signed by him. Therefore, where, in the case of the sale of a quantity of cotton yarn, a bill of parcels was sent by the seller to the purchaser, headed: 'London, 24th Oct., 1812. Messrs. John Schneider & Co., bought of Thomas Norris & Co., agents, cotton yarn and piece goods. No. 3, Freeman's Court, Cornhill.' Following this was a list of the articles sold, the particulars, quantities and prices—it was held, in an action for not delivering the yarn, to contain a sufficient memorandum to satisfy the requirement of the statute as to the signature of the party to be charged. In this case, the whole of the heading of the bill of parcels was printed, except the words, 'Messrs. John Schneider & Co.' But as it was then given out to the other contracting party by the party to be charged, recognizing the printed name as much as if he had subscribed his mark to it, he had recognized and avowed it as his signature." The auctioneer's memorandum in this case was made at the very time of the sale and was written on the notice, and this was sufficient to make a complete contract of sale, the memorandum being physically attached to the notice, or so connected with it as to constitute a sufficient reference to it, and so that they may be read together as parts of one and the same paper; the latter being an offer to sell the property (describing it), and the memorandum on the notice being an acceptance of the offer upon the terms contained therein.

In *Proctor v. Finley*, 119 N. C. 536, 26 S. E. 128, this court held that advertising a sale of land at auction is an offer to sell at the highest bid, and the person who makes the last and highest bid thereby accepts the offer, and the sale is complete, the auctioneer being the agent of the vendor to sell the land, and of the bidder to complete the sale, by making and signing a proper memorandum thereof, and that the statute of frauds, as adopted in this state, does not require that the name or signature of the bidder should be *subscribed* to the memorandum, but the latter may be in any form which indicates that he has accepted the offer and agrees to be bound by the contract of sale. The name of the bidder and the price, in that case, were written on the side of the notice, and this was held to be a good memorandum; citing *Gwathney*

v. Cason, 74 N. C. 5, 21 Am. Rep. 484; Mayer v. Adrian, 77 N. C. 83; Browne on the Statute of Frauds, § 369; 3 Am. & Eng. Enc. 848 and 849. The rule is thus stated in 29 Am. & Eng. Enc. of Law, page 856: "When the statute requires the memorandum to be 'signed,' it is immaterial in what part of the instrument the name of the party appears, whether at the top, in the middle, or at the bottom thereof, if applicable to the whole substance of the agreement, and written by the party, or by his authority, with the intention of thereby executing the same as a binding obligation. A printed name upon a paper, which is delivered under circumstances showing an intention to regard the printed name as the person's own, will suffice, as will an entry in a book containing the owner's name at the top of the page. When the statute requires that the memorandum be 'subscribed,' the signing must be a literal one at the end of the instrument. It is not necessary that the signature should be a part of the agreement itself. It is sufficient if it be indorsed upon it as a notification of the assent of the party, or if it be written in a letter or memorandum which refers to the agreement. The statute does not require that both parties shall sign one paper containing the contract. The subscription may be upon separate papers, as where counterpart memoranda are made and signed by the respective parties, or where an offer in writing is followed by a written acceptance of the same." The case of Dickerson v. Simmons, 141 N. C. 325, 53 S. E. 850 (opinion by Justice Brown), is distinguishable. There no sufficient memorandum referring to the written notice or offer of sale was made, but the principle herein stated was fully recognized. In our case, the entry on the notice was equivalent to an acceptance of the offer of sale at the price, and as much so as if the acceptance had been expressed in explicit terms and signed by the auctioneer, as agent for the vendee. It is just as indicative of his purpose to buy upon the terms of the offer and at the amount of the bid, as was the entry in the Proctor Case, if not more so. But, if the first memorandum had not been sufficient, the plaintiff cannot profit by the defect, as his memorandum is identical with it, and he therefore acquired no right, under the statute, by his bid and the entry of the auctioneer upon the notice of sale to call for a deed.

As both parties signed the memorandum in this case, the mortgagee having signed the notice, which was witnessed by the auctioneer, and the defendant having, within the meaning of the statute, signed the memorandum by his agent, duly authorized, it is unnecessary to decide another question in regard to what is a sufficient signing of the memorandum. The statute says it must be "signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." Commenting on this part of the statute, Mr. Smith, at marginal page

96 of his work on Contracts, says: "The signature is to be that of the party to be charged, and therefore, though, as I have pointed out to you, both sides of the agreement must appear in the writing, it is not necessary that it should be signed by both the parties; it is sufficient if the party suing on it is able to produce a writing signed by the party whom he is seeking to charge. And such a writing signed is sufficient to satisfy the fourth section, though it be only a proposal accepted by parol by the party to whom it is made. The person, however, who seeks to enforce the agreement has not the other altogether at his mercy, but must either do, or be ready to do, his own part of the agreement, before he can seek performance on the part of the person who has signed." Davis v. Martin, 146 N. C. 281, 59 S. E. 700; Love v. Atkinson, 131 N. C. 544, 42 S. E. 968.

[4] But, while the memorandum was sufficient within the statute of frauds, the sale to the plaintiff by the defendant and the auctioneer was invalid. If the purchaser at an auction sale is unable or refuses to comply with his bid before the bidders disperse, the property may be sold without a fresh advertisement, or the property may be afterwards sold, if it has been newly advertised. Discussing this subject, it is said, in 27 Cyc. at page 1486, that the bidder is liable for the amount of his bid, which may be recovered in a proper suit against him, or, if he is unable to comply with his bid, the property may be put up for sale a second time. This may be done immediately, if the purchaser's refusal or inability is clearly manifested, and the necessity of advertising a second time or giving new notices may be avoided if the resale is made on the spot and before the bidders disperse, although otherwise there must be a new publication and evidence of the trustee's or mortgagee's continuing authority to make the sale. It is no valid objection to such a resale that the property did not bring as much as at the first sale. In Barnard v. Duncan, 38 Mo. 170, 90 Am. Dec. 416, the very question we have here was presented. The bidder had refused, after the sale, to accept the deed because it did not contain covenants of warranty, and with reference to this the court said: "Upon the refusal to accept it, the trustee proceeded at once to put up the property for sale again, at the same place, on the same day, without readvertising or any new notice, and, few persons being present, the property was resold for \$25. This proceeding can neither be justified nor sustained. It was, in practical effect, a sale without notice. The sale, as advertised, had taken place several days before, and all bidders had departed. Though yet within the hours mentioned in the advertisement, it cannot be considered a fair and valid sale pursuant to notice. There should have been a new publication of notice for another day." It was so held in the case of Dover v. Kennerly, 38 Mo. 469, the following being the headnote.

which fairly states the substance of the opinion: "Where property offered for sale at auction by a trustee in a deed of trust is knocked down to the highest bidder, the sale may be enforced in equity in a suit for a specific performance, or the bidder may be held liable at law for the damages sustained. When the purchaser to whom the property is struck off at a trustee's sale at auction fails to complete his purchase, the property must be re-advertised for sale." *McClung v. Trust Company*, 137 Mo. 106, 38 S. W. 578. In this case it appears that the second sale was made after the bidders had dispersed and without any new advertisement. The trustee and auctioneer had no power or authority from the mortgagor to release the first bidder and sell to the second bidder for a less price. The mortgagor was vitally interested in this transaction, as, if we should hold that the second sale was valid, he would lose \$325.

[5, 6] Jennings was bound by his bid, and, as we have seen, it could have been enforced against him by a suit in equity, now a civil action. We hold the second sale, which was made to the plaintiff, to be invalid for the reasons stated, and as the mortgagee has made a deed to Jennings, in accordance with his bid, for the full amount of \$1,500, and as the mortgagor has assented to the execution of this deed by receiving the balance of the purchase money, after paying the debts, costs, and expenses, we think Jennings must be declared to be the owner of the land, and the plaintiff is not entitled to recover against the mortgagor, who is the defendant in this action, the difference between his bid and the real value of the land, according to his contention. It can make no difference, so far as he is concerned, whether Jennings acquired title to the land under his bid and the subsequent deed from the mortgagee, for it is sufficient to decide that the plaintiff acquired no right or title by virtue of his bid at the second sale, as the mortgagee had no power or authority to sell to him.

[7] The plaintiff cannot recover upon the ground that the mortgagee assumed to exercise a power to sell which he did not have, and that he was thereby misled or deceived to his injury, for the simple reason that he bought with full knowledge of all the facts, and as he is presumed to know the law he was fixed with notice of the fact that the mortgagee did not have the power to sell under the circumstances, and therefore he was in no sense defrauded. In *Le Roy v. Jacobovsky*, 136 N. C. 443, 48 S. E. 796, 67 L. R. A. 977, Justice Connor, quoting from *Reinhard on Agency*, § 308, and other authorities, says: "If the party with whom the agent has contracted knew that the agent had no authority, or was cognizant of all the facts upon which the assumption of authority was based, as, for example, when both parties labored under a mistake of law with reference to the

liability of the principal, the agent is not liable, either in tort or upon the contract.' *Newport v. Smith*, 61 Minn. 277 [63 N. W. 734]; *Baltzen v. Nicolay*, 53 N. Y. 467. In *Michael v. Jones*, 84 Mo. 578, the justice writing for the court says: 'But I am satisfied that under the best-considered modern decisions the principle invoked by the plaintiff cannot be carried to such an extent. The true rule, I think, is that, as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent with liability.' *Ruffin, J.*, in *Fowle v. Kerchner*, *supra* [87 N. C. 49], says: "The general rule is that whenever a party assumes to act as agent for another, if he has no authority, or if he exceeds his authority, he will be held to be personally liable to the party with whom he deals, for the reason that by holding himself out as having authority he misleads the other party into making the agreement. But the rule is founded upon the supposition \* \* \* that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guarantee a ratification of the act, and when this want of authority is known, and it is clear that the agent did not undertake to guarantee a ratification, it results that the agent is not personally bound.'" In this case, as we have indicated, the plaintiff had full notice of the situation, and will be held, therefore, to have known all the facts, and it is clear that the mortgagee did not undertake to guarantee a ratification by the mortgagor, so that the essential elements of a warranty as to the authority of the defendant to sell to him is lacking, and he cannot justly claim to have been deceived or defrauded. There is therefore no error in the case.

No error.

(112 Va. 544)

**DAMRON & KELLY v. CITIZENS' NAT. BANK OF CLINTWOOD.**

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

**ATTACHMENT (§ 87\*)—AFFIDAVIT—SUFFICIENCY.**

Under Code 1904, § 2964, which requires affidavits in attachments to be made by the plaintiff, his agent, or attorney, affidavits of attachment in favor of a bank, signed by individuals as vice president and as director, without any explanation, are insufficient; it not appearing on the face of the affidavits that such officials are agents.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 217-220; Dec. Dig. § 87.\*]

Appeal from Circuit Court, Dickenson County.

Attachment by the Citizens' National Bank of Clintwood against W. C. D. Sutherland and others, in which Damron & Kelly intervened as subsequent attaching creditors. From a judgment for complainants, interven-

ers appeal. Reversed, and complainants' bill dismissed.

Chase & Daugherty, for appellants. Skeen & Skeen and W. H. Rouse, for appellee.

**HARRISON, J.** This is an appeal from two decrees of the circuit court of Dickenson county in two chancery causes heard together, which were attachments in equity, sued out by the appellee bank against W. C. D. Sutherland in the one case, and against W. C. D. Sutherland, Lizzie Sutherland, and Frances Vanover in the other. The appellants, J. K. Damron and D. G. Kelly, who were subsequent attaching creditors, appeared by consent of counsel and with leave of court, for the purpose of moving the court to quash the attachment of the appellee bank in each case, upon the ground that the affidavits upon which the attachments were issued did not comply with section 2964 of the Code, which requires such affidavits to be made by the plaintiff, his agent, or attorney. From the two decrees overruling the motion to quash and directing a sale of the property attached, this appeal has been taken.

The affidavit in one case was made by C. C. Childress, who signed the same, "C. C. Childress, Vice President;," and in the other case the affidavit was made by J. H. Long, who signed the same "J. H. Long, Director." The question presented is whether either the vice president or director of a bank is such an agent of the corporation, in contemplation of the attachment laws, as to authorize either of them, by virtue of his office, without other authority, to make the required affidavit.

This question has been fully discussed and decided by this court in the case of Taylor v. Sutherlin-Meade Co., 107 Va. 787, 60 S. E. 132, where it is held that an attachment awarded to a corporation as plaintiff, based upon the affidavit of its secretary and treasurer, as such and without more, cannot be maintained. The principle there settled is equally controlling in the case of the vice president or a director of a corporation. The court cannot say, as a matter of law, in the absence of averment, that the term "vice president" or "director" necessarily imports the relation of agency between such officer and his corporation, within the intendment of the statute laws of this state, which require the affidavit to be made by "the plaintiff, his agent or attorney." If he is in fact such agent, it should be averred in the affidavit. Attachment laws being in derogation of the common law and harsh in their application, substantial compliance with their requirements must be made to appear on the face of the proceedings.

Correct practice requires the affidavit to aver that the affiant is "the plaintiff, his agent or attorney," according to the fact, and compliance with the rule imposes no undue hard-

ship upon the attaching creditor. In the case of a corporation, it can appoint as many agents as it pleases, with specific authority to make such affidavits.

The appellee bank having failed to comply with the law concerning the affidavits upon which its attachments were issued, we are of opinion that the circuit court erred in overruling the motion of the appellants to abate the same.

The decrees complained of must therefore be reversed, and the two bills filed by the appellee in these attachment cases will be dismissed.

Reversed.

(112 Va. 644)

#### WINGFIELD v. MCGHEE et al.

(Supreme Court of Appeals of Virginia. Sept. 14, 1911.)

##### 1. EQUITY (§ 71\*)—DEFENSES—LACHES.

Mere delay in bringing an action is not always laches barring it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204-211; Dec. Dig. § 71.\*]

##### 2. EQUITY (§ 340\*)—PLEADING—VERIFICATION—EFFECT AS TO PROOF—RESPONSIVENESS OF ANSWER.

The complaint in a suit to subject land to the payment of a legacy to plaintiff by the original owner alleged that the original owner devised the land to his daughters and devised \$300 to complainant to be paid by them, which was made a charge upon the land; that the daughters conveyed the land to defendant subject to complainant's claim, and that complainant had made frequent futile demands upon defendant for its payment; that the land is the only estate out of which the legacy can be satisfied, and the prayer was that it be sold and the proceeds applied to the payment of the legacy and for further relief. *Held*, that an allegation of the answer, which was under oath, that, if complainant ever had any claim upon the realty, it was settled during the lifetime of testator's daughters by an agreement between complainant and the daughters, was not responsive to the bill, but was new matter in avoidance of complainant's claim, so as to require defendant to prove such settlement by proof other than the sworn answer.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 697-700; Dec. Dig. § 340.\*]

##### 3. WILLS (§ 733\*)—LEGACIES—DISCHARGE.

The requirement of a will that a legacy charged upon land should be paid as soon as convenient meant that it should be paid within a reasonable time under the circumstances, and not that it should never be paid, or not paid until after the death of the devisees of the land.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1843; Dec. Dig. § 733.\*]

##### 4. APPEAL AND ERROR (§ 1036\*)—HARMLESS ERROR—ABSENCE OF PARTIES.

A decree for complainant in a suit to have land sold to satisfy a legacy to complainant which was a charge upon it should not be reversed because of the failure to make the personal representatives of the devisees parties, where there was no demurrer or objection below on that ground, and it is not shown that such devisees left personality out of which the legacy could be paid, even if it would be liable for its payment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1036.\*]

Appeal from Circuit Court, Appomattox County.

Suit by Mary J. McGhee against Alexander S. Wingfield and others. From a decree for complainant, defendant named appeals. Affirmed.

The bill alleged that complainant, Mary J. McGhee, is the daughter of Minervia Linthicum, and granddaughter of Thomas Wingfield, who died about the year 1849; that the said Thomas Wingfield left a will; that the said Thomas Wingfield devised to his five daughters, Ann H. Wingfield, Martha W. Wingfield, Jane S. Wooten, Mary G. Eubank, and Betsy Smith, a farm containing 250 acres; that to your oratrix, Mary J. Linthicum, granddaughter of the testator, he devised the sum of \$300, to be paid by the said Ann H. Wingfield, Martha W. Wingfield, Jane S. Wooten, Mary G. Eubank, and Betsy Smith, which was made a charge upon the said land; that all of the children aforesaid of the testator are now dead, and that oratrix and A. S. Wingfield (the defendant) are the only children surviving the said daughters of the testator; that the said Ann H. Wingfield, Martha W. Wingfield, Jane S. Wooten, and Mary G. Eubank deeded to A. S. Wingfield the said tract of land, bearing date on the 18th day of February, 1881, subject, however, to the claim of the oratrix; that oratrix has made frequent demands for the payment of this claim without avail; that, in further support of her claim she begs to file herewith the letter of Jane S. Wooten, sister of your oratrix's mother, dated January 25, 1864, and marked "Exhibit B," in which the admission of her claim is made as well as the liability, also the letter of A. S. Wingfield, dated February 28, 1888, and marked "Exhibit C," which letter admits a claim due your oratrix; that the said tract of land is the only estate out of which your complainant's debt can be made, together with the interest thereon. Wherefore complainant prays that A. S. Wingfield be made a party to this bill and be made to answer the same; that the said real estate be sold and the proceeds thereof be applied to the payment of said claim, which is a charge as aforesaid on said land, and any residue thereof be distributed among the parties entitled thereto; and that all such other general and further relief be afforded your complainant as the nature of her case shall require or to equity shall seem meet, and she shall ever pray, etc.

H. D. Flood, for appellant. G. E. Caskie and A. H. Clement, for appellees.

BUCHANAN, J. This suit was brought by the appellee Mrs. Mary J. McGhee against the appellant, Alexander S. Wingfield, and others, to subject a tract of land owned by him to the payment of a legacy of \$300, which, as is alleged, was a charge

upon the said tract of land. The relief sought was granted, and from that decree this appeal was taken.

The record shows that Thomas Wingfield died during or before the year 1856, leaving a will which was probated in the county court of Appomattox county at its November term, 1856. The records of that court were destroyed by fire in the year 1892, and there is not, it seems, a complete copy of the will in existence. But an extract from and a memorandum of the contents of the will, made by an attorney and filed with his deposition in the cause, and a recital in the deed under which the appellant acquired title to the land sought to be subjected to the payment of the legacy, show that Thomas Wingfield, by his said will, devised to his five daughters the said tract of land, and, in the event of the death of any of them without lawful issue, her interest in the property devised was to pass to the surviving daughter or daughters, and that he gave a legacy of \$300 to the complainant, his granddaughter, then Linthicum, now McGhee, to be paid as soon as convenient, and which was made a charge upon the land devised them. In the year 1881 four of the daughters of the testator, one of them having died without issue, conveyed the land to the appellant in consideration of services rendered and to be rendered in supporting and maintaining them. In that deed it is stated that they acquired title to the land under the will of their father, and that they further transferred and conveyed to the appellant "all our right, title and interest in and to the \$300 charged upon our farm in favor of Mary J. Linthicum, which sum has never been paid, and which is to revert to us in case the said Mary J. Linthicum dies without a lawful heir."

In the year 1888 the appellant, in reply to a letter from the complainant, wrote to her that it was true that her aunts, one of whom was his mother, had conveyed the land to him for the purpose of compensating him for providing for the grantors during their lives, but with no intention whatever of depriving her of her legacy, and expressing a willingness to cut off a part of the land to satisfy her legacy, or to do the best he could towards paying it in money.

The first error assigned is that the trial court erred in not sustaining the defense based upon the laches of the complainant in asserting her claim.

It is true that her right accrued nearly a half century ago, but it clearly appears from the admissions of the devisees of the land upon which it was charged that the legacy was still due and unpaid, and was fully recognized in the year 1881 when they conveyed the land to the appellant, and its validity as an existing liability upon the land is distinctly admitted by the appellant in his letter to the complainant in the year 1888.

It further appears that the parties whose duty it was to pay the legacy were closely related to the complainant, that the devisees were poor and afflicted, and never financially able to pay it without a sale, in whole or in part, of the land upon which it was charged, and there is no pretense that the appellant ever paid anything on account of it.

[1] Mere delay is not always to be considered laches. *Jameson v. Rixey*, 94 Va. 347, 26 S. E. 861, 64 Am. St. Rep. 726. If the facts and circumstances already adverted to do not fully explain the complainant's delay in asserting her claim, it satisfactorily appears that her legacy has never been abandoned or paid, and that no injustice will result to any one from subjecting to its payment the land upon which it is charged.

The answer of the appellant, which was under oath, after denying that the complainant's legacy was a charge upon the land, contains the following allegation: "But, if the complainant ever had any claim upon the said real estate, respondent alleges and charges that this claim was settled years ago, and during the lifetime of the survivors of the said five daughters, and that a full and complete settlement was then arranged and entered into between the complainant, on the one hand, and the survivors of the five daughters, on the other hand, satisfactory to both parties, which completely and entirely settled the demand of the complainant."

The appellant introduced no evidence of any such agreement and settlement, but his contention is that the statement in his answer was under oath and responsive to the allegations of the bill, which did not waive answer under oath, and was, therefore, conclusive evidence that the legacy had been settled, as set out in the answer, and that the trial court erred in not so holding.

[2] The statement in the answer was not responsive to any allegation of the bill, but set up new matter in avoidance of the complainant's claim. The burden was therefore on the appellant to prove such agreement and settlement by independent proof. It is well settled that where the answer is not responsive to the bill, or sets up affirmative allegations of new matter in avoidance of the complainant's demand, and is replied to, the answer is of no avail as evidence in respect to such allegations, and the respondent is as much bound to establish the allegations by independent testimony as the complainant is to sustain his bill. *Vathir v. Zane*, 6 Grat. 246, 261; *Seltz v. Mitchell*, 94 U. S. 580, 24 L. Ed. 179; 1 *Daniel's Chy. Pr.* 844, note; 1 *Barton's Chy. Pr.* 419.

It is also insisted by the appellant that, inasmuch as the complainant's legacy was made payable when or as soon as it was convenient for the devisees of the land to pay it, it was never a charge upon the land, since

they were poor and afflicted and never able to pay it, or, if it was payable at all, it was not payable until after the death of the devisees.

[3] Neither of these contentions can be sustained. The requirement that the legacy should be paid when or as soon as convenient meant that it was payable in a reasonable time, under all the circumstances of the case, and not that it should never be paid or not paid until after the death of the devisees. See *Chichester v. Vass*, 1 Munf. 98, 4 Am. Dec. 531; *Howes' Ex'rs v. Woodruff*, 21 Wend. (N. Y.) 640, 642; *Lewis v. Tipton*, 10 Ohio St. 88, 75 Am. Dec. 498; *Barnett v. Bullett*, 11 Ind. 310.

[4] It is also insisted that the decree appealed from is erroneous because the personal representatives of the devisees of the land were not made parties to the suit. There was no demurrer to the bill nor objection made in the trial court on that ground. There is no suggestion that these devisees left any personal estate out of which the complainant's legacy could be paid, even if their personal estate, under the facts disclosed by the record, would be liable for its payment. We do not think that the decree should be reversed on that account.

Upon the whole case, we are of opinion that there is no error in the decree appealed from to the prejudice of the appellant, and that it should be affirmed.

(126 Ga. 791)

**RAMEY v. CONEY, LOVEJOY & CO.**

(Supreme Court of Georgia. Sept. 22, 1911.)

(Syllabus by the Court.)

ADMISSION OF EVIDENCE — INSTRUCTIONS — SUFFICIENCY OF EVIDENCE — REFUSAL OF NEW TRIAL.

There was no error in the admission of evidence. The instructions to the jury upon which error was assigned were not subject to the exceptions taken thereto; nor did the court err in merely failing to explain to the jury the meaning of "the burden of proof," or of "ground for reasonable suspicion," nor in merely failing to instruct the jury as complained of. The verdict was not without evidence to support it, and the trial judge did not abuse his discretion in refusing to grant a new trial.

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action between G. W. Ramey and Coney, Lovejoy & Company. From the judgment, Ramey brings error. Affirmed.

Howard E. Coates and Payne, Little & Jones, for plaintiff in error. M. H. Boyer and Anderson, Felder, Rountree & Wilson, for defendant in error.

FISH, C. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.



(136 Ga. 780)

GROGAN et al. v. DARNELL et al.

(Supreme Court of Georgia. April 14, 1911.)

*(Syllabus by the Court.)***DEMURRER TO INTERVENTION.**

There was no error in sustaining the demurrer to the intervention of the plaintiffs in error.

Error from Superior Court, Dawson County; J. J. Kimsey, Judge.

Action between Minerva Grogan and others and J. J. Darnell and others. From the judgment, Grogan and others bring error. Affirmed.

H. H. Perry and Charters & Charters, for plaintiffs in error. Geo. K. Looper, O. J. Lilly, Luther Roberts, and C. W. Bond, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 790)

KEY v. STATE.

(Supreme Court of Georgia. Sept. 22, 1911.)

*(Syllabus by the Court.)***REVIEW ON APPEAL.**

There being no complaint that any error of law was committed on the trial, and the evidence being sufficient to support the verdict, there was no error in overruling the motion for new trial.

Error from Superior Court, Webster County; Z. A. Littlejohn, Judge.

Johnie Key was convicted of crime, and brings error. Affirmed.

G. Y. Harrell, J. F. Souter, and M. A. Walker, for plaintiff in error. J. R. Williams, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 798)

DAVIS v. STATE.

(Supreme Court of Georgia. Sept. 22, 1911.)

*(Syllabus by the Court.)***1. CRIMINAL LAW (§ 790\*)—INSTRUCTIONS—BINDING EFFECT.**

Upon the trial of one charged with the offense of murder, the court did not err in instructing the jury as follows: "You will accept as correct, for your guidance in making up your verdict, the law as I shall give it to you in charge;" and "Having applied the law to the evidence as you shall find it to be, you may render such verdict as the law demands at your hands." *Ridenhour v. State*, 75 Ga. 382 (4); *Malone v. State*, 77 Ga. 767 (2); *Berry v. State*, 105 Ga. 683 (3), 31 S. E. 592.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 790.\*]

**2. CRIMINAL LAW (§ 790\*)—DUTIES OF JURY.**

The court did not err in failing to charge that "on the trial of all criminal cases the jury shall be the judges of the law and facts."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 790.\*]

**3. SUFFICIENCY OF EVIDENCE.**

The verdict was supported by the evidence, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Calhoun County; Frank Park, Judge.

Andrew Davis was convicted of homicide, and brings error. Affirmed.

W. D. Sheffield, for plaintiff in error. W. E. Wooten, Sol. Gen., F. A. Hooper, and H. A. Hall, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 842)

FUSSELL v. STUBBS et al.

(Supreme Court of Georgia. Sept. 25, 1911.)

*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE—DIRECTION OF VERDICT—AFFIRMANCE ON CONDITION.**

Under the rulings announced in *Osteen v. Wynn*, 131 Ga. 209, 62 S. E. 37, 127 Am. St. Rep. 212, the evidence demanded a verdict for the plaintiffs for the premises in dispute.

(a) There was no evidence authorizing the direction of a verdict for \$40 as mesne profits.  
(b) The judgment of the court below is affirmed, provided the defendant in error, within 20 days from the filing of the remittitur from this court in the office of the clerk of the court below, will write off from the verdict and judgment the recovery for mesne profits. If this is not done, the judgment of the court below is reversed, and a new trial is granted.

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action by J. A. Stubbs and others against W. B. Fussell. Judgment for plaintiffs, and defendant brings error. Affirmed on condition.

M. B. Cannon and J. L. Bankston, for plaintiff in error. E. H. Williams and Hal Lawson, for defendants in error.

HOLDEN, J. Judgment affirmed, on condition.

BECK, J., absent. The other Justices concur.

(136 Ga. 845)

WALLACE et al. v. AIKEN et al.

(Supreme Court of Georgia. Sept. 28, 1911.)

*(Syllabus by the Court.)***1. NAVIGABLE WATERS (§ 36\*)—LAND UNDER WATER—TITLE—EVIDENCE.**

The controversy as to ownership of the shore between high-water and low-water marks, not involving the question of the permission to

build a wharf under federal statutes, the grant of a license to build a wharf, issued by the Secretary of War to one of the rival claimants of land, was not admissible in evidence as tending to show title in such claimant.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 36.\*]

## 2. EXCLUSION OF EVIDENCE.

If certain plats and grants from the state, which were offered in evidence, would have been admissible if accompanied by adminicular proof, under the facts disclosed by this record, their rejection constituted no such error as to require a reversal.

## 3. APPEAL AND ERROR (§ 477\*)—STAY OF PROCEEDINGS.

On the hearing of an application for interlocutory injunction, the presiding judge having denied such injunction in part, and this court having reversed the judgment, and a further hearing having been had upon substantially the same evidence, together with certain additional evidence and amended pleadings, and when this court passed upon the case, under such facts and under the evidence introduced on the second hearing, which was brought on by a petition to make the judgment of this court the judgment of the court below and grant the injunction, which had been denied, there was no abuse of discretion as against the defendant in granting the partial injunction, which was granted to remain of force until a full determination of the rights of the parties upon the final hearing. See the case of *Aiken v. Wallace*, 134 Ga. 873, 68 S. E. 937.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 477.\*]

Error from Superior Court, Glynn County; C. B. Conyers, Judge.

Action by T. D. Aiken and others against Mrs. Bena Wallace and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Bolling Whitfield and A. D. Gale, for plaintiffs in error. Harry F. Dunwoody and D. W. Krauss, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 789)

SOUTHERN COTTON MILLS v. RAGAN et al.

COOPER et al. v. PARSONS et al.

(Supreme Court of Georgia. Aug. 22, 1911. Motion for Rehearing Denied Sept. 22, 1911.)

(Syllabus by the Court.)

## 1. CORPORATIONS (§ 482\*)—MORTGAGES—FORECLOSURE—VALIDITY OF DECREE.

Whether or not a bank was authorized by its charter to act as a trustee for bondholders secured by a mortgage, this did not authorize decrees, rendered in an equitable proceeding to foreclose the mortgage, to be treated as nullities, at the instance of a person who took a conveyance under a sale by receivers appointed in such case.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 482.\*]

## 2. APPOINTMENT OF RECEIVERS—CANCELLATION OF CONVEYANCE—ACCOUNTING.

Under the pleadings and evidence, there was no error in refusing to appoint a receiver under the petition filed by the grantee from the receivers, which sought to have the conveyance canceled and to have an accounting.

## 3. CORPORATIONS (§ 560\*)—MORTGAGES—RECEIVERS.

A corporation issued bonds and executed a mortgage to secure them. Under an equitable petition filed by the trustee named in the mortgage the property of the mortgagor was placed in the hands of receivers, and a decree of foreclosure was entered. The receivers sold at private sale the property covered by the mortgage, and, upon confirmation by the court, made a deed and delivered the property; the grantee paying an amount in cash, giving a certain note to the receivers for another amount, and assuming the payment of the bonds and buying subject to the mortgage. Held, that the directors of the mortgagor had no such title or interest as authorized them to file, in their own names as directors, a petition to enforce the contract of purchase from the original receivers or to seek to foreclose the mortgage, and to have new receivers appointed to take charge of the property sold.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 560.\*]

## 4. CORPORATIONS (§ 560\*)—MORTGAGES—RECEIVERS.

It was accordingly erroneous to appoint receivers under an equitable petition so filed, over objection of the purchasers.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 560.\*]

## 5. CORPORATIONS (§ 558\*)—MORTGAGES—RECEIVERS.

Under the facts of this case, such appointment, upon a petition filed solely by the directors of the mortgagor in their individual names as directors, was erroneous, although the bondholders and the trustee were named as defendants along with the purchasers at the receivers' sale, and some of the defendant bondholders, under the name of interveners, and the trustee, joined in the prayer for a receiver.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 558.\*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Actions between the Southern Cotton Mills and T. B. Ragan and others, receivers, and between J. C. Cooper and others and W. N. Parsons and others. From the judgments, writs of error were sued out. Judgment affirmed in first case, and reversed in the second.

Robt. L. Berner, J. R. Cooper, and M. H. Boyer, for plaintiffs in error. W. L. & Warren Grice, Hardeman, Jones, Callaway & Johnston, and Jno. P. Ross, for defendants in error.

LUMPKIN, J. Judgment affirmed in the first entitled case, and reversed in the second. All the Justices concur, except BECK, J., absent.

(136 Ga. 844)

**COLEMAN et al. v. BOARD OF EDUCATION OF EMANUEL COUNTY et al.**

(Supreme Court of Georgia. Sept. 25, 1911.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 327\*)—PARTIES—DEFENDANTS IN ERROR.**

Civil Code 1910, § 1534, provides for an election to be held in any county to determine whether or not there shall be local taxation therein to supplement the public school fund received from the state by such county, and provides that the returns of any election held shall be made to the ordinary of the county, who shall declare the result, and further provides: "If the election is carried for local taxation, the ordinary or board of county commissioners, whichever levies the county tax, shall levy a local tax as recommended by the county board of education upon all the property of the county, not to exceed one-half of one per cent." An election was held in Emanuel county under the provisions of this section, and the ordinary declared the result to be in favor of local taxation. The plaintiffs in error, taxpayers of the county, brought suit against the county, its board of education, and its board of roads and revenue commissioners, alleging, among other things, that the vote at the election in one precinct of the county should not have been counted in consolidating the returns and declaring the result of the election, because the election therein was held at a place other than a lawfully established precinct, and that the exclusion of such vote would have worked a change in the result of the election. Complainants prayed "that the court inquire into the legality of said election, and into the truth of all complaints herein made, and that the returns be counted, and that the court inquire into all errors alleged, and decide whether said tax can be legally and constitutionally levied upon the property of petitioners and all other citizens of said county similarly situated," and for an injunction against the collection of any tax by reason of said election, and for general relief. Upon the trial of the case the court directed a verdict in favor of the defendants, and the plaintiffs excepted. The bill of exceptions designates as the defendants therein "Board of Education of Emanuel County et al." The acknowledgment of service was by named persons, "Attys. Deft. in Error." *Held*, that the county, at least, was a necessary party to the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 327.\*]

**2. EXCEPTIONS, BILL OF (§ 58\*)—PARTIES—DESIGNATION—"ET AL."**

Under the former rulings of this court prior to the act approved August 21, 1911 (Acts 1911, p. 149), the abbreviation "et al." when occurring in a bill of exceptions after the name of a party therein designated, cannot be held to include any other person who figured as a party in the trial court; and an acknowledgment of service for "defendant in error," or for "defendants in error," does not cover any person who was not, at the time such acknowledgment was entered upon the bill of exceptions, actually named or designated therein as a party defendant in error. *Orr v. Webb*, 112 Ga. 806-808, 38 S. E. 98.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 58.\*]

**3. APPEAL AND ERROR (§ 336\*)—PARTIES—STATUTORY PROVISIONS.**

If the fourth and fifth sections of the act approved August 21, 1911, have any applica-

tion to a case argued in this court before its passage, no motion has been made to make the county a party to the bill of exceptions as one of the defendants in error therein, in accordance with the provisions of the fifth section of the act.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 336.\*]

**4. APPEAL AND ERROR (§ 336\*)—DISMISSAL OF WRIT OF ERROR—GROUNDS.**

The board of education of Emanuel county being the only party defendant in error to the bill of exceptions, the motion to dismiss the writ of error because of this fact must be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1868-1876; Dec. Dig. § 336.\*]

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Suit by J. C. Coleman and others against the Board of Education of Emanuel County and others. Judgment for defendants, and plaintiffs bring error. Writ of error dismissed.

Saffold & Larsen, for plaintiffs in error. R. L. Gamble and Williams & Bradley, for defendants in error.

HOLDEN, J. Writ of error dismissed.

BECK, J., absent. The other Justices concur.

(136 Ga. 797)

**MACON RY. & LIGHT CO. v. MAYOR, ETC., OF CITY OF MACON.**

(Supreme Court of Georgia. Sept. 22, 1911.)

*(Syllabus by the Court.)***1. TAXATION (§ 200\*)—CONSTITUTIONAL LAW (§ 137\*)—EXEMPTION FROM TAXATION—STIPULATIONS IN ORDINANCE.**

On September 16, 1902, the municipal authorities of the city of Macon adopted an ordinance providing for the consolidation of the Consolidated Street Railway Company, the Macon Railway & Light Company, and the Metropolitan Street Railroad Company. The consolidated company provided for by the ordinance subsequently had its name changed to that of the Macon Railway & Light Company. The ordinance granted to the consolidated company certain rights and privileges as to the exercise of its business in the city, and provided for certain things to be done by the company. The company accepted the ordinance, complied with all of its obligations thereunder, and in accordance with its terms operated a street railway and an electric lighting plant in the city. The ordinance stipulated that from January 1, 1914, a designated per cent. of the yearly gross receipts of the consolidated company should be paid into the treasury of the city, and that "the percentage of the gross receipts herein provided to be collected shall be in lieu of all license, occupation, or special tax or taxes, but shall not at any time be considered to interfere with, or in any wise prevent, the collection of the ad valorem tax upon all of the property of said company, as all other property, real and personal, in the city of Macon, is taxed," etc. *Held*, that the stipulation in the ordinance that the payment of the percentage of the gross receipts of the consolidated company, as provided for in the ordinance, "shall be in lieu of all

license, occupation, or special tax or taxes," did not cover a tax on the franchise of the consolidated company, as provided for by the act of the General Assembly approved December 17, 1902 (Acts 1902, p. 37), nor purport to exclude the right of the city to collect a tax on the franchise of the consolidated company. Such tax on franchise is neither license nor occupation nor special tax. The ordinance expressly provided in this connection that the collection of the named percentage of the yearly gross income of the company "shall not at any time be construed to interfere with, or in any wise prevent, the collection of the ad valorem tax upon all of the property of said company, as all other property, real and personal, in the city of Macon is taxed."

(a) Accordingly, the act of the General Assembly of 1902, above referred to, did not impair the obligation of the contract as embraced in the ordinance accepted by the consolidated company.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 200; \* *Constitutional Law*, Cent. Dig. § 354; Dec. Dig. § 137.\*]

## 2. TAXATION (§ 200\*)—EXEMPTIONS—EFFECT OF ORDINANCE—CONSTRUCTION BY PARTIES.

The language of the ordinance, stipulating that the payment by the consolidated company of a given percentage of its yearly gross receipts should "be in lieu of all license, occupation, or special tax or taxes," being clear and unambiguous, and there being no suggestion that anything was omitted therefrom by fraud, accident, or mutual mistake, it was not competent for the mayor and council of the city of Macon, on November 26, 1907, to put a different binding construction on such ordinance, in the respect indicated, by adopting a report of the then finance committee of the council to the effect that, "in the matter of the petition of the Macon Railway & Light Company," the committee had before it the members of the council making the contract with the company in September, 1902, "and it appeared from their testimony that it was the intention of the contract that the percentage on the gross receipts to be paid by the company shall be in lieu of all special tax or taxes, and that the special franchise tax, afterwards imposed by the Legislature, was intended and was actually included in this exception; [and] we recommend that the city demand only the ad valorem taxes and said percentage on gross receipts, and that the city has no right to collect any special franchise tax under the terms of the original contract, and that the settlement of their taxes be made in accordance with this report." When a subsequent council ordered the collection of the franchise tax, as provided by the act of the General Assembly of 1902, the adoption of such report, as exhibited by the ordinance in the respect indicated, could not prevent the collection of such tax. See, in this connection, *City of Fitzgerald v. Witchard*, 130 Ga. 552, 61 S. E. 227, 16 L. R. A. (N. S.) 519; *Horkan v. City of Moultrie*, 136 Ga. 561, 71 S. E. 785.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 200.\*]

## 3. DIRECTED VERDICT — REFUSAL OF NEW TRIAL.

In view of the above rulings, the verdict directed by the court was demanded, and there was no error in refusing to grant a new trial.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action between the Macon Railway & Light Company and the Mayor and Council of the City of Macon. From the judgment, the Railway & Light Company brings error. Affirmed.

Ellis & Jordan and Guerry, Hall & Roberts, for plaintiff in error. Lane & Park, for defendants in error.

FISH, C. J. Judgment affirmed

BECK, J., absent. The other Justices concur.

(9 Ga. App. 760)

## KENNEDY v. MAYOR, ETC., OF CITY OF SAVANNAH. (No. 3,207.)

(Court of Appeals of Georgia. Sept. 11, 1911. On Rehearing Sept. 30, 1911.)

(Syllabus by the Court.)

### 1. MUNICIPAL CORPORATIONS (§ 801\*)—TORTS — DEFECTS IN HIGHWAY — PERSONS ENTITLED TO RECOVER.

A policeman is not by reason of his position as an employé of a city precluded from recovering damages from the city for personal injuries caused by the city's neglect to keep a highway in proper repair.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1660-1665; Dec. Dig. § 801.\*]

### 2. MUNICIPAL CORPORATIONS (§ 801\*)—TORTS — DEFECT IN HIGHWAY — PERSONS ENTITLED TO RECOVER.

Though a policeman employed by a city to patrol a particular beat so materially deviates from the route he is instructed to follow while on that beat that if the case were one falling under the ordinary law of master and servant he could not (on account of his violation of rules and instructions) recover from his employer, the city, for any injury received by him through his encountering latent dangers, known to his employer and not known to him, nevertheless, if at the time of the injury he is, in a usual and orderly way, traveling upon a public highway of the city and is hurt by a defect which the city has negligently allowed to remain in the highway, he is entitled to recover damages on the same terms that any other citizen would be.

(a) Query: Do the ordinary doctrines of the law of master and servant apply as between a city and its police officers?

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1660-1665; Dec. Dig. § 801.\*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by R. F. Kennedy against the Mayor, etc., of City of Savannah. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 8 Ga. App. 98, 68 S. E. 652.

E. H. Abrahams and Osborne & Lawrence, for plaintiff in error. H. E. Wilson, David C. Barrow, and Saml. B. Adams, for defendant in error.

POWELL, J. Kennedy, a policeman of the city of Savannah, was assigned to a beat known as "Factor's Wharf." While patrolling one night, he was injured by a fall sustained on account of an alleged defect in one of the public streets of the city. He sued the city, claiming that this defective way lay within the route he should have traversed.

ed as a patrolman. The city claimed to the contrary, and insisted that he had left the beat assigned to him, and at the time of his injury was in a state of neglect of duty by not being on the street on which he should have been. The first trial resulted in a nonsuit. That judgment was reversed by this court, but on a ground not here presented. See *Kennedy v. Savannah*, 8 Ga. App. 93, 68 S. E. 652. In the trial now under review, the court directed a verdict for the defendant, on the ground that the evidence undisputedly shows that at the time the plaintiff was injured he had deviated from the route assigned to him by his superior officer, and that he could not look to his employer, the city, for compensation for an injury which he received while he was thus violating or neglecting his duty. For the purposes of this decision, we will not go into the question as to whether the evidence demanded a finding that the plaintiff had materially deviated from the route he should have taken in patrolling his beat, but will assume that to be true. The question we shall discuss is whether the policeman by leaving the beat assigned to him and by going upon another public street of the city forfeited his right to claim damages on account of a negligent defect in the public street over which he was thus traveling.

[1] The wrong, if any, which the city committed against the plaintiff, was the violation of a duty on the city's part (howsoever imposed, if imposed by any rule of law) to keep the place where the plaintiff was hurt free from latent, harmful things jeopardizing his right of personal security. Duties usually arise from the law attaching to relationships. A single relationship between the parties may impose a duty upon the one in favor of the other; but it is also true that the same duty as to the same thing at the same time may be imposed upon the same one person in favor of the same other person by reason of two or more different relationships simultaneously existing between the parties. Further, cases arise in which the relationship between the parties is twofold (or even multifold), but in which some particular duty is owing by the one party to the other under only one of the relationships; also, there are cases where a person having the same duty generally owing him by another person under two concurrent relationships has forfeited his right of action for a breach of the duty as respects one of the relationships, but not as respects the other. If two relationships exist, the plaintiff has a right of action for damages arising from the breach of a duty owed to him thereunder, whether owed under only one or under both of them; and, if the duty is generally owing under both, he may successfully maintain his action, notwithstanding that he has forfeited his rights to invoke the breach of duty as a cause of action so far as one of the rela-

tionships is concerned, provided he has not also forfeited it as to the other.

[2] The trial court in this case looked upon the plaintiff's cause of action as arising under the relationship of master and servant. Generally speaking, the master must not expose the servant to latent dangers which he in ignorance of them is likely to encounter in the line of the performance of the duty assigned to him. A duty to warn exists in such cases; and a failure to warn, followed by hurt therefrom to the servant, usually gives a cause of action. But if it appears that the servant would not have been injured if he had pursued his duty according to the instructions given him, and that he was hurt while materially deviating from the line of his duty, he is not in a position to invoke the failure to warn or the undisclosed existence of the latent danger as a cause of action, so far as the relationship of master and servant is concerned; and, if there does not exist between the parties some other relationship adequate to impose the duty and to preserve it under the facts, he cannot recover. So in this case, if there were no duty on the city save that of a master, and no right in favor of the policeman save that of a servant, the judgment of the trial court would be correct. In so far as the city and the policeman are to be viewed as master and servant, the city owed to the policeman the duty of not sending him without warning to walk over a route in which there existed a hidden danger, of which the city had actual or constructive knowledge and the policeman had not, whether that danger lay in a public street or not. If the policeman, in violation of instructions, left the route assigned him, and of his own volition took another, and the latent danger was there encountered, he could not in his capacity of employé hold the city liable in the capacity of employer.

However, another relationship existed between the parties—that of municipality and traveler upon the public highway. A duty as to the particular thing by which the plaintiff was hurt exists under the law of that relationship. "Keeping the sidewalks [and public ways] reasonably safe is the duty of a municipal corporation relatively not only to travelers, but to any person lawfully upon a sidewalk [or public way] using it for any purpose for which sidewalks [and public ways] are designed." *City of Columbus v. Anglin*, 120 Ga. 785 (2), 48 S. E. 318. The plaintiff was a citizen as well as a policeman. As a policeman (or servant) he was not entitled to protection against latent defects in the way over which he passed, unless he confined himself substantially to the route he was instructed to go. As a citizen he was entitled to protection against such defects, no matter where his inclinations took him, provided he confined himself to the public highway.

The fact that he had forfeited his rights to warning and to protection in his capacity of patrolman on duty did not work a forfeiture also of his rights as a citizen lawfully traveling the highway. A person may be lawfully traveling a highway, though at the time of his travel he may be engaged in violating some duty, or even in violating some law. For instance, a person walking orderly down a sidewalk is using the sidewalk lawfully, though he may be violating the law by having a pistol concealed in his pocket. The fact of his having the pistol concealed would not prevent his recovering from the city if he fell on account of a latent defect in the sidewalk and broke his leg. *Atlanta Steel Company v. Hughes*, 136 Ga. 511, 71 S. E. 728. Suppose that the plaintiff in this case had wholly deserted his beat, and had gone into an entirely different portion of the city for some purpose utterly foreign to his duties as a policeman, and had there suffered injury through a defect in the street, would he be precluded from holding the city liable to him as a citizen? We think not. Suppose a track foreman of a railroad company leaves his accustomed work before his hours of service are over and buys a ticket, and takes passage upon one of the trains of the company for which he is working. The company no longer owes him duty as a servant, but it none the less owes him the same duty it would any other passenger.

Enough has been said to show that we are of the opinion that the court erred in directing a verdict against the plaintiff. In what we have said we have assumed that the ordinary rules of the law of master and servant are generally applicable between a city and one of its policemen, but, before we close this opinion, we wish to say that this assumption has been made only for the purposes of the argument; for, while the point is not before us, we incline to the view that the relation between the city and a policeman is not the ordinary relation of master and servant, but is a special relation in which the public character of the policeman's office is an important factor. Many courts have so held. See *City of Galveston v. Hemmis*, 72 Tex. 558, 11 S. W. 29, 13 Am. St. Rep. 828, and citations. The governmental function involved in the city's duty of employing policemen presents an element not involved in the ordinary case of employer and employé. Be that as it may, it is well settled that policemen, firemen, and other city employés are entitled to hold the city liable for defects in the streets and other highways on the same general terms as other citizens. An excellent note and collection of cases on the subject is found in 20 L. R. A. (N. S.) 748.

Judgment reversed.

#### On Rehearing.

It is contended in the motion for a rehearing that this court has overlooked the decision in the case of *Atlanta, etc., Ry. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145, in which the court says (quoting from 16 Am. & Eng. Enc. of Law, pp. 411, 412): "In order to maintain an action for a negligent injury, it must appear that there was a legal duty from the person inflicting the injury to the person on whom it was inflicted, and that such duty was violated by a want of ordinary care on the part of the defendant. It is not sufficient that there be a general duty to the public which is violated, but in all civil cases the right to enforce such duty must reside in the individual injured because of a duty due him from his injurer, or he cannot recover." We think that a careful reading of our opinion previously filed will show that we have not overlooked this doctrine. We took then, and now take, the view that the city owed to Kennedy a duty residing in him in his individual capacity as a traveler upon the highway, the duty of keeping the highway reasonably safe, and that, while this is a general duty owing to all the public, it is a specific duty as to each member of the public, when that individual puts himself in such relation as to be able to invoke it in a particular case. The doctrine was applied in the *Gravitt Case* to the extent of holding that, as to crossing laws, the general duty of giving signals and checking the train, which the railway companies owe, could not be invoked by one who was not attempting to use the crossing, but who was injured at another place. Or, to state it differently, the general duty imposed upon railroad companies as to crossings exists only in favor of such members of the general public as are using or are attempting to use the public crossing, and that *Gravitt*, who was not using or attempting to use the crossing, had no right to invoke as negligence a failure of the railroad company to comply with the crossing law. So, in this case, if Kennedy had not been a traveler upon the highway, he could not invoke as negligence the fact that the city had neglected the duty of keeping the highway in repair. The court in the *Gravitt Case* did not mean to say that, because the duty imposed upon railroad companies as to public crossings is a duty owing to the general public, an individual who was about to use the crossing could not claim the benefit of it. Likewise, in this case, we have held that, though the duty owing by the city as to keeping its streets in repair is a general duty owing to all the public, still any member of the public who at the time happens to be lawfully traveling over the particular street can invoke the duty, and that Kennedy was at the time of his injury such a traveler.

Rehearing denied.

(9 Ga. App. 790)

KIMBALL v. SMITH, Sheriff. (No. 3,107.)

(Court of Appeals of Georgia. Sept. 30, 1911.)

*(Syllabus by the Court.)*

SHERIFFS AND CONSTABLES (§ 121\*)—LIABILITIES—FAILURE TO TAKE BOND.

If bail trover process against more than one defendant is placed in the hands of a sheriff for execution, and he finds the property in the possession of one of them, and takes from him a bond with good security in terms of the statute, conditioned for the production of the property or the payment of the eventual condemnation money in accordance with the judgment of the court, he cannot thereafter seize the property, and is consequently relieved from the duty of taking bond from the other defendants, or from arresting them for failure to give bond. The law only requires the sheriff to have before the court either the specific property or a solvent bond standing in the place of it.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Dec. Dig. § 121.\*]

Error from City Court of Monroe; A. C. Stone, Judge.

Rule by Sallie Kimball against A. S. Smith, Sheriff. Judgment for defendant in rule, and plaintiff brings error. Affirmed.

Jos. H. Felker, for plaintiff in error. Napier & Cox, for defendant in error.

HILL, C. J. Mrs. Kimball instituted trover against Biggs, Hester, and Doss jointly, and made affidavit for the purpose of requiring bail that the property was in the possession of the three defendants. The sheriff executed the bail process by taking from Hester and Doss separate bonds for the eventual condemnation money. It appears that these two had the horse in their possession, and that Biggs did not. No bond was taken from Biggs, nor was he arrested. He was simply served with a copy of the trover suit. He was insolvent. At the trial of the trover case the plaintiff recovered a judgment against Biggs for the value of the property, but the finding of the jury was in favor of the other two defendants. It seems that this result came about by reason of the fact that the plaintiff had sold the horse for which the trover suit was instituted to Biggs under an unrecorded contract or conditional sale, and that Biggs had sold it to the other two defendants, who purchased without notice, so that at the trial of the trover suit Biggs was estopped from denying the plaintiff's title, and even from setting up outstanding title in his codefendants. But these codefendants, not being estopped to deny the plaintiff's title, were released by the judgment. The plaintiff, being unable to make the amount of the judgment out of Biggs on account of his insolvency, brought a rule against the sheriff, claiming damages for the sheriff's neglect to take also from Biggs a bond for the eventual condemnation money.

At first we were under the impression that the sheriff was plainly liable; that, where he has bail process against three defendants in the same suit, he must take either joint or several bonds with ample security from them, and from all of them; and that, since he had failed to do this in the present case, the trial court properly held him liable. On maturer reflection we have come to the conclusion that our former opinion was incorrect. A trover suit is somewhat of a mixed action under the practice of this state. The plaintiff in it has the option of recovering either the possession of the specific property or of taking damages for the unlawful conversion of it; that is, the value of the property. If the plaintiff has reason to fear that the specific property will be put beyond the reach of the court's processes, he may make additional affidavit alleging that the defendant had the possession, custody, or control of the property at the time of the making of the affidavit, and that there is danger of his eluding it or carrying it away. Whereupon it becomes the duty of the officer to take such steps as will be adequate to have before the court at the time of the final trial of the case either the specific property or what is its legal equivalent—a valid bond, conditioned either for the forthcoming of the property or for the payment of the eventual condemnation money, as the plaintiff may elect.

The law has pointed out the method which the sheriff shall pursue to attain this end. This law is set forth in Civil Code 1910, §§ 5150-5152. The method there outlined for the execution of a bail process is that the sheriff shall first give the defendant opportunity of giving a bond of the nature stated above. If the defendant refuses to give such bond, the sheriff shall seize the property, if he can find it. If he does not get a bond, and if he cannot find the property, he then arrests and imprisons the defendant, for the purpose of compelling him either to produce the property or to give bond. But these steps are to be taken only in the order named. He cannot seize the property if adequate bond be tendered. He cannot arrest the defendant, whether bond be tendered or not, if he can seize the property. As we have said already, the object of the bail process is to bring into the custody of the court the physical property out of the possession of him who holds it at the time the bail process is sued out, or to require a bond which will put the court in a position in which it will be in its power to enforce its process as if the property had been seized. Unquestionably the failure of the sheriff to perform his duty in this regard where bail process has been placed in his hands renders him liable for the money. *Edwards v. Harris*, 7 Ga. App. 209, 66 S. E. 622, and cases there cited. Now, if the sheriff, having bail process against three distinct defendants in the same

case, goes forth to execute it, and finds the property physically held by one of them only, and the person so holding it puts it into the possession of the sheriff, this would be a valid execution of the process on the sheriff's part. Similarly, if this same defendant so possessing and controlling the particular property gives to the sheriff a bond conditioned as the statute requires—that is, either to produce the property or to pay the eventual condemnation money that may be awarded against him because of that possession which he is holding—the sheriff cannot thereafter seize the property, nor can he arrest any one else on the process, for the reason that seizure of the property and arrest of the principal can be exercised only when the sheriff has not taken a bond which stands for the same purposes as would be accomplished by the seizure of the property from the particular person who holds possession of it. If at the trial of the case it turns out that this person who holds the property in his possession was holding it either for himself or for one of the other defendants—that is, if his possession is either his own, or is the legal possession of one of the other defendants—and it further turns out that the plaintiff in the trover suit would be entitled to take that property away from that possession, if the effect of the judgment in the case is to establish the title in the plaintiff carrying with it a right to possession of the property, judgment can be taken upon the bond, though executed by only one of the defendants; and it being a bond for the production of the property, or for the payment of the eventual condemnation money, it is fully sufficient to answer every purpose that could be accomplished if the property were before the court.

To apply the principle to the case before us: If the sheriff, instead of taking bond from the defendant who had the property, had done what is the legal equivalent—that is, had seized the property and had had it before the court for disposition on the trial of the trover case—all the court could have done would have been to restore the property to those defendants who had given the bond, and to enter up a judgment for damages against the defendant Biggs. When the sheriff had the bond of these two defendants before the court, he had what was the exact legal equivalent of the property itself. If it had turned out on the trial of the case that the possession which was held by the two defendants who gave the bond was in any sense the possession of Biggs, the bond would have been answerable for the judgment against Biggs. But the bond was exonerated in this case for the all-sufficient reason that the possession against which the bail process was directed was not the unlawful possession of Biggs, but was the lawful possession of the two defendants who

gave the bond, a possession based on a title superior to the plaintiff's. It will be seen, therefore, that a sheriff who does not take bonds from each and all of the defendants himself takes the risk of showing that he took it from one of them who had the property physically in his control, and that this bond, under all the circumstances of the case, was adequate to give the court the same power or control over the property as if the property had been seized under the bail process and was being held by the officer for disposition.

Any other rule than the one we are now announcing would put it in the power of the plaintiff in a trover suit to use the writ most oppressively against innocent persons joined as defendants. In other words, any would-be plaintiff, standing in such relation to a prospective insolvent defendant that the latter could not deny his title to a piece of property in fact held by some third person by a superior title, could, by joining this solvent true owner, compel him to give up his property into the possession of the sheriff, or else procure bond from an insolvent co-defendant against whom the plaintiff would be entitled to take judgment. In rules against sheriffs, the well-established doctrine is that the plaintiff must show injury and damage to himself, as well as neglect of duty on the part of the sheriff. The proximate cause of the plaintiff's loss in this case, under all the facts, was not neglect on the sheriff's part, but was the plaintiff's own lack of title to the property as against the person who held it.

Judgment affirmed.

(9 Ga. App. 794)

KENDALL v. STATE. (No. 3,132.)

(Court of Appeals of Georgia. Sept. 30, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1182\*)—APPEAL—REVIEW.

No material error of law appears, and there is some evidence to support the verdict. [Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1182.\*]

2. CRIMINAL LAW (§ 20\*)—"WILLFUL"—DEFINITION.

The word "willful," as used with relation to penal offenses, means more than "intentional." It means an intentional act done purposely to violate the law (citing 8 Words and Phrases, p. 7471).

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 20.\*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

I. H. Kendall was convicted of disturbing a public assemblage, and brings error. Affirmed.

Perry, Foy & Monk and J. J. Forehand & Son, for plaintiff in error. J. H. Tipton, Sol., for the State.



RUSSELL, J. The plaintiff in error was convicted of a violation of section 424 of the Penal Code 1910, which is in the following language: "Any person who shall willfully interrupt or disturb any public school, private school, or Sunday school, or any assemblage or meeting of any such school, lawfully and peacefully held for the purpose of scientific, literary, social, or religious improvement, either within or without the place where such school is usually held, shall be guilty of a misdemeanor." His motion for a new trial was overruled, and he brings error.

[1] In so far as the general grounds of the motion for a new trial are concerned, we may content ourselves with the statement that there was evidence to authorize the verdict, and unless some prejudicial error of law appears this court cannot disturb the finding of the jury. The motion for a new trial contained numerous assignments of error, but they involve no novel principle of law of general interest, and with one exception do not demand any elaborate discussion. This one relates to the definition which it is claimed that the court gave to the word "willfully" in the statute which qualifies or characterizes the criminal act of interrupting or disturbing a lawful assemblage of persons therein described. On this subject the court charged as follows: "You will consider whether or not an assembly of the character alleged in the accusation was disturbed, and whether or not it was disturbed in the manner alleged in the accusation (and I mean by that in any of the ways alleged in the accusation), and you will determine whether or not willfully, and if you find that the disturbance was intentional, it would be willfull." The gravamen of the complaint against this charge is that the court defined the word "willfully," in the statute, as entirely synonymous with the word "intentionally," and that this interpretation of the word was too narrow, and was incorrect, because the word "willfully," in the statute, implies something more than intentionally.

[2] We think that the word "willfully," in this criminal statute, and in most criminal statutes, is a stronger word than the word "intentionally," and is broader and more comprehensive in its meaning. It embraces "intentionally" in its meaning, but it means an intentional act committed with an evil design or purpose and without legal justification. In other words, the word "willfull," when used in a criminal statute, means the intentional and deliberate doing of the wrongful act prohibited by the statute. See definitions of the words "willful" and "willfully" in Words and Phrases Judicially Defined, vol. 8, p. 7471 et seq. The facts of this case illustrate fully the im-

port of the word "willfully," as distinguished from the word "intentionally," which we have attempted to show. Here the accused had a difficulty in an assembly of people held for secular purposes. He claims that the difficulty was provoked, and that he was justifiable in his act, so far as the difficulty was concerned; that his purpose was not to disturb the assembly, although he did intentionally do the act which in its consequences disturbed them.

As before intimated, we think the evidence warrants the verdict that he not only intentionally did the act which in its consequences disturbed the assemblage but that he did in fact willfully disturb them; that he did something more than merely engage in a difficulty, in that he designedly and willfully disturbed the people assembled in the schoolhouse; and we think the trial judge, in the instruction excepted to, fully conveyed to the jury the idea that the act of the defendant which would be a violation of the statute was not the committing of the act of disorderly conduct, but was the intentional or willful disturbing of the congregation or assemblage of people. In other words, that he not only intended to participate in the difficulty which in its consequences did disturb the assemblage, but that he went further in willfully acting so as to create a disturbance, and that a broader and stronger definition of the word "willfully," as applicable to this statute, than the word "intentionally," was fully elucidated in the charge. And we therefore conclude that this excerpt from the charge was not subject to the criticism contained in the exception.

Judgment affirmed.

(9 Ga. App. 752)

LEE v. ATLANTA, B. & A. R. CO.

(No. 3,024.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 316\*)—NEGLIGENCE  
—INDEPENDENT CONTRACTOR.

The relation of principal and agent does not generally arise between employer and employé, when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer; and in such cases, where torts are committed by the employé, the employer is not liable under the provisions of section 4414 of the Civil Code of this state. No exception to this rule exists in a case where a chartered railroad company employs another person or corporation, not under its immediate direction and control, to do such work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 316.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by L. L. Lee against the Atlanta, Birmingham & Atlantic Railroad Company.

Judgment for defendant, and plaintiff brings error. Affirmed.

Burton Smith, for plaintiff in error. Rosser & Brandon, for defendant in error.

**RUSSELL, J.** The suit was for damages alleged to have resulted under the following circumstances: The plaintiff alleged that he was an employé of the defendant company, and was working for it in the capacity of a fireman. At the time he was injured he was working on the line of the defendant's railroad at the trestle named in the petition. The special work in which he and those associated with him were engaged was filling in dirt at the end of the trestle. There were two additional stationary engines on a flat car, and they were used in pulling a plow over the flat cars to scrape dirt from them which had been placed there to fill in the trestle. The steam used in the operation of these stationary engines was furnished by steam pipe connection with the locomotive engine. It was a part of the duty of the petitioner to run the stationary engines. At the time he was injured he turned on the steam at the locomotive and started over to the stationary engines for the purpose of starting them. Immediately after he left the locomotive, a pipe, connecting the locomotive and the stationary engines, blew out, and he was thrown to the ground some distance below and injured. This pipe was alleged to have been defective in certain particulars mentioned. The plaintiff alleged that he was free from fault, and did not know the defective condition of the pipes which exploded. He suffered severe injuries as stated in his declaration.

Upon the trial of the case, after the evidence was all in, the court directed a verdict in favor of the defendant; and to the judgment so directing the verdict the plaintiff excepted. The undisputed evidence on the trial showed that the work of filling in the trestle in question was being done by the Atlantic & Birmingham Construction Company, a corporation organized by a judgment of the superior court under a contract wherein the construction company agreed with the Atlanta, Birmingham & Atlantic Railroad Company (which will hereafter be referred to as the railroad company) to construct and fully complete its line of road from a point near Warm Springs, in Meriwether county, up to the city of Atlanta, but not into the city itself. The injury occurred at a point at which the construction company, under its contract, was bound to construct the railroad. The plaintiff, at the time of his injury, was an employé of the construction company, and not of the railroad company. He was engaged in and about the work of the construction company, and was not doing any work for the railroad company. His contract of employment was with the construction company. He was

paid by the construction company for his services, and the defendant company insisted upon its nonliability, and upon the ground that he was in the employment of an independent contractor, and suffered injuries as a consequence of the negligence of the independent contractor. The railroad company exercised no supervision or control over him or his associates in and about the work of the construction company, and reserved the right only to supervise the work of the construction company to the extent of seeing that it properly complied with its contract. As to all of the other essential ingredients of the case it is assumed, for the purposes of determining this writ of error, that the evidence, otherwise than as above stated, would have justified a recovery for the plaintiff.

The question, then, is whether or not the employer, under the circumstances stated, was liable for the conduct of the independent contractor. Section 4414 of the Civil Code of 1910 provides that "the employer generally is not responsible for torts committed by his employé when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer." It is insisted, notwithstanding the provisions of this section, which would seem to be conclusive of the nonliability of the defendant, that it could have no application to a railroad company, and that the railroad company could not, by the employment of an independent contractor to construct its roadbed, escape liability for injuries occurring upon its tracks. We do not think this contention well taken. In the first place, the injuries inflicted in this case did not occur as the result of any breach of duty owing by the railroad company to the plaintiff. Relatively to him there could be no implication of such duty as would arise in favor of a passenger, or even of a third person who was injured because of the railroad company permitting a third person to use its tracks, or other special franchises. It owed a duty of safety to its passengers, and a like duty to a third person to guard them against negligence in the operation either of its own trains, or the trains of a third person which it permitted to go upon its tracks. No duty is imposed upon a railroad company by its charter or otherwise to build by any particular means its roadbeds, and there is nothing in our law which prohibits it from committing such work to the hands of an independent contractor. *Atlanta & Florida Railroad Company v. Kimberly*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231; *Fulton County Street Railroad Company et al. v. McConnell*, 87 Ga. 756, 13 S. E. 828; *Brunswick Grocery Company v. Brunswick & Western Railroad Company*, 106 Ga. 270, 32 S. E. 92, 71 Am. St. Rep. 249.

It is perfectly apparent from reading the contract, which is found in the record, that the construction company occupied relatively to the railroad company in question the

position of an independent contractor. The railroad company retained no control over the building of the railroad except to see by its appropriate officers that in the construction of the railroad the contract was complied with, and the mere fact that it specified the plans and specifications under which the road was to be built, and that it was to be built to the satisfaction of the railroad company's engineer, did not change the relation, except as between the railroad company and third persons, nor establish any right or duty between the railroad company and the construction company. See *Atlanta & Florida Railroad Company v. Kimberly*, supra, and *Louisville & Nashville Railroad Company v. Hughes*, 134 Ga. 75, 67 S. E. 542. See also, *Lampton v. Cedartown Co.*, 6 Ga. App. 147, 64 S. E. 495. In discussing that case, at 6 Ga. App. 149, 64 S. E. 496, Chief Judge Hill says: "When a person lets out work to another to be done by him such person to furnish the labor, and the contractee reserving no control over the work or workmen, the relation of contractor and contractee exists, and not that of master and servant, and the contractee is not liable for the negligent or improper execution of the work by the contractor. This does not mean that the specific work to be done shall not be done according to definite plans and specifications of the employer, or that he may not reserve, through the direction of an architect or an agent, a general supervision to see that the work is properly done according to the plans and specifications, provided the methods and instruments of doing this specific work are left under the exclusive control of the contractor. It is contended in this case that the work was not to be done by an independent contractor, because the owner of the building furnished the material for its construction, and the work was to be done according to the plans and specifications of the architect, and to the satisfaction of the engineer of the owner; in other words, that by these stipulations the owner of the building in question reserved the right to exercise control over the details of the work in question. The injury in this case has no connection with any material that was used, but was purely a casual act of negligence occurring in the course of construction, when the contractor had absolute and entire control of the work. In nearly all cases of independent contractors, the owner or proprietor mutually retains control by a skilled architect, 'not for the purpose of controlling the contractor in his method, but for the purpose of assuring himself that the results enumerated in the specifications of the contract are reached by the contractor step by step as the work progresses.' 2 Thompson on Negligence, par. 41. Nor did the fact that the contractor in this case required that the work be done to the satisfaction of the engineer of the defendant make the case one of master and servant. Certainly it would not prevent one

from being an independent contractor that the stipulation in his contract required that his work be done to the satisfaction of the contractee or employer. The Supreme Court of this state has in several cases made an application of the principle of law now under discussion to particular facts. See *Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320; *Atlanta & Florida Railroad Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231; *Ridgeway v. Downing Co.*, 109 Ga. 591, 34 S. E. 1028."

Nor can it make any difference that the railroad company might have furnished some of the materials for the construction of its roadbed, or hired to the construction company its locomotive for the purpose of pulling its cars. The stationary engines were the property of the construction company itself, and the case of *Central Railroad & Banking Company v. Grant*, 46 Ga. 417, seems to be conclusive to the effect that these circumstances do not impose a liability upon the defendant company. On page 421, the court, in discussing that case, uses the following language: "In our judgment, under the law defining the liability of the defendant, as a railroad corporation or company, for damage done to persons by the running of the locomotives or cars or other machinery of such company, the defendant was not liable in damages to the plaintiffs for the injury received by them, on the statement of facts contained in the record. The plaintiffs were in the employ of Names, the contractor, under his supervision and direction in the use and management of the mules, car, and driver. The fact that the defendant furnished the mules, car, driver, and trestle, under the contract with Names to construct the embankment, did not make it liable for the negligence or carelessness of Names in operating and managing the same in the performance of his contract."

Upon principle we are unable to distinguish between that case and this. We do not find, therefore, any authority for the proposition that a railroad company occupies a position different from that which would be occupied by any other employer relative to an independent contractor, and it is only necessary to read section 4415 of the Civil Code of 1910 to see that the facts of the present case do not bring the employer in this case within any of the exceptions named in that section. Upon the undisputed testimony in the case, the non-liability of the defendant company is apparent, and the court did not err in directing a verdict for the defendant.

A number of exceptions were taken to rulings excluding evidence, but, since the evidence admitted could not have changed the result in any way, it is unnecessary to discuss them, further than to say that no error was committed in excluding the evidence which was rejected.

Judgment affirmed.

(9 Ga. App. 707)

**ARMOUR & CO. v. BLUTHENTHAL & BICKART.** (No. 2,964.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

*(Syllabus by the Court.)***1. ACCOUNT, ACTION ON (§ 6\*)—EVIDENCE—BILL OF PARTICULARS.**

Where suit is brought on an account, with bill of particulars containing each item of the account, a recovery can be had only for those items proved as alleged and set out in the bill of particulars.

[Ed. Note.—For other cases, see *Account, Action on*, Cent. Dig. § 10; Dec. Dig. § 6.\*]

**2. EVIDENCE (§ 158\*)—BEST AND SECONDARY EVIDENCE.**

The fact of payment may be shown by parol evidence, although the payment may have been made by a check, which is not produced.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 473; Dec. Dig. § 158.\*]

**3. GUARANTY (§ 89\*)—ACTION—EVIDENCE.**

In a suit on a contract guaranteeing the payment of an account, the burden is on the plaintiff to prove the contract of guaranty, that the goods were sold and delivered in accordance with and on the faith of the guaranty, and that no part of the account has been paid by the principal debtor. This is true, whether the contract of guaranty be absolute or conditional.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 102; Dec. Dig. § 89.\*]

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by Armour & Co. against Bluthenthal & Bickart. From a judgment for less than the amount claimed, plaintiff brings error. Affirmed conditionally.

Anderson, Felder, Rountree & Wilson, for plaintiff in error. Slaton & Phillips, for defendants in error.

HILL, C. J. Armour & Co. brought suit against Bluthenthal & Bickart for \$3,066.98, the price of a car load of hotel supplies alleged to have been shipped and delivered to the Toxaway Hotel Company upon a written guaranty of payment therefor made by the defendants to the plaintiff. The jury found a verdict for the plaintiff, for \$1,588.04 principal, besides interest. The plaintiff, being dissatisfied with the amount of the verdict, filed a motion for a new trial, and the case is here on exceptions to the judgment overruling the motion.

The plaintiff in error insists that it proved all the items of the bill of particulars attached to the petition, and therefore was entitled to a verdict for the full amount of the suit, and it specifically assigns error on the ruling of the trial judge in directing the jury to find against its claim as to two items of the account, and contends, also, that the verdict was further improperly reduced in amount because of the finding of the jury of a payment of \$1,000 on the account; it being insisted that there is no legal evidence as to this payment, and that the ruling admitting the testimony in reference thereto was erro-

neous. It is conceded that the plaintiff proved all the items of the account except the two which the court instructed the jury the plaintiff failed to prove. The first of these two items is the first item in the bill of particulars, and is as follows: "5 21/2 Chix loaf 10 95 \$9.50." The second item is the fifteenth in the bill of particulars, and is as follows: "40 Bl. Livers 2934 16 \$469.44." The witness relied upon by the plaintiff to prove these items testified as follows: "Now, there are two items here that are not absolutely correct. The first item on the first line of the account is '5 21/2 chicken loaf.' There is no such package as that. That should be five cases, 24 cans, 2 pounds each, which means two dozen halves. On the fifteenth line there is 40 livers noted here, 2,934 pounds. That should be loins, beef loins. Livers at 16 cents a pound. That is clearly a mistake. The amount of \$3,066 is right, and has not been paid. With the two changes to which I have referred, the items of the account are correct."

As to the first item, we think that there was no material variance between the allegation and the proof. There was no special demurrer to this item, although somewhat indefinite, and the evidence of this witness explaining this item of the account was that what was meant by "chicken loaf" was 5 cases, 24 cans, 2 pounds each, \$9.50. The evidence shows that there were 5 cases of chicken loaf, each case containing 24 cans, 2 pounds each. In other words, the only variance in the allegations and the proof is that there were 24 cans, instead of 21, contained in the 5 cases of chicken loaf. The price, however, claimed for this item on the account, is \$9.50. We cannot think that the slight variance in the number of cans contained in the five cases between the allegation in the bill of particulars and the proof in support of that item of the bill of particulars is at all material, and we think that the court erred in holding that the plaintiff failed to prove this item in the bill of particulars, and in instructing the jury to that effect.

As to the item in the bill of particulars claiming \$469.44 for 40 barrels of livers, when the proof showed that there were no such livers furnished, and that this item should have been 40 barrels of loins, instead of livers, we do not think there was any evidence proving this item of the account, and the court properly so instructed the jury. Clearly a suit for 40 barrels of livers is not proved by showing that no livers were furnished, but instead of livers, the 40 barrels of loins were furnished. It would be as logical to claim that a man, sued for a horse of a certain value, could be held liable for the horse, although the evidence showed that it was a cow, and not a horse, which he had purchased. As to this item the plain-

tiff should have amended to meet the proof. Failing to amend, he cannot be heard to complain that the judge instructed the jury to the effect that proof of the sale of 40 barrels of loins did not support the allegation in the bill of particulars that 40 barrels of livers were sold.

[1] The burden was upon the plaintiff to prove every item in the bill of particulars substantially as alleged. The defendant is only called upon to meet the allegations set out in the bill of particulars, and presumptively he prepares to meet the items of the bill of particulars, and not others that may be proved against him, and he is entitled to demand that the evidence prove the items of the bill of particulars as alleged. So much for these two items of the account set out in the bill of particulars, which the trial judge directed the jury to disregard, because they were not proved.

What is here written relating to the item of 40 barrels of livers claimed in the bill of particulars as part of the account is the view entertained by a majority of the court. The writer does not fully concur in this opinion. No objection was made by the defendants to the evidence of the plaintiff explaining and correcting this item. It seems to me, therefore, that in the absence of such objection there was a tacit admission that the item as written in the bill of particulars was only a clerical error, and should have been "loins, beef loins," instead of "livers." Neither was there any denial of the allegation as corrected that the "beef loins" had been delivered and receipted by the Toxaway Hotel Company as among the contents contained in the car of hotel supplies payment for which was covered by the guaranty. In the absence of any objection to the evidence explaining and correcting this item of the bill of particulars, or any question that the "loins, beef loins," had been in fact delivered to the hotel company, I think no amendment was necessary, and that the plaintiff was entitled to recover this item of the account. The contrary view, it seems to me, is a too strict adherence to the technical rules of pleading at the expense of substantial right. It presents a situation where the plaintiff loses entirely payment for its property, which was admittedly delivered to the original debtor, for any subsequent suit for the amount would probably be res adjudicata.

[2] The next point insisted upon by the plaintiff in error is that the jury improperly allowed a credit of \$1,000 to the defendants. It was insisted that there was no legal evidence before the jury proving this credit. The Toxaway Hotel Company was the original debtor, the payment of whose debt was guaranteed by the defendants. The president of that company testified in substance that on September 10, 1906, the Toxaway Hotel Company made a payment of \$1,000 to Armour & Co., the plaintiff; that this payment

was for material which Armour & Co. had furnished to the Toxaway Hotel Company; and that the payment was subsequent to the furnishing of the car load of supplies by Armour & Co. to the hotel company in pursuance of the written guaranty made to it by the defendants. While it is not absolutely clear, in view of the other testimony of the president of the Toxaway Hotel Company, that his company was indebted to Armour & Co. on various other accounts contracted during the year 1906 in addition to the car load of supplies for which the suit was brought, yet the question whether or not the \$1,000 was paid for the car load of supplies, or paid on some other account, was issuable, under the evidence. If it was not paid on the car load of supplies when it was claimed as a credit by the defendants, the plaintiff should have made it clear to the jury that this credit was not properly applicable to the car load of supplies, because it was a payment for other articles.

But it is further insisted that there was no legal evidence before the jury of the payment of the \$1,000 by the Toxaway Hotel Company on any account to Armour & Co. It is insisted that the testimony as to this payment, in the light of the cross-examination of the witness relied upon to prove the payment, was illegally admitted in evidence by the court over the objection of plaintiff. On cross-examination this witness testified that the payment was made by a check sent in a letter; that that was the usual and customary way adopted by the Toxaway Hotel Company in the payment of all of its debts; that the payment of the \$1,000 was not made directly to any agent or officer in person of Armour & Co., but was simply a check inclosed in a letter and sent by the hotel company to Armour & Co. It is insisted that the letter and the check were the best evidence of the payment, and that the testimony admitted was secondary and without probative value. We do not agree with this view. The witness testified positively that the payment of the \$1,000 was made. It was wholly immaterial whether it was made by a check or in currency, and the positive statement of the witness that this payment was made carries with it the necessary implication that, if it was made by a check, the check was accepted in payment, and that the check was paid. Besides, it is well settled that the fact of payment may be proved by parol testimony, where the payment was made by a check or promissory note, without producing such check or note, or accounting for their nonproduction. *Fisher v. Jones Co.*, 93 Ga. 717, 21 S. E. 152. It may be further stated that the witness who testified positively as to this payment was not only the president of the original debtor, the Toxaway Hotel Company, but he was introduced by the plaintiff, and we think, for the reasons stated, the evidence was properly admitted to the jury, even without the pro-

duction of the letter or the check; and, as before stated, the question as to whether the payment was made on the account sued for, or on some other account, was issuable.

[3] The next question raised by plaintiff in error is that the trial judge erred in charging in effect that the burden was upon the plaintiff to show that no payment had been made—in other words, to prove affirmatively that the account was unpaid—and in refusing to charge a written request that payment was a matter of defense, and the burden of showing payment was on the defendant. The court charged, in effect, that the burden was upon the plaintiff to make out its case by showing that the goods sued for were sold and delivered, and, furthermore, that they had not been paid for. Ordinarily, where suit is brought for goods sold, it would be sufficient to shift the burden for the plaintiff to show that the goods were sold and delivered, and in such case payment is an affirmative defense, which should be set up and proved by the defendant, and this is the ruling in the case of *Christian v. Bryant*, 102 Ga. 561, 27 S. E. 686, relied upon by the plaintiff in error. But this is a suit, not against the original debtor, but against the guarantor; and if the guarantor, the defendant, had made any payment on the account, the burden would be upon the guarantor to show the fact of payment. But where suit is brought against the guarantor, the plaintiff must show the contract of guaranty and refusal to pay the account by the principal debtor, and, ordinarily, notice by the creditor to the maker of the guaranty, before the goods were sold and delivered, that the same were accepted, and should allege that on the faith of such guaranty the goods represented by the account sued on were sold and delivered as requested in the guaranty. *Small v. Claxton*, 1 Ga. App. 83, 57 S. E. 977.

Certainly in all cases, whether the contract of guaranty be absolute or conditional, the plaintiff must show, in order to make out a prima facie case, his contract of guaranty, that the goods were furnished in pursuance of the contract of guaranty, and that the debt has not been paid by the original debtor, for only under these circumstances would the guarantor be liable on his contract. In other words, in cases of suits against guarantors, the nonpayment of the debt by the principal debtors is a material fact necessary to constitute the plaintiff's cause of action, and it must be alleged in the petition and proved as a part of the plaintiff's case. 16 Enc. Pleading and Practice, p. 932; *State v. Peterson*, 142 Mo. 520, 39 S. W. 453, 40 S. W. 1094. In other words, the foundation of the suit against the guarantor on a contract of guaranty is the failure of the principal debtor to pay the debt guaranteed; for only

in the event of such failure could there be any liability on the guaranty. 30 Cyc. 1265. We conclude, therefore, that the trial judge did not err in instructing the jury that the burden was on the plaintiff in this case to allege and prove that no part of the account had been paid by the original debtor, and that this burden was upon the plaintiff, whether the guaranty was conditional or absolute.

This case has been twice before this court, and in view of the fact that the only error of the trial judge was an instruction to the jury not to allow the \$9.50 for the items of the bill of particulars referred to in the former part of this opinion, we think there should be an end to the litigation; and, while we cannot direct that the judgment below be increased in amount, we think that the defendant in error in this case should be allowed the privilege of paying the \$9.50, and we therefore decline to grant a new trial, if the defendant, when the remittitur is filed, will pay to the plaintiff the \$9.50 and interest thereon. But, if the defendant refuses to accede to this, a new trial must be granted.

Judgment affirmed conditionally.

(9 Ga. App. 781)

PRUDENTIAL INS. CO. OF AMERICA v. CHESTNUT. (No. 3,043.)

(Court of Appeals of Georgia. Sept. 30, 1911.)

(Syllabus by the Court.)

INSURANCE (§ 367\*)—LIFE POLICIES—CONSTRUCTION.

Under the facts presented, the policy of insurance was in force at the date of the death of the insured, and the court did not err in directing the verdict in favor of the beneficiary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 935-938; Dec. Dig. § 367.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by T. R. Chestnut against the Prudential Insurance Company of America. Judgment for plaintiff, and defendant brings error. Affirmed.

McDaniel, Alston & Black, for plaintiff in error. Moore & Pomeroy, for defendant in error.

RUSSELL, J. The case has been to the court previously, and, as many of the facts are stated in the opinion then delivered (8 Ga. App. 246, 68 S. E. 952), they will not be repeated here, but this opinion should be read in connection with the former opinion. On that hearing (which was upon demurrer) it appeared that the quarterly premium due December 21, 1908, had been paid. On the evidence coming in, it appeared that the last quarterly premium paid was the one due September 21, 1908. The further facts necessary to an understanding of the case here

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

presented may be summarized as follows: The policy was dated June 21, 1906. The premiums were payable quarterly on the 21st of June, September, December, and March. They were paid up to and including September 21, 1908. The insured died July 8, 1909. The provisions as to extended insurance in the event of a lapse of the policy for non-payment of premiums are as follows: If the policy has been in force for 1 full year, an extension of 60 days from the lapse; if for 2 full years, 120 days from the lapse; if for 3 full years, 1 year and 177 days from date of last payment of premium. It is also stated that, if the premiums are paid in quarterly installments, "due allowance" will be made for that portion of the year's premium which has been made. The court directed a verdict in the plaintiff's favor.

The record contains the testimony of Mr. Samuel Barnett, an insurance actuary. His testimony so clearly shows that the policy was in force at the time of the death of the insured, and at the same time so lucidly explains the nature of such contracts as the one before us, that we deem it advantageous to the profession to set forth extracts from his testimony in lieu of any extended discussion on our part. Among other things, Mr. Barnett testified as follows:

"I am an insurance actuary and an insurance lawyer. The duties of an actuary are to do the mathematical work of a life insurance company, including the calculation of premiums and the reserves on policies, and everything in detail, the mathematical part and all about that part of it, and, to a large extent, the legal part of the work which bears on insurance. Practically, I have been all my life at this actuarial work. I have done this kind of work for eight or ten or more insurance companies. I have studied in Europe, and made this work a life study. I am familiar with the methods of calculating reserve and expenses on insurance, and other provisions of life insurance policies. I am familiar with the basis upon which all companies figure—not the Prudential Insurance Company specially, but all companies. There is only one way in which values under a policy can be calculated. The Prudential Insurance Company advertises itself as following the American Experience Tables of Mortality, at 3 per cent. interest. Now, if they do follow the American Experience Tables at 3 per cent., I know how they make their calculations. Three per cent. reserve means that the calculations are made upon the Mortality Table and expected interest rate of 3 per cent. It means a certain reserve laid aside each year at 3 per cent. would meet the policy when it matures.

"The component parts of a premium are, first, the mortality; second, the interest rate; and, third, the expense. The premiums accumulate the reserve; the reserve comes out of the premium. When the premium is first paid, it is made up of nothing except reserve

and expense. Leave out the expense, then the uses to which a premium is put are simply to meet the mortality losses as they accrue. Now, when a premium is paid, all the net part of it is reserve at the time it is paid. You can call it reserve for mortality, for the company has got to pay the claim, and therefore you can say, in a certain sense, it is for mortality. The accumulated premium that the policy carries is all the company has to pay anything with, extended insurance, or paid-up insurance, or mortality, or anything else. Premiums are paid from time to time; but it is utterly impossible, when you pay premiums, to say how much is for mortality, how much for surrender value, or how much for anything else. The object of all these premiums is to meet the conditions as they arise along in the future, whatever they may be, and the premiums should be sufficient for that purpose. The surrender values at the end of the third year do not represent the entire reserve on the policy. So far as that part of it is concerned, it is arbitrary. I am inclined to think that the 60 days' extension at the end of the first year is an arbitrary value. I haven't figured it. I think the 120 days at the end of the second year is an arbitrary value.

"When the first premium was paid on this policy, that premium had to pay, first, an agent's commission. The company has to pay an agent's commission. If they don't get it from that first premium, they have got to get it somewhere else. I don't know, as to the Prudential Insurance Company specially; but when the first premium on that policy was paid, this premium of \$33, a certain part of that premium went first for agents' commissions. If you ask me the general custom, I can state it. All I know is the general custom. I don't know whether the Prudential paid commissions on the first year's premium. All I know is the general custom. I can only know from my general knowledge that a commission was paid on the first year's premium. If you ask me if I know a general practice, or if I know it in a general way, as a general custom, then I say I do know. I know it from general knowledge. I do not know it from any special knowledge concerning the Prudential Insurance Company. The doctor's medical examination fee was not taken out of the first year's premium as such. Those things have to be paid, but I don't say they would take it out of the first year's premium. They paid the doctor something, but I don't say they took it out of the first year's premium. A certain amount has to be paid for office expenses. If there isn't enough to cover those things, then they have got to go outside and get it. They have a certain amount to cover those things.

"There is no such thing as theoretical reserve, distinct from legal. The reserve is a liability against the company, and the com-

pany has got to put it up. The company on full legal reserve basis on usual expenses has got to borrow from some other source to put up the reserve at the end of the first year. The same thing is true at the end of the second year. If the premiums are not sufficient to put up that reserve, they have to go somewhere and get it. No company on full legal reserve on ordinary expenses, after they pay the agents' commissions, and the medical examiners' fees, and the home office expenses, has anything left at the end of the first year, out of the first premium. As a rule, there cannot be much reserve saved out of first premium at the end of the first year. There can be reserve saved out of the premiums at the end of the second year. At the end of the second year, there may be saved as a rule in the neighborhood of a quarter of the premium. I can tell what actual reserve saved there would have been on this policy at the end of the second year, if you will let me know what the expenses of the company are; otherwise, I would have to go into an elaborate calculation of the expense. In order to tell, I would have to know what the commissions were, and what the medical examiner's fee was, and what the home office expenses were, and what the renewal commission was, out of the second year's premium.

"In reference to what the first half of the third year's premium purchased, and the results arrived at by me, I will have to make a little explanation there. The premiums on life insurance policies are all considered to be paid annually, in advance. All calculations are made by all companies on that basis, and there is strictly no such thing recognized as semiannual payments of premium, or quarterly payments of premium; but the policy either goes into a new policy year, or it does not. The company, for the accommodation of the policy holder, frequently allows quarterly payments, or semiannual payments; but technically the company is in that policy year when it accepts a quarter payment or half payment, and all settlements are made as of the end of the year, whenever the policy gets into that year at all. The surrender values are all based upon the results at the end of the year, provided the first quarter is accepted by the company, and it gets into that year at all. Technically speaking, the whole premium is considered paid, and the company is considered to make an extension and a loan of the unpaid parts of the premium. They have the technical name of 'deferred premiums.' A deferred premium is simply a part of the year's premium, annual premium, which has not been paid, so that, strictly speaking, there is no such thing in insurance business at all as quarterly or semiannual premiums; nothing except annual premiums.

"If a man dies within the life of a policy, after the payment of two quarterly premiums, as to whether the company would

deduct the balance of the year's premium, the company considers the unpaid quarters as debts due the company, and would deduct them. Whenever a policy goes into a year, the whole of the premium has got to be paid by the policy holder. If he is alive, he pays it; if he dies, the company deducts it. Whenever a company gets into the year, it carries the policy over to the end of the year. The payment of the first two quarters, therefore, carried this policy to the end of the third policy year, and entitles the policy holder to the extended insurance allowed at that time; in the meantime the policy holder being compelled to account to the company for those two unpaid quarters, that being the universal rule among life insurance companies. The two quarters paid on this third year entitled the policy holder to an interpolation between the end of the second year and the end of the third year, and that interpolation will carry the policy 331 days from the middle of the third year; that is, from December 21, 1908, would carry the policy 331 additional days, clear over into the third year, to December of the third year. I don't mean exactly over to the middle of the third year on that policy, from December 21, 1908. Strictly speaking, it ought not to be interpolated exactly that way. It ought to be interpolated by making due allowance, by grading: instead of 331 days, it ought to be about 325 or 326 days. Still it would carry it over the date of death, and it is not necessary to go into that question more accurately.

"It is not exactly proportionate, just like compound interest. Compound interest is interest on interest, and it don't grow exactly in a straight line. There is no use going into that. It don't make any difference, but amounts to a few days. I think the words 'due allowance' under that policy have a recognized meaning among insurance companies—recognized or special meaning. I don't mean the exact words 'due allowance' in themselves have, but the interpolation of those values between that time has a very distinct meaning among actuaries in insurance. The word 'interpolation' means this: Those benefits are not given except at the end of a distinct year. Now, suppose something happens in between, interpolation is the method of arriving at what is the correct value to the assured upon this intermediate date, and that is a meaning thoroughly recognized in insurance, and it is in following that method of interpolation that I come to that conclusion.

"From the standpoint of the insurance company, the meaning of the clause in the policy, 'If the premiums on this policy are paid in quarterly or semiannual installments, due allowance will be made in computing benefits, in proportion to the full year's premium,' is where benefits are allowed at the end of a certain year, and for



some reason those benefits have to be paid at intermediate periods, then 'due allowance' means the assignment of the correct benefit, according to the same law, for those intermediate periods. That means that, if the third year's premium as a whole purchased a year and 177 days of extended insurance, the first two quarters of that year's premium would purchase practically one-half of that additional extended insurance compared with the second year. It would be a little less than one-half, not much less than one-half—a few days, no more probably than six. In determining what benefits, if any, the half of the third year's premium purchased, I would base my calculation on the interval between the second and third year. If the third year's premium purchased three years of extended insurance, and the second year's premium, as such, purchased two years of extended insurance, then the half of the third year's premium, in determining what extended insurance that half purchased, would be based upon what the whole of the third year's premium purchased. It is true that each year stands to itself in the calculation of this extended insurance and cash surrender values in the policy. Each year is a separate calculation in a certain sense.

"Now, of course, the policy year determines what the amount will be. The second year would be calculated independently, or the third year independently, and the fourth year independently. These independent figures are not strictly added onto the separate purchases for the preceding year in getting the total benefit beyond the year you are working on. The policy is not extended each year the same way exactly proportionately. The extended values for each year are figured by themselves. They don't run the same from year to year. If any allowance whatever is to be made for one-half or one-third of a year, it must be based on what the whole of what that particular year's premium would purchase. The results of the end of the third year would not be based upon the results which may have been obtained on the first or second year's premiums. The results of the first or second year could not constitute the same basis of calculation. The additional value would be based upon the results at the end of the third year. One-half of the third year's premium in this policy would purchase within five or six days of one-half of the total extended insurance specified in the policy. Values are not based upon each separate year's premium. Values are based upon a review of the whole situation, from beginning to end. Values are based, at the end of each year, upon the accumulated reserve at the end of each year; that is, they ought to be, and theoretically they are. If there is any value at the end of the third year, it is based upon the reserves at the end of that year. If there is no reserve at

the end of the first year, the policy has no value. It could not have. If there is no reserve at the end of the second year, the policy has no value at the end of the second year, technically. If there is no reserve at the end of two and a half years—The only way, I can place a value on a policy, either cash surrender value, loan value, or extended insurance value, is knowing what the reserve was at a certain time, at which I undertake to figure their value. I would have to know what the value was at the end of the first year to get the extended insurance at that time, provided the extended insurance was based upon the reserve; and it ought to be based upon the reserve. All surrender values are based upon reserve, or ought to be. True value is based upon the reserve at the end of the first year; but the surrender value, or extended value, or loan value, may be more or less than the true value of a policy. We have to know what the reserve is, before we can know what the reserve will buy. I can tell you what the reserve was on this policy, in dollars and cents. I have that at 3 per cent. I can tell you at  $3\frac{1}{4}$  per cent. in a few minutes. I can figure it. What the expenses are, the first year's commissions, the medical examiner's fee, the expenses of the home office, and the second year's renewal premium wouldn't have anything to do with it.

"There is no actual reserve, independent of the legal reserve. The law makes the reserve. The reserve of a policy is what is called the 'legal reserve,' and that is the legal reserve, and that is based on the American Experience Tables and the interest rate assumed by the company, and it is not a question of whether the company has actually that reserve on hand, or not. All insurance is written on the basis of annual premiums. Quarterly premiums and semiannual premiums are not recognized. As a matter of calculation, they don't calculate values on them. The company considers the full premium paid, if they run the policy on quarterly payments, and that they have loaned the policy holder the rest of the money.

"No extension value is granted on premiums, but it is granted on reserve entirely. The premium has nothing to do with extended insurance. The extension is based upon the reserve as the basis of calculation; that is, it ought to be. The reason extended insurance at the end of each year varies is because the reserve varies at the end of each year. In dollars and cents, the reserve on this policy on December 21, 1908, was \$23.50. That reserve would carry the policy beyond July, 1909; that is, the reserve the company ought to have had. If you want me to go a little more accurately into that reserve, I may correct it this way, because there is what we call 'intermediate reserve.' You should add to that figure which I have given one-half of what is called 'pure premi-

um.' You had better put it that way, to get it accurately."

Objection was made to certain parts of Mr. Barnett's testimony, on the ground that he was dealing with unambiguous details of the contract, and was attempting to explain matters that stood in no need of expert interpretation. Even if this objection were abstractly valid, the error complained of is harmless, as, in our opinion, he interpreted the contract correctly, and no harm was done in merely taking his advice.

Judgment affirmed.

(9 Ga. App. 733)

JOHNSON v. KLASSETT. (No. 3,040.)

(Court of Appeals of Georgia. Sept. 11, 1911.  
Rehearing Denied Sept. 28, 1911.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 44\*)—JURISDICTION—AMOUNT IN CONTROVERSY—SPLITTING CAUSE OF ACTION.

A running book account, all the items of which have matured at the time of the suit, cannot be split into separate parts, without the consent of the defendant, for the purpose of bringing each part within the jurisdiction of the justice's court; but the account constitutes one demand, and all the items thereof must be included in a single suit. If the running account, thus indivisible, is divided into separate parts, a recovery upon one part would ordinarily be a bar to a subsequent action for any items of the account not included within the first suit.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 168; Dec. Dig. § 44.\*]

2. JUDGMENT (§§ 595, 720\*)—CONCLUSIVENESS—MATTERS CONCLUDED.

Where a running account containing debits and credits is divided into two parts, and a suit is brought on each part, and to the first suit a plea to the jurisdiction is filed in the court in which the suit originated, on the ground that the account has been improperly split into two parts for the purpose of giving the court jurisdiction, which it otherwise would not have of the entire account, and this plea is decided against the defendant on the necessary ground that the account was as a matter of law divided and he acquiesces in such adverse decision, although the decision was erroneous, he is estopped from renewing the same objection to the second suit brought against him for the items of the account not included within the first suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1110; Dec. Dig. §§ 595, 720.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by R. S. Johnson against A. KLASSETT. Judgment for defendant, and plaintiff brings error. Reversed.

The facts upon which the questions arise in this record, substantially stated, are as follows: KLASSETT bought groceries from JOHNSON as needed, agreeing to pay for them by the week, and for some time carried out this agreement; but he fell behind in his payments, and owed JOHNSON about \$130 on a running account for the years 1905 and

1906. JOHNSON split the account into two parts, including the items for 1905 in one part, and the items for 1906 in another part, and brought two suits in a justice's court against KLASSETT for the separate parts of the account. Both suits were carried to the superior court by appeal. When the suit for sixty odd dollars, including the items for 1906, was reached for trial in the superior court, the defendant filed a plea alleging that the plaintiff had split a solid account in order to bring it within the jurisdiction of the justice's court, and that this was unauthorized by law. This plea seems not to have been sustained in the superior court, and a verdict was rendered for the plaintiff for the full amount of the suit. Subsequently the appeal in the other suit, involving the items for 1905, was dismissed in the superior court, and the plaintiff sued again for these items in the justice's court, and to this suit a plea of res judicata was filed, under section 4335 of the Civil Code of 1910, setting up the judgment in the first suit in the superior court as an adjudication of the same subject-matter, and insisting that the items included in this judgment were identical with those in the suit then pending. When this case was reached for trial in the justice's court, the plaintiff, through his attorney, confessed judgment in open court for the defendant, and thereafter he entered an appeal from that judgment to a jury in the same court. When the appeal came on to be heard, the defendant made two motions before the magistrate: First, that the court dismiss the appeal, on the ground that it was illegal and void because the defendant had filed a plea in bar to the suit, which, if well pleaded, precluded the plaintiff from recovery for all time, and the plaintiff had made a solemn admission in *judicio* that this plea was well pleaded, and therefore neither an appeal nor a certiorari would lie. Second, that the magistrate direct the jury to sign up a verdict for the defendant, on the ground that the defendant had filed a plea in bar and the plaintiff had confessed a judgment in favor of the defendant in open court, and this admission in *judicio* was conclusive between the parties, and, although the technical right of appeal existed, it could avail the plaintiff nothing, and the only verdict that could be lawfully rendered under the facts was a verdict sustaining the plea in bar. The court overruled both of these motions, and the case proceeded to trial before the jury.

The plaintiff testified, in proof of his account, that in 1905 he opened up an account with the defendant, who at that time said that "he could pay by the week, and would pay by the week," and the plaintiff sold him groceries, charging them to his account with this understanding, and that for a while the defendant did pay by the week, but finally

got behind, and that the account sued on was just, true, correct, and unpaid. The defendant introduced no evidence attacking the correctness of the account, but introduced a certified copy from the record showing the other suit for the account of 1906 and the filing of the plea in bar. The jury found a verdict for the plaintiff for the full amount of the suit, \$67.50, and the defendant sued out a writ of certiorari, which was sustained by the judge of the superior court, who thereupon entered a final judgment in favor of the defendant; and to review this judgment a writ of error is brought to this court.

Horton Bros. & Burress, for plaintiff in error. C. B. Rosser, Jr., for defendant in error.

HILL, C. J. (after stating the facts as above). [1] The questions of law raised by the facts in this case seem never to have been distinctly decided by our Supreme Court; but the principle involved has been before the court on several occasions, and we think is embraced in section 4389 of the Civil Code of 1910, which declares that: "If a contract be entire, but one suit can be maintained for a breach thereof; but if it be severable, or if the breaches occur at successive periods in an entire contract (as where money is to be paid by installments), an action will lie for each breach; but all the breaches occurring up to the commencement of the action must be included therein." It is true that this section relates by its terms to breaches of a contract. But in the case of *Floyd v. Cox*, 72 Ga. 147, the Supreme Court construed a running account, continuing through several consecutive years, where it was added up at the end of each year, the credits subtracted, and the balance carried forward to the next year, as one entire claim, "but one account and one indebtedness." In *Thompson v. McDonald*, 84 Ga. 5, 10 S. E. 448, which was a suit on an account, it was held that the "account resulting from a single contract cannot be split up into two causes of action, the whole being mature when the first action was brought." That was a suit brought by the plaintiff for certain lumber which had been bought by the defendant, and on the trial of the case certain of the items of lumber claimed to have been furnished were stricken from the bill of particulars, and the court held that there could be no recovery in the second suit, on the ground that when the first suit was brought the items now sued for, as well as the rest of the general account, were due, and that, having voluntarily withdrawn these items from the account, a second suit could not be brought for them; the rule being that all breaches of a contract up to the time of bringing the suit must be in one action. *Macon & Augusta R. R. Co. v. Garrard*, 54 Ga. 327; *Evans v. Collier*, 79 Ga. 319, 4 S. E. 266. In the case of *Atlanta Elevator Co. v. Fulton Bag & Cotton Mills*, 106

Ga. 427, 82 S. E. 541, it was held that a creditor cannot bring an action against his debtor for an amount admitted to be due upon an account resulting from a single contract, the whole debt being mature when the suit is brought, and afterwards maintain a second action for the balance alleged to be due on the same account in excess of the amount originally sued for.

The whole question resolves itself into this: Was the general running account against the defendant a divisible demand, which could be separated at the will of the plaintiff and collected by several actions? If the running account was an entire and indivisible demand, the judgment in the suit for the account due in 1906 was a good plea in bar to the account for 1905; for, at the time of this second suit for 1905, all the items of the account were matured and past due. The case of *Parris v. Hightower*, 76 Ga. 631, is relied upon by plaintiff in error. In that case, however, it seems that there was an express agreement that the account for goods sold on the same day should be divided into four distinct parts due on different dates, and in view of this agreement the Supreme Court held that the plaintiff had the option to bring separate suits on each portion of the account, or to unite them. In a well-considered case by the Supreme Court of Iowa, *Electric Co. v. Electric Co.*, 134 Iowa, 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529, it was held that the sale of goods, although at different times and upon different orders, payment for all of which has matured, constitutes but a single demand, and separate suits based upon each distinct order and sale cannot be maintained, although in itself a complete transaction; and a recovery upon one such order and sale is a bar to an action upon the other sales then due. And in speaking for the court the learned justice says: "The proposition that a continuous book account is entire, and cannot without agreement of the parties be split into separate and distinct demands to form a basis for several suits, is one which has general recognition by the authorities, and is no longer open to question"—citing a great many authorities in support of this proposition. All of these authorities uphold the contention that an account of several items, all of which are due and payable, constitutes but one demand, and if the party to whom the account is due sees fit to bring suit for a part thereof and recovers judgment, such recovery will be a bar to any further suit for the remainder of the claim. See, also, to the same effect, *Buck v. Willson*, 113 Pa. 423, 6 Atl. 97; *Hughes v. Dundee Trust & Mortgage Co.* (C. C.) 26 Fed. 831, and many cases there cited.

All of these cases are based upon the principle that both law and equity abhor a multiplicity of suits, and will not permit a plaintiff to divide the items of an account then due for the purpose of harassing the

defendant and subjecting him to unnecessary suits. The only just and sound rule—a rule just to both parties—is to compel the plaintiff, where all of the items of the account are due when suit is brought on a running account, to include the whole account in a single suit. In the case now under consideration, if the plaintiff had the right to split the account of \$130 into two parts, to bring it within the jurisdiction of the justice's court and unnecessarily harass the defendant with two suits, he could have split the account into weekly amounts and brought any number of suits against the defendant, which would have been an intolerable hardship, and one which the law would not permit. It is therefore clear to our minds that the plaintiff in this case should not have been permitted to divide this account into two parts for the purpose of obtaining jurisdiction in the justice's court, but the suit should have been relegated to the court having jurisdiction of the entire amount. This would not have deprived him of the right of asserting any part of his claim, but would simply have compelled him to assert his entire claim in one suit.

[2] But the proper place to have made this question was the place where it was raised in the superior court when the first case in which a judgment was rendered was tried. Then and there the plaintiff's right to split his account into two parts was directly challenged, and, in our opinion, it being conceded that there was but this one account, this plea should have been sustained; but, through an erroneous view of the law, this plea was decided against the defendant's contention, and judgment was entered up against him accordingly. He submitted to this judgment, and the question was therefore res adjudicata so far as he was concerned, and he could not be subsequently heard, in answer to the second suit, to raise the same question which had been decided by the superior court, and in the decision of which he had acquiesced. There must be an end to litigation, and the end was reached on this point, so far as the defendant was concerned, when the question was raised by the suit tried in the superior court and decided against him, and he submitted to the decision. For this reason we are constrained to hold that the learned judge of the superior court erred in sustaining the certiorari.

Judgment reversed.

(9 Ga. App. 714)

**KING et al. v. STATE.** (No. 2,981.)  
(Court of Appeals of Georgia. Sept. 23, 1911.)

(Syllabus by the Court.)

1. **USURY (§ 149\*)—CRIMINAL PROSECUTION—CONSTITUTIONALITY OF LAW.**

The validity of the act of 1908 (Acts 1908, p. 83) embodied in sections 3444 and 3445 of the Civil Code of 1910, making it a misdemeanor

or "to reserve, charge, or take, for any loan, or advance of money or forbearance to enforce the collection of any sum of money, any rate of interest greater than five per cent per month, either directly or indirectly, by way of commission for advances, discount, exchange, the purchase of salary or wages, by notarial or other fees, or by any contract, or contrivance, or device whatever," under which the indictment was framed, is fully upheld in the opinion rendered by the Supreme Court on the questions certified by this court.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 149.\*]

2. **USURY (§ 149\*)—INDICTMENT—DEMURRER.**

The demurrers on various grounds, attacking the form and particularity of the indictment, are without merit. The allegations of the indictment in its various counts set forth clearly, distinctly, and with sufficient particularity all the acts complained of charged to be a violation of the statute, not only in the language of the statute itself, but also with such clearness and distinctness as to be easily within the comprehension of the jury, and the judgment overruling the demurrer is affirmed.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 149.\*]

Error from Superior Court, Fulton County; L. S. Roan, Judge.

R. D. King and others were convicted of violating the usury law, and bring error. Affirmed.

See, also, 71 S. E. 1093.

Rosser & Brandon, Candler, Thomson & Hirsch, R. B. Blackburn, Lamar Hill, and J. D. Kilpatrick, for plaintiffs in error. C. D. Hill, Sol. Gen., D. K. Johnston, L. C. Hopkins, H. M. Dorsey, Sol. Gen., and Ogburn, Dorsey & Shelton, for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 723)

**BROWN & ADAMS v. SAM WEICHSEL-BAUM CO.** (No. 3,203.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

(Syllabus by the Court.)

**APPEAL AND ERROR (§ 592\*)—AFFIRMANCE—FAILURE TO BRIEF EVIDENCE.**

This case is here on a judgment overruling the motion for a new trial. The evidence on the trial of the case consisted of interrogatories and over 50 pages of documentary evidence, telegrams, letters, etc. Apparently the only effort to brief the evidence by interrogatories was simply by leaving out of the brief the questions, and leaving in all the parts of the answers, material and immaterial. No effort whatever is made to brief the documentary evidence, but all the letters and telegrams are incorporated in what purports to be the brief in extenso. The only questions raised depend entirely upon a consideration of the evidence. Under the express requirements of Civil Code 1910, §§ 6140, 6141, and the repeated rulings of the Supreme Court and of this court, the judgment of the lower court must be affirmed. *Cunningham v. Strom*, 8 Ga. App. 87, 68 S. E. 616; *Albany & Northern Ry. Co. v. Wheeler*, 6 Ga. App. 270, 64 S. E. 1114; *Huntley Mfg. Co. v. Nixon Grocery Co.*, 6 Ga. App. 46, 64 S. E. 270, and cases there cited.

[Ed. Note.—For other cases, see Appeal and Error. Dec. Dig. § 592.\*]

Error from City Court of Dublin; K. J. Hawkins, Judge.

Action between Brown & Adams and the Sam Welchelbaum Company. From the judgment, Brown & Adams bring error. Affirmed.

Ira S. Chappell, for plaintiffs in error.  
Miller & Jones, J. S. Adams, and P. L. Wade, for defendant in error.

HILL, C. J. Judgment affirmed.

(3 Ga. App. 714)

WILLIAMS et al. v. PEOPLE'S BANK OF SUMMIT. (No. 3,046.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 121\*)—CONSTRUCTION—PARTIES.

Where two persons sign a note, apparently as joint principals, and there is nothing in the note to show that one is surety for the other, the presumption of law is that both are liable as joint principals. This is not, however, a conclusive presumption, and may be rebutted by parol evidence or by circumstances.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 255, 256; Dec. Dig. § 121.\*]

2. BILLS AND NOTES (§ 495\*)—PRINCIPAL OR SURETY—BURDEN OF PROOF—DISCHARGE.

Where one has signed a note, apparently as principal, but in reality as surety, the burden is on him to establish the fact of suretyship; and where he claims a discharge by some act increasing his risk, he must further show that the payee knew he was surety at the time of the act in question.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1863-1868; Dec. Dig. § 495.\*]

3. BILLS AND NOTES (§ 121\*)—USURY (§ 127\*)—SIGNATURE TO NOTE—EVIDENCE—DISCHARGE.

Whether one signs a note with another as joint principal maker, or as surety merely, is a question to be determined by the facts, and not by the opinion that either party to the contract may entertain. Under the uncontroverted facts in the present case, held, that the defendant was only a surety on the note, that usury was charged against the principal maker by the payee when the note was originally given, that the waiver of homestead contained in the note was rendered void by the usury, and, this secret taint of usury increasing the risk of the defendant as surety, the law released him from all liability thereon.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 121; \* Usury, Dec. Dig. § 127.\*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action by the People's Bank of Summit against R. A. Williams, Jr., and John R. Sharpe. Judgment for plaintiff, and defendant Sharpe brings error. Reversed.

Hawes & Pottle, for plaintiff in error.  
Donalson & Donalson, for defendant in error.

HILL, C. J. The People's Bank of Summit brought suit on a promissory note against R. A. Williams, Jr., and John R. Sharpe as joint principal makers. Williams admitted the execution of the note and liability thereon as principal maker. He alleged, further, in his plea, that John R. Sharpe signed the note only as surety. Sharpe filed a defense, and set up that he signed the note simply as a surety, that 10 per cent. usury had been charged on the note by the bank without his knowledge, that the note contained a waiver of homestead, and that as surety he was discharged on account of the usurious interest so charged; his risk as surety being increased. The jury rendered a verdict against both defendants as joint principal makers, and Sharpe brings error. His motion for a new trial contains numerous assignments of error, but the view that we entertain on the merits of the controversy makes a decision on these special assignments of error unnecessary.

[1] The contentions of the defendant Sharpe in the court below were, that he was a surety, that usury had been charged by the bank without his knowledge, and that as a legal result, in connection with the waiver of homestead by the maker of the note, Williams, his risk had been increased, and he was legally discharged thereon as surety. Two facts are not controverted: (1) That the note contained a waiver of the homestead exemption; and (2) that 10 per cent. usury was charged by the bank when the note was originally made and the money advanced by the bank to Williams. There was no evidence that Sharpe knew that the usury had been charged by the bank, there being nothing on the face of the note to disclose the fact, and Sharpe positively testified that he had no knowledge that usury had been charged by the bank. The only real contention in the case was as to the relation in which Sharpe stood to the note. It was contended by the bank that he was a joint maker. It was insisted by him that he was a surety only. In support of its contention the bank insisted that on the face of the note both Williams and Sharpe had signed as joint makers, that there was nothing in the contract itself that indicated that Sharpe was only a surety for Williams, and therefore the presumption of law was that Sharpe was liable as a joint principal with Williams. This is unquestionably the law. *Trammell v. Swift Fertilizer Works*, 121 Ga. 780, 49 S. E. 739. But it is equally well settled that this presumption is rebuttable, and can be disputed by parol evidence, or by circumstances, and the actual relationship of each one who signs his name to the note can be shown.

[2] Where one party to the note signs apparently as a principal, and he relies upon the defense of suretyship, the burden, of course, is upon him to show the fact of sure-

tyship. And the burden is also upon him to show the further fact that the payee of the note, the one who advanced money thereon, knew of his relation as surety, or had reasons to know that he was such surety, when the alleged act increasing the risk was done. 1 Brandt on Suretyship, § 42; Goodman v. Litaker, 84 N. C. 8, 37 Am. Rep. 602; Hall v. Capital Bank of Macon, 71 Ga. 715. After all, the legal relationship of each party to the note or contract must be determined by the facts. This relation is not determined accurately or conclusively by the mere opinion of the parties to the contract. The fact that the bank thought and had reason to think that Sharpe signed as principal maker of the note did not make him such principal. Although Sharpe himself may have thought that he signed the note as a principal, this did not in law determine his true relationship to the contract. It may be stated that Sharpe testified positively that he signed the note as surety, and Williams, who admitted that he was the principal maker, testified that Sharpe signed as surety and not as joint maker with him. The cashier of the bank, per contra, testified that when the note was signed by Sharpe he did not know and had no reason to believe that the plaintiff signed other than as principal maker with Williams, and, moreover, that Williams had told him that Sharpe had an interest in his business and in the consideration for which the note was given.

However, there are admitted facts which in our opinion not only show that Sharpe was surety only, but which brought home to the bank knowledge that Sharpe was a surety—irrespective of how he signed. First. The note sued upon was not an original note. It was a renewal note. The original note was given to the bank by Williams with two other parties as sureties. Sharpe did not sign the original note. He did not know anything about the original transaction of Williams with the bank. He did not receive one cent of the money which Williams borrowed from the bank. He had no interest in the consideration of the note, or in any business of Williams in which the money borrowed by Williams from the bank had been used. When he signed the renewal note he had no interest in the consideration of the original note. Williams got no money from the bank on the renewal note. He simply got an extension of time of payment. Sharpe had no interest in the consideration of this note at any time, either when the original note was made or when it was renewed. At the request of Williams Sharpe signed the renewal note, in order that Williams might obtain from the bank an extension of payment of the note originally made by Williams and the other sureties. Under these admitted facts did the mere statement of the cashier that Williams told

him that Sharpe was interested in his business have sufficient probative value to overcome these positive, uncontroverted facts clearly indicating that Sharpe was surety only? Even if Sharpe did have an interest in Williams' business at the time he signed this note, that of itself would not make him a principal maker; nor would it show, or tend to show, that he had any interest in the consideration of the original note. It may be stated, in passing, that Williams denied that he told the cashier that Sharpe had any interest in the note, or in the business for which the note was given. Be this as it may, the cashier unequivocally testified as to the original note, for which the present was a renewal: "When I loaned this money I did not know or recognize in this transaction any man on God's green earth except Williams."

[3] We do not think, therefore, that under these facts the question as to Sharpe's relationship to this note was an issuable fact. The question of his relationship to the contract must be determined by the facts, as we before stated, and these facts, in our opinion, amount to a legal demonstration that the relation which Sharpe held to this note was simply that of suretyship. These facts bring Sharpe squarely within the definition of a surety. Civil Code 1910, §§ 3538, 3541. He signed the note purely for the accommodation of Williams, to enable the latter to renew his note to the bank, having no interest in the loan and receiving none of the money. Buck v. Bank of the State of Georgia, 104 Ga. 660, 30 S. E. 872. This being true, and it being admitted that usury was charged by the bank when the loan was made to Williams, and there being no evidence that Sharpe had any knowledge tending to show that usury was charged in the note, and as the note contained a waiver of homestead, Sharpe's risk being thereby increased, the note was rendered void, and Sharpe was discharged from liability thereon. We think, under these facts, a verdict should have been directed in favor of Sharpe, and the judgment refusing a new trial is therefore reversed. Lewis, Leonard & Co. v. Brown, 89 Ga. 115, 14 S. E. 881.

Judgment reversed.

(9 Ga. App. 779)

J. L. PHILLIPS & CO. v. HUDSON.

(No. 2,974.)

(Court of Appeals of Georgia. Sept. 30, 1911.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 513\*)—ACTION ON NOTE—DEMURRER.

A plea filed by a corporation to a suit on a note signed in the corporate name by its treasurer, which in general terms set up that the note was not signed by an officer authorized to execute it, but in specific detail set up that it was executed under the direction of the president of the corporation in pursuance of an

agreement which the corporation had made, sets up no valid defense and is properly stricken on demurrer.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 513.\*]

## 2. MASTER AND SERVANT (§ 3\*)—CONTRACT OF EMPLOYMENT.

Where it is provided in a contract of employment that, in addition to a stated salary, the employer will give to the employé a certain percentage of the earnings of the business, the agreement as to the giving of the percentage of the net earnings is not a voluntary agreement, but is a contractual obligation, resting on a valid consideration, and is enforceable.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 3.\*]

Error from City Court of Thomasville; W. M. Hammond, Judge.

Action by C. W. Hudson against J. L. Phillips & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Theodore Titus, for plaintiff in error. Smith, Hammond & Smith, for defendant in error.

RUSSELL, J. Hudson was employed for the year 1906 by Phillips & Co., a corporation, at a stated salary. At the end of the year 1906 the president of the company informed him that the year had been prosperous, and that the company had decided to give him, in addition to his earned salary, a bonus of \$1,000, which was paid him in cash. (This, however, is not involved in the direct question now before us.) The president of the company then told Hudson that as to the year about to begin (1907) the company would give him, in addition to the stated salary he had formerly received, a bonus or "gift" of an amount equal to what would be the earnings of \$5,000 worth of the capital stock of the company, and during the year 1907 this amounted to \$1,976, which was entered to Hudson's credit on the books of the company. The understanding was that Hudson would not demand the cash for this amount, as the company was needing its money for other purposes. However, he was allowed to draw a portion of it in cash. It was then agreed that the company would issue to Hudson \$5,900 worth of its capital stock, taking in payment therefor the sum to his credit on the books of the company and Hudson's note for the difference; it being understood, however, that the stock was to be paid for out of the earnings. Later on the company fell into financial difficulties and a receiver was appointed. The receivership was a little later dissolved, and the company then took back from Hudson the stock, surrendered to him his note, and gave to him the note sued on, which represented the amount which had been credited in the original purchase price of the stock because of the amount standing to Hudson's credit on the company's books. Hudson sued on this note and the company defended on two

grounds: (1) That the note was not the act of the corporation (an attempt at a plea of non est factum), because its treasurer, who signed it in the company's name, acted beyond his power in so doing; (2) that the note was nudum pactum. The plea set up all the facts stated above. The court struck it on general demurrer.

[1] 1. The so-called plea of non est factum was not sufficient. While it is alleged in general terms that the treasurer of the corporation had no authority to execute it on behalf of the corporation, the specific facts recited show that it was in fact a corporate act and deed. Prima facie, the treasurer was a proper officer to sign for the corporation. The plea also avers that the note was given under the direction of the president of the corporation and in pursuance of the arrangement, made by the corporation itself, under which Hudson was to surrender his stock.

[2] 2. That the note was not without consideration seems to be manifest. Even if the surrender of the stock cannot be treated as the true consideration, and if we look upon the note as representing the sum which was placed to the credit of the plaintiff on the defendant's books as a bonus in addition to his regular salary for the year 1907, still it is not nudum pactum. The promise to pay the definite bonus (i. e., a percentage of the company's earnings) in addition to the stated salary, being made concurrently with the contract for the plaintiff's services for that year, was not a mere voluntary promise. The so-called bonus was not, in legal essence, a gift at all, but was merely extra compensation, to be determined by something to be ascertained in the future. Such a promise, made at the beginning of the employment, is enforceable, though it would not be if made pending the term or after performance was complete. See *Haag v. Rogers*, 9 Ga. App. —, 72 S. E. 46, distinguishing *Davis v. Morgan*, 117 Ga. 504, 43 S. E. 782, 61 L. R. A. 148, 97 Am. St. Rep. 171.

Judgment affirmed.

(9 Ga. App. 728)

## SPARKS MILLING CO. v. WESTERN UNION TELEGRAPH CO. (No. 2,940.)

(Court of Appeals of Georgia. June 29, 1911.  
Rehearing Denied Sept. 28, 1911.)

(Syllabus by the Court.)

### 1. TELEGRAPHS AND TELEPHONES (§ 53\*)— NEGLIGENCE OF TELEGRAPH COMPANIES— ACTION—EVIDENCE.

The damages sought to be recovered were not caused by the alleged negligent conduct of the defendant telegraph company, but resulted from the voluntary act of the plaintiff in complying with the terms of a proposal or offer to

contract which it had not accepted, and which it was under no legal compulsion to perform.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 53.\*]

## 2. DAMAGES (§ 157\*)—GENERAL OR NOMINAL—EVIDENCE.

In a suit for special damages alone, where the plaintiff is not entitled to recover the special damages sued for, there can be no recovery of general or nominal damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 429-440, 447-453; Dec. Dig. § 157.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Sparks Milling Company against the Western Union Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The Sparks Milling Company brought suit against the Western Union Telegraph Company for damages growing out of the alleged negligent conduct of the defendant in the transmission and delivery of certain cablegrams. A general demurrer to the petition was sustained, and this judgment is here for review. The allegations of the petition are substantially as follows:

The Sparks Milling Company is a corporation manufacturing and selling flour. Ross T. Smyth & Co. represented it in Liverpool. On August 16, 1907, it had two separate negotiations with Smyth & Co. by cipher cablegrams over the lines of the defendant. The first cablegram related to what was known as "Armada" flour, and was sent by the milling company to Smyth & Co. It was as follows: "Best offer we can make is: We offer to sell you one thousand 140 lb. sacks Armada at 22 shillings." On the same day a reply was received, as follows: "We accept your offer of one thousand 140 lb. sacks Armada at 22 shillings." On receiving this acceptance the milling company cabled to Smyth & Co. the following: "We confirm sale [referring to the sale already completed of one thousand 140 lb. sacks Armada at 22 shillings], and offer you 1,000 more at a third advance." The last cablegram was not delivered to Smyth & Co. until the following day, August 17th. Between the sending of this last cablegram and its receipt, Smyth & Co. opened negotiations as to the second transaction by sending to the milling company the following cablegram: "We offer to buy of you 3,000 sacks weighing 140 lbs. Sparks' Best, at 23-6 shillings per sack, September and October shipment." This offer was not accepted, but a counterproposition was cabled to Smyth & Co. as follows: "We offer to sell you 3,000 sacks weighing 140 lbs. each of Sparks' Best at 24 shillings per sack. We offer to sell you 3,000 sacks, 140 lbs. each, of Yarrow flour at 23-6 shillings per sack, all September shipment." This cablegram containing the counterproposition was never delivered.

It is alleged that Smyth & Co., receiving no response to their "Sparks' Best" cablegram, necessarily construed the third cablegram relating to the "Armada" transaction as referring to their offer by cablegram to purchase 3,000 sacks of "Sparks' Best," and as an acceptance of that offer; that if they had received the third cablegram relating to the "Armada" transaction within a reasonable time, to wit, on the day on which it was sent, they would necessarily have interpreted it as meaning that the milling company was offering an additional 1,000 sacks of "Armada," weighing 140 pounds each at 22½ shillings; that, not receiving this cablegram within a reasonable time, and receiving no response to their offer to purchase 3,000 sacks of "Sparks' Best," and construing the third cablegram relating to the "Armada" transaction as referring to their cablegram with reference to "Sparks' Best," they resold the 3,000 sacks of "Sparks' Best," and insisted that the milling company was bound to deliver the 3,000 sacks of "Sparks' Best" at 23-6 shillings; and the milling company considering itself bound to deliver this flour in accordance with an apparently closed transaction as hereinbefore stated, and in the exercise of good faith, and with a view to preserving its credit and protecting its good name in the business world, carried out the trade and delivered the 3,000 sacks of "Sparks' Best" on the terms contained in the offer made by Smyth & Co., and to do so it was compelled to purchase in the open market 3,000 sacks, weighing 140 pounds each, of "Sparks' Best," at an advance of 3 shillings per sack, resulting in a loss of \$1,080, for which sum the suit is brought.

Payne, Little & Jones, for plaintiff in error. Dorsey, Brewster, Howell & Heyman, for defendant in error.

HILL, C. J. (after stating the facts as above). The judgment dismissing the petition on general demurrer must be affirmed. Conceding the negligence of the defendant company as alleged, the damage to the plaintiff, nevertheless, did not result from this negligence, but was due to the voluntary act of the plaintiff in complying with the unauthorized demand of Smyth & Co., resulting from an inexcusable error of the latter in interpreting the third cablegram which by its express terms applied only to the "Armada" transaction, which transaction had been entirely closed by the two previous cablegrams, the offer made by the milling company and its acceptance by Smyth & Co., as referring to the cablegram offering to purchase 3,000 sacks of "Sparks' Best" at 23-6 shillings per sack, and as being an acceptance of the offer. The alleged delay in delivering the confirmatory cablegram referring to the "Armada" flour transaction cannot rea-



sonably be considered as forming the basis of any claim for damages in connection with the "Sparks' Best" flour transaction. This cablegram could not have been reasonably construed as referring to the "Sparks' Best" flour transaction, or as a reply to the proposition to buy "Sparks' Best" flour, contained in the cablegram of Smyth & Co., for the very simple reason that the confirmatory cablegram by its terms referred to the "Armada" transaction, confirming the sale theretofore made of the 1,000 sacks of "Armada" flour and offering to sell 1,000 more sacks at a third advance. When Smyth & Co. construed this confirmatory cablegram as relating to 3,000 sacks of "Sparks' Best" flour, they made an unreasonable and inexcusable error, and this erroneous interpretation was in no sense binding upon the milling company; and if the milling company, for the purpose of protecting its credit, accepted this erroneous construction, it was its voluntary act, for it was not legally bound to sell the 3,000 sacks of "Sparks' Best" flour to Smyth & Co. at the price offered by them. It had expressly declined this offer, and had made a counterproposition; and, while the cablegram containing this counterproposition may not have been delivered, it is indisputably shown that there was not, in law a contract between the milling company and Smyth & Co. in reference to the "Sparks' Best" flour.

Now, unless the milling company was bound by a valid contract to sell to Smyth & Co. "Sparks' Best" flour, on the terms proposed in the cablegram, there could not be any recovery by it from the telegraph company. The essential condition precedent to the right of such recovery would be a valid contract with reference to "Sparks' Best" flour between the milling company and Smyth & Co. *Western Union Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933; *Beck & Gregg Hardware Co. v. Knight*, 121 Ga. 292, 48 S. E. 930, 3 L. R. A. (N. S.) 420; *Haber, Blum, Bloch Hat Co. v. Southern Bell Tel. Co.*, 118 Ga. 874, 45 S. E. 696; *Richmond Hosiery Mills v. Telegraph Co.*, 123 Ga. 216, 51 S. E. 290; *Bass v. Postal Tel. Co.*, 127 Ga. 426, 56 S. E. 465, 12 L. R. A. (N. S.) 489. Certainly it cannot be reasonably contended that the milling company was legally bound to Smyth & Co. to sell them the 3,000 sacks of "Sparks' Best" flour at 23-6 shillings per sack, when Smyth & Co. had not accepted the milling company's offer and had made it a counterproposition, which had never been received. This liability could only be claimed upon the assumption that the interpretation which Smyth & Co. placed upon the confirmatory cablegram relating to the "Armada" transaction was a reasonable and necessary construction, and was caused by the negligent conduct of the defendant company, as alleged. While the allegation is that, if this confirmatory cablegram referring to the "Armada" transaction had been delivered within a reasonable

time to Smyth & Co., they would have discovered from it that it referred to the "Armada" transaction, and not to the "Sparks' Best" transaction, yet it is seen that when the cablegram was actually delivered, notwithstanding its express terms, they construed it as referring to the "Sparks' Best" transaction, and as an acceptance of their offer to purchase 3,000 sacks of the latter brand of flour.

[1] This whole case, it seems to us, lies in a very narrow compass, and may be comprehensively stated as follows: There were two transactions between the milling company and their correspondents, Smyth & Co. The first transaction related to the sale of 1,000 sacks of "Armada" flour at 22 shillings per sack. This contract was completed by the offer contained in the cablegram sent by the milling company to Smyth & Co., and accepted by Smyth & Co. in their reply cablegram. The third or confirmatory cablegram, which was sent by the milling company to Smyth & Co., was wholly unnecessary; for, the contract having been completed by the offer and acceptance above stated, no confirmation was necessary. Even, therefore, if the terms of the confirmatory cablegram bore out the contention that Smyth & Co. necessarily construed it, in the absence of any reply to their offer to purchase 3,000 sacks of "Sparks' Best" flour, as a reply to their cablegram and as an acceptance thereof, this erroneous interpretation was caused, not by any negligence of the telegraph company, but by the unnecessary act of the milling company in sending the confirmatory cablegram and in making it possible for the erroneous interpretation to be placed upon it. The offer to purchase 3,000 sacks of "Sparks' Best" flour was not accepted by the milling company and consequently there existed no contract binding upon it to sell this flour on the terms proposed by Smyth & Co. If the milling company, notwithstanding that it was not legally bound to sell this flour on the terms proposed, did so, not because of any legal liability, but for the purpose of protecting its credit and standing commercially, this was a mere voluntary act, and could not be the basis of a claim for damages against the telegraph company.

[2] 2. It is insisted by counsel for the plaintiff that in any event the court erred in sustaining the general demurrer and dismissing the petition, because the plaintiff at least was entitled to have the question of nominal damages passed upon by the jury. We think this contention is unsound for two reasons: In the first place, as we have endeavored to show, we do not think that the plaintiff has the right to recover any sort of damages from the telegraph company; and, in the next place, the suit is limited to a claim for special damages, arising under the circumstances set out in the petition. There is no suit for general damages or nominal

damages; and, under such allegations, only the character of damages sued for could be recovered. In other words, there can be no recovery for either nominal or general damages, where the suit is exclusively one to recover special damages. *Christophulos Café Co. v. Phillips*, 4 Ga. App. 819 (2), 62 S. E. 562; *Wright v. Smith*, 128 Ga. 432, 57 S. E. 684.

Judgment affirmed.

(9 Ga. App. 700)

**DARBY v. STATE** (No. 2,849.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

(*Syllabus by the Court.*)

**1. HOMICIDE (§ 304\*)—INSTRUCTIONS—ACCIDENTAL HOMICIDE.**

Where it appears that the defendant shot the deceased with a pistol from his coat pocket, and the contention of the state was that the killing was deliberate and intentional, and the contention of the defendant was that the discharge of the pistol was accidental, and caused by the fact that his hand was maimed, so that, when he went to withdraw the pistol from his pocket, his finger caught over the trigger, and he pulled on it, thinking that it was the trigger guard, it was error for the court, in charging the jury, to neglect entirely to instruct them as to the defense of accidental homicide, especially in view of the fact that the judge gave a number of instructions to the jury as to what would be the legal effect if, though the discharge of the pistol was somewhat accidental the defendant was not entirely free from culpability.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 304.\*]

**2. CRIMINAL LAW (§ 364\*)—EVIDENCE—RES GESTÆ.**

Where it appears that immediately after the shooting a witness went up to the defendant, who was still standing at the scene of the shooting, and walked a few steps away with him, and asked him why he shot, and he said then and there that he shot unintentionally, this statement being made in less than two minutes from the time of the shooting and under circumstances tending to negative premeditation, it should have been admitted in evidence as a part of the *res gestæ*.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.\*]

**3. HOMICIDE (§ 202\*)—DYING DECLARATIONS—ADMISSIBILITY.**

An alleged dying declaration is not admissible in evidence, unless it was made at a time when the declarant was in the article of death, notwithstanding that at the time it was made the declarant may have believed that he was going to die, and notwithstanding that he died immediately following an operation which took place a few hours later; and it was error for the court to instruct the jury that they should consider the declaration as a dying declaration in the event it was made between the time of the declarant's receiving the wound and the time of his death, and at a time "when he was conscious that he would die, and he was aware of his approaching death," without instructing them that the declaration should not be received unless he was actually in the article of death at the time.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 202.\*]

**4. REVIEW ON APPEAL.**

Except as indicated in the foregoing head notes, there was no error.

Hill, C. J., dissenting.

Error from Superior Court, Toombs County; B. T. Rawlings, Judge.

W. L. Darby was convicted of homicide, and brings error. Reversed.

H. D. D. Twiggs, Williams & Giles, Jones & Sparks, G. W. Lankford, Hines & Jordan, and S. N. Gazan, for plaintiff in error. Alfred Herrington, Sol. Gen., for the State.

POWELL, J. This court, after carefully considering the many assignments of error contained in the somewhat voluminous record, has finally been able to agree that the trial was free from error except as to the points set out in the first three headnotes preceding this opinion, and even as to them the Chief Judge is not convinced that what seems to the majority of the court to be error was such error as to justify a new trial.

[1] The homicide occurred while the defendant and the deceased were having an altercation in a public street. The defendant, it seems, used opprobrious language to the deceased (though there was some denial of this). The deceased struck the defendant a blow in the face with his hand, and according to the defendant's statement, and according to the testimony of the defendant's witnesses, threw his hand towards his pocket as if to draw a weapon. At this moment the pistol of the defendant, which was in his side coat pocket, was fired, and the mortal wound was inflicted. The defendant stated to the jury, and contended, that this firing of the pistol was accidental. It appears that the defendant was a small man, inflicted with a rheumatic infirmity in his lower limbs, and in addition to this he had been maimed by having the thumb and one finger cut from his right hand. The deceased was a large, strong man. The defendant stated to the jury, and contended, that when he was struck by the deceased, and saw him make the movement as if to continue the assault, he reached in his pocket with his maimed hand in order to get his pistol, so as to defend himself if the deceased in fact pursued the attack, and that in attempting to withdraw the pistol, which was an automatic revolver, his finger caught over the trigger, which he mistook for the guard, and the pulling upon the trigger caused the pistol to fire.

The judge in his charge nowhere instructed the jury upon the theory of an accidental shooting, except in the following language: "I charge you further, gentlemen, if you find from all the facts and circumstances of the case that the defendant was making an attack upon the deceased with an unlawful

intention to kill, unjustifiably, and the defendant's pistol was discharged accidentally, and the deceased was killed, I charge you that such killing would constitute the crime of murder." It may be further noted that he also instructed the jury upon the subject of involuntary manslaughter in the commission of an unlawful act, as well as in the commission of a lawful act without due circumspection. We deem the omission of the court to instruct the jury as to the defense of accidental homicide a material error. If the defendant's statement as to the manner in which the pistol was fired be true, he was guilty of no offense, and the court should so have informed the jury.

[2] 2. The other members of the court somewhat share the doubt of the Chief Judge as to the point we are about now to discuss, but after careful consideration we have decided that the court erred in his ruling upon it. As soon as the shot was fired, friends of each party ran up. One of them took the deceased to a buggy, and the statement which the deceased there made as to how the homicide occurred was admitted by the judge as a part of the *res gestæ*. The court, however, rejected the testimony of another person to the effect that he immediately approached the defendant, and withdrew with him a few steps from the place where he was standing when he did the shooting, and asked him why he shot, to which the defendant replied. "I did not intend to shoot." This all occurred within less than two minutes from the time of the shooting, and the surrounding circumstances concerning the making of the statement are detailed by the witnesses. In the judgment of the majority of the court, the statement was sufficiently close to the act, and was apparently sufficiently free from afterthought (or rather forethought and deliberation), to require its admission as a part of the *res gestæ*.

[3] 3. An alleged dying declaration of the deceased was allowed in evidence. The testimony as to whether the deceased was in fact in the article of death at the time he made the statement is somewhat equivocal, though it was perhaps sufficient to justify the court in submitting the matter to the jury. But the court charged the jury as follows: "I charge you, if you find from all the facts and circumstances of this case that after the deceased was wounded, and between the time of receiving the wound and his death, he made certain statements as the cause of his death and who killed him, and if you find that these statements were made at a time when he was conscious that he would die, that he was aware of his approaching death, I charge you should consider that testimony along with the other testimony in the case in determining the main issue; that is, as to whether or not the defendant is guilty as charged beyond a reasonable doubt." It will be noticed that

under the language of this charge the judge did not make the fact of the declarant's being in the article of death one of the prerequisites to his declaration being received as a dying declaration. A statement made "after the deceased was wounded, and between the time of receiving the wound and his death," was not necessarily a statement made while he was in the article of death. The law is plain that the declaration is not admissible unless the declarant was in the article of death at the time of making it. The man may be conscious that he is going to die, and may be aware of his approaching death, without being in a dying condition, or, as the law phrase is, in the article of death.

[4] 4. Except in the particulars which have already been discussed, we find no error; but we deem these sufficient to justify the grant of a new trial, as they seem to go to the very vitals of the case.

Judgment reversed.

HILL, C. J. (dissenting). I do not think the alleged errors on which the judgment of reversal is based, if errors at all, are of sufficient gravity to require another trial. Under the evidence a verdict for murder would have been amply supported, and a verdict for a lesser grade of homicide was manifestly a concession to sympathy, and not to doubt. Certainly, in my opinion, the verdict could not have been caused by any of the errors complained of, and for which a new trial is ordered.

1. The first assignment of error deemed material by the majority of the court is that the trial judge erred in neglecting entirely to instruct the jury as to the defense of accidental homicide. This theory is not raised by the evidence, but depends solely on the statement of the accused, and it has been repeatedly ruled by the Supreme Court and by this court that a theory of the defense which depends solely on the statement of the accused need not be charged, unless there is a written request, and in this case there was no written request to charge on this theory. While the evidence fully negated the theory of any accidental homicide, the statement of the accused does not present a case of killing resulting alone from an accident. The attempt to draw the deadly weapon from the pocket was admittedly intentional. But it is claimed by the accused that, although his effort to draw his weapon was intentional, he unintentionally pulled the trigger. He claimed that he endeavored to draw his pistol for the purpose of using it in self-defense. The trial court fully charged the law applicable to justifiable homicide in self-defense, and all the grades of homicide. Under the view which I take of the evidence, he also charged the law applicable to that character of accidental homicide logically deduced from the statement of the accused. The overwhelming weight of the evidence

shows that the accused was the aggressor; that he made an attack upon the decedent with a deadly weapon for the sole purpose of resenting a blow with the open hand provoked by his opprobrious language, and the learned trial judge charged to the effect that if the accused made an attack upon the decedent with the unlawful intention to kill unjustifiably, and in this attack the pistol of the accused was discharged accidentally killing the decedent, the accidental discharge would be no justification. But if it be insisted that the actual discharge of the pistol was due entirely to an accident, and was not a part of an unlawful act, it seems to me that it was hardly necessary for the trial judge to tell the jury that an accidental killing of that character could not in any possible view constitute guilt of any kind. Courts of justice are not kindergartens, where the jurors are pupils and the judges are teachers of manifest truisms. Some intelligence should be accorded to jurors. The law says that they are "upright and intelligent"; and it does seem that the jurors might be presumed to know that a homicide, the result of an accident pure and simple, would not make the unfortunate actor guilty of any offense.

2. The second alleged error for which a new trial is granted, dubitante, is based upon the ruling of the court in excluding from evidence the following testimony: "We [meaning witness and defendant] went on down the street together. He had the pistol at that time in his hand, and he unbreached it and threw out the cartridges, and I says, 'How come you to shoot?' and he says, 'I didn't intend to shoot.'" The majority of the court thinks this declaration should have been admitted as a part of the *res gestæ*. I must confess that I do not know whether this declaration is a part of the *res gestæ* or not. What is or is not within the rule of *res gestæ* is one of those legal obstacles that cannot be surmounted by any inflexible criterion. The English doctrine that the declarations, to be admissible, must be contemporaneous with the main transaction, has been greatly enlarged by the American cases. Under these decisions the element of time is not always material. If the declarations are the spontaneous, impromptu outpourings of the mind, uttered either contemporaneously with or shortly after the main transaction, and are not merely descriptive or narrative of past events, they are admissible as *res gestæ*. In the present case this declaration was after the commission of the act, when the accused had left the place where the act was committed. It was not spontaneous or impromptu, but elicited by a question of a third person. If entitled to any weight at all, it was solely due to the credit to be attached to the speaker, and not to the nature of the declaration itself. I cannot think that the trial judge (who must necessarily be clothed with a very wide discretion) commit-

ted a serious error in excluding from the jury merely this declaration of the accused of his intention. The safest test of intention is the nature of the act and the circumstances under which it was committed, and not what the actor says about it after its commission. Besides, the accused got the full benefit of this defense when he stated to the jury that the shooting was accidental; and therefore, if the exclusion of this declaration as evidence was error, it was harmless error.

3. The third alleged error is that the trial judge failed to instruct the jury that they should not consider the alleged dying declaration, unless it was made at a time when the declarant was in the article of death. The statute requires, as a condition precedent to the consideration by the jury of a dying declaration as evidence, that it must be made when in the article of death and by a person conscious of his condition. Penal Code 1910, § 1026. If the judge omitted from his instructions the necessary element that the declarant must have been actually dying when the declaration was made to give the declaration probative value, and yet the evidence proved that the declarant was in fact dying when he made the declaration and he was conscious of his condition, would this failure amount to reversible error? Is it not the fact that gives probative value? And if this fact is shown, is not the requirement of the law fulfilled? In this case the attending physician testified that when the declaration was made the declarant was "in articulo mortis." He himself repeatedly declared that he was dying. From the time he was shot until his death he never uttered one word of hope, but every word unequivocally indicated consciousness of approaching death. The dying declaration, therefore, had every essential element necessary to make it evidence, and even if the judge neglected to include in the charge one of these elements, it nevertheless existed, and the jury had the right to consider it as evidence.

But I think the judge did in substantial effect instruct the jury that the evidence must show that the declarant was in the article of death when he made the declaration, before they could give it evidentiary value. His charge was as follows: "I charge you, if you find from all the facts and circumstances of this case that after the deceased was wounded, and between the time of receiving the wound and his death, he made certain statements as to the cause of his death and who killed him, and if you find that these statements were made at a time when he was conscious that he would die, that he was aware of his approaching death, I charge you should consider that testimony," etc. Taking this charge all together, can it be reasonably doubted that the jury understood that the evidence must show that the declarant was in a dying condition and was conscious of that fact before they

could consider the declaration? How could the declarant have been "aware of his approaching death," unless death was in fact approaching? Of course, all men are in a sense aware of approaching death. The event is certain as to fate, only uncertain as to time. But this is not what the judge meant. He was speaking of the condition "at the time when the declaration was made," and the jury doubtless so understood him. Besides, the dying declaration was admitted for the purpose only of showing "the cause of death and the person who killed him." These two facts were not contradicted. The accused admitted the killing. If it be said that the dying declaration further included the statement that the accused "cursed the declarant, and he slapped him with his hand, and he shot him," these facts are also abundantly proved by eyewitnesses of the tragedy. In other words, the dying declaration was only cumulative, and disclosed no fact that was not proved.

For the foregoing reasons, I regard all three of the alleged errors, if errors, on which the judgment of reversal is based as immaterial. The accused has had a fair trial. He has no just complaint against judge or jury. Every substantial legal right was given him, and the evidence would have supported a verdict for a more serious offense.

(9 Ga. App. 771)

THOMPSON v. PASSMORE. (No. 2,841.)  
(Court of Appeals of Georgia. Sept. 30, 1911.)

(Syllabus by the Court.)

1. EXEMPTIONS (§ 48\*)—CROPPERS—"WAGES."

Where the landlord furnishes to the cropper everything to make the crop, except labor, and that is furnished by the cropper and his family, the net amount due the cropper after full settlement with the landlord is in the nature of "wages" paid to day laborers, and is not subject to process of garnishment while in the hands of the landlord.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 64-72; Dec. Dig. § 48.\*

For other definitions, see Words and Phrases, vol. 8, pp. 7369-7373; vol. 8, p. 7831.]

Powell, J., dissenting.

(Additional Syllabus by Editorial Staff.)

2. WORDS AND PHRASES—"LABORER."

The test for determining who is a "laborer" is whether the work of a particular person involves mental skill, business capacity, involving the exercise of the intellectual faculties, or whether the work depends on mere physical power and manual labor; in other words, whether mind or muscle preponderate in the performance of the work.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 3952-3968; vol. 8, p. 7700.]

Error from City Court of Dawson; M. C. Edwards, Judge.

Action by A. P. Passmore against I. F. Thompson. Judgment for plaintiff, and defendant brings error. Reversed.

W. H. Gurr, for plaintiff in error. H. A. Wilkinson, for defendant in error.

HILL, C. J. Thompson was a cropper for Hill during the year 1909. Under a verbal contract between the landlord and the cropper the former was to furnish the land, the stock, the supplies, and everything necessary to make the crop, except the labor. This was to be furnished by the cropper and the members of his family. In making the crop and in the performance of his labor the cropper was to work under the directions and control of the landlord. For his labor the cropper was to receive one-half of the net proceeds of the lint cotton raised on the farm, and one-half of all the net proceeds of the other farm products, such as cane, ground peas, potatoes, and hogs, except the corn and cotton seed, all of which was to be the landlord's. The landlord was to advance during the year, from time to time, supplies necessary for the support of the cropper and his family. At the end of the year a settlement was made between the landlord and the cropper, and there remained in the hands of the landlord the sum of \$98.29, net, which belonged to the cropper under the contract. Before a settlement was made, however, a judgment creditor of the cropper, holding a judgment rendered in 1903 for \$250, sued out summons of garnishment against the landlord, and the landlord, in his answer to the summons of garnishment, set out the above-stated indebtedness of \$98.29 to the cropper, arising under the cropper's contract with him for the year 1909. The cropper claimed that this fund in the hands of his landlord was exempt from the process of garnishment. The trial judge held to the contrary, and this judgment constitutes the only error for the determination of this court.

[1] There was no controversy in the evidence. The contract between the landlord and the tenant, as above set out, was admitted, and the judgment of \$250 was admitted. The cropper testified that his family consisted of his wife and five children; three of the children being minors, and two girls over the age of 21 years. The principal part of the work on the farm was done by the cropper and his oldest son, Ben; these two doing all the plowing and heavy work incident to a farm. His wife and his children assisted him in hoeing and gathering the crop. Besides, on several occasions during the year, he exchanged work with two other adult sons; these two sons helping him for several days, and he in return helping them for several days. He was also compelled to employ additional labor for a few days to assist in picking his cotton. He had no contract with his two adult daughters, but they lived with him and were supported by him.

We think, under the facts of this case and

adjudications of the Supreme Court, and a proper construction of the statute law of this state exempting the wages of a laborer from garnishment, that the court erred in holding that the wages of the cropper were not exempt from the process of garnishment. It has been repeatedly held by our Supreme Court that the statute exempting from process of garnishment the daily, weekly, or monthly wages of journeyman mechanics and day laborers (Civil Code 1910, § 5298) should be given a liberal construction, to protect the rights of those for whom the statute was passed. *Caraker v. Matthews*, 25 Ga. 571; *Butler, Carter & Co. v. Clark & Co.*, 46 Ga. 468. And in designating the laborers who were embraced within the terms of the act, the Supreme Court has not confined itself to the express letter of the act, but has in many cases made most liberal constructions in order to carry out its manifest purpose. The act exempting from process of garnishment the daily, weekly, or monthly wages of the persons characterized as journeyman mechanics and day laborers was enacted for the purpose of furnishing the means of support to the laborer and those who are dependent upon him. It was intended to apply to those whose sole income for support and maintenance of themselves and family is the proceeds of their manual labor. From time to time our Supreme Court has held that locomotive engineers, street railway conductors, motormen, clerks in retail stores, railroad clerks, bookkeepers, public school teachers, farm hands, painters, bartenders, and stenographers were laborers, and that their wages, whether paid by the day, week, or month, semiannually or annually, were exempt from the process of garnishment. *Cohen v. Aldrich*, 5 Ga. App. 256, 62 S. E. 1015.

[2] In the case of *Oliver v. Macon Hardware Co.*, 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300, the court declares that the test for determining who is a laborer in any particular case is whether the work of the particular person involved mental skill, business capacity, involving the exercise of the intellectual faculties, or whether the work depended upon mere physical power and manual labor; in other words, whether mind or muscle preponderated in the performance of the work. Of course, every man, however intellectual his pursuit, may be in one sense a laborer, and every man who works with his hands, in order to win, must mix with his work and muscle, to some extent, at least, his brain; and just in proportion as man mingles his thoughts with his labor does he excel, whatever may be his vocation. But it ought not to be difficult for a discriminating mind, under the test laid down by our Supreme Court, to determine in each particular case under which category the particular laborer falls. Does the sweat of the laborer's brow come from the work of his brain or the work of his hands. If the latter, he is a laborer, although he may be a skilled laborer.

The character of his work must determine the question. *McPherson v. Stroup*, 100 Ga. 228, 28 S. E. 157. Clearly the act was made to protect and to give bread to the intelligent laborer, as well as to the ignorant laborer. The most liberal case decided by our Supreme Court is that of *Caraker v. Matthews*, supra. In that case "Jordan [the laborer] was to be Caraker's overseer for a year, at the price of \$250, 200 or 250 pounds of pork, and 30 bushels of corn, the money to be paid daily, or weekly, as might be needed for the support of Jordan's family," and the court held that Jordan was a day laborer in the language of the law, and as such entitled to have his daily, weekly, or monthly wages exempt from the process of garnishment. Where a person was employed to work on a farm for six months at a stipulated price, but by the terms of his contract he could call at any time during his service for such portion of his earnings as he might require to supply his necessities, his wages were not subject to garnishment. *Prothro v. Grubbs*, 71 Ga. 863. There is no rational distinction on this point between a cropper and one who makes a contract to labor on a farm for a year, with the right to have advances according to necessities.

To no character of laborers does the divine declaration, "In the sweat of thy face shalt thou eat bread," apply more peculiarly and strongly than to what is known as the cropper class. The laborer of this class owns no land, no personal property of any consequence, has limited personal credit, and has usually a large family to support. The passing seasons only change the character of his labor. Preparing the soil, planting the seed, harvesting the crop, it is labor, hard manual labor, spring, summer, and winter from sun up to sun down. He exercises no individual judgment, and takes no initiative, but is always under the control and direction of the landlord. The man and his family live as they labor, on advances, sometimes grudgingly furnished by the landlord. When the year of labor closes, and the day of settlement arrives, and the advances are charged up, rarely sufficient is left to the cropper to feed and clothe himself and family. In this case the year's result from the labor of the family of seven, left after settlement with the landlord, was the meager pittance of \$98.29. If this little sum should not be sacred to the support of the cropper and his wife and children, and should not be exempt from the claim of any creditor of the cropper, however just the claim may be, we know of no product of human labor that should be. If the wages of the overseer, the conductor, the engineer, the clerk, and the stenographer are exempt, why should not the wages of the cropper be also exempt? Advances made during the year are equivalent to wages paid during the year, and the net balance left to the cropper

at the end of the year after settlement with the landlord is in the nature of wages.

In *McElmurray v. Turner*, 86 Ga. 215, 12 S. E. 359, the Supreme Court held that the share of the crop after the landlord had been fully settled with was simply a mode of paying the cropper wages for the labor of herself and her children, that the part of the crop which she and her children had made was in the nature of wages, and that her special laborer's lien was not lost because her children aided her in making the crop, nor because she had also hired some outside assistance to help harvest the crop." The *McElmurray* Case is almost identical on the facts with the instant case, and in principle is controlling. In that case Chief Justice Lumpkin declares that "all who come within the spirit of the act (meaning the exemption from garnishment act) should be brought within its provisions. I know no reason why the employes of corporations, or even journeymen mechanics, should have privileges which are withheld from those who till the earth. The cravings of hunger can no more be appeased in the one case than in the other."

The decision in the *McElmurray* Case, *supra*, answers also the suggestion that as the cropper in the present case was assisted by two adult daughters, and occasionally exchanged work with two sons, and hired some little assistance, he was a contractor, and not a laborer. It would be absurd to hold that because of these facts the work of the cropper rose to the dignity of intellectual labor and his wages were not exempt. If the landlord can be successfully garnished at the close of the year, and the cropper's share of the crop subjected, the result might be disastrous. The landlord would be unwilling to make advances to support the cropper, if he was to incur the annoyance and risk of litigation with the cropper's creditors at the close of the year; and surely the cropper would have little encouragement to finish his contract, if he knew that he would lose the small results of his year's labors just when he needed it most. In that event the temptation would be strong to desert his landlord and his own crops, and hire himself and his family as day laborers paid in money by the day. By this method he would be free from the pestiferous process of garnishment and reap the reward of his labors. In so far as we can, we will spare him the temptation to break his contract with his landlord, by holding that his part of the crop in the hands of the landlord is not subject to the process of garnishment, but, being in the nature of wages due the laborer, is clearly within the spirit of the statutory exemption.

Judgment reversed.

POWELL, J. (dissenting). I cannot concur with my Associates. It is true that the part of the crop which comes to the cropper

is in the nature of wages, still I think that the very nature of this contract puts him in that class of working people who are regarded by the law as contractors or quasi contractors, and excludes him from the class designated in the exemption laws as "journeymen mechanics and day laborers." This distinction here asserted does not depend upon whether the work is chiefly manual or is largely intellectual, nor upon whether it is performed in the sun or shade, but upon the nature of the business the workman is carrying on. The honest toil of the village blacksmith, for example, is proverbial in song and story, and still, when he runs his own shop, the debts due to him by his customers are not exempt from garnishment. *Tatum v. Zachry*, 86 Ga. 573, 12 S. E. 940. The fact that a laborer is paid by the piece or by the actual quantity of work turned out is not material to the question before us, for that fact does not make him a contractor; but it is material if he undertakes to do a definite job, such as building a house, or repairing a bridge, or cultivating a crop upon a definite contract as to what he is to receive, for then he is viewed as a contractor, and not as a laborer. *Johnson v. Hicks*, 120 Ga. 1002, 48 S. E. 383, distinguishing and reconciling *Swift Mfg. Co. v. Henderson*, 99 Ga. 186, 25 S. E. 27, and *Moore v. Hendry*, 111 Ga. 863, 36 S. E. 921.

The cropper is, generally speaking, a farm hand who declines to work for fixed wages and to work generally on his employer's farm, but who makes a special contract whereby he is to work a particular piece of ground and is to have in return therefor a certain percentage of the net profits. He and his family are supported during the year out of advances made by the landlord and taken out of his portion prior to the settlement. It seems to me that the net sum remaining in the hands of the landlord after final settlement is so essentially of the nature of profits on the cropper's contract as to prevent its being considered as ordinary wages. The exemption law primarily contemplates that laborers shall have at hand their wages as due them from day to day, from week to week, or from month to month, as a fund from which they may furnish support to themselves and families, and that they shall not be deprived of this means of support through its being tied up on other debts—debts which are not less honest, but, in legal contemplation, less urgent. The cropper, in every case where the question of exempting his part of the crop arises, has had this support furnished him by the landlord; for there is no fund in the hands of the landlord, which in any event can be reached by garnishment, until these living expenses have been deducted. The overplus, if any, belongs in common honesty to the creditor, and not to the cropper. Debt may seem to be a cruel master; but he who owes debts ought to pay them.

even if to do so reduces the expenditures of him and the family back to the necessities of life; and the law ought to make him pay thus far at least.

The opinion of the court seems to me to create an unjust distinction between a cropper and a tenant. A tenant and a cropper, for instance, may work adjoining fields. Under the tenant's contract he may pay the landlord a percentage of the crop as rent and retain the remainder, after paying for the supplies, as his remuneration for his labor; and his net interest in the crop is unquestionably subject to execution and other legal process. The cropper contracts that the landlord shall have a percentage of the crops, and that after the supplies are paid for he shall have the remainder as his remuneration for his labor; and, under the decision about to be rendered, his net interest in the crop is exempt. To my mind it seems unfair to say that the summer rays which fall upon the head of the tenant as he toils is mere sunshine, and that the similar rays which fall upon the cropper are hot sun, or that the exudation which trickles down their cheeks alike is in the one case perspiration and in the other case common sweat. If it were my province to enter into the political economy of the question, I would say that it is bad policy to take away from the cropper even that small basis of credit which exists in his favor as to his expectancy in the crop. His status for purposes of credit is low enough as it is. The present case, it is true, involves an old debt; but a new debt would stand on the same basis—even a new debt for family or crop supplies furnished any one other than the landlord.

However, I do not put my dissent on political economy, but on the law.

(9 Ga. App. 738)

**MCRANEY v. PERRY.** (No. 3,089.)

(Court of Appeals of Georgia. Sept. 11, 1911.  
Rehearing Denied Sept. 28, 1911.)

*(Syllabus by the Court.)*

**1. MORTGAGES (§ 291\*)—FORECLOSURE—RIGHT TO FORECLOSE.**

It appears that the property levied on was *prima facie* subject to the mortgage *fi. fa.*, it having been proved that the defendant in *fi. fa.* was in possession of the property at the time the mortgage was given; but, as it also appears that the mortgage was not recorded, and that the claimant acquired the property from one who for a valuable consideration bought it from the mortgagor, without actual notice of the mortgage, the jury properly found the property not subject.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 291.\*]

**2. CHARGE OF COURT—NO ERROR.**

The charge of the court was free from error.

Error from City Court of Newton; A. S. Johnson, Judge.

Action between M. A. McRaney and Lula Perry. From the judgment, McRaney brings error. Affirmed.

W. I. Geer, for plaintiff in error. Benton Odom, for defendant in error.

**RUSSELL, J.** Judgment affirmed.

(9 Ga. App. 744)

**SEABOARD AIR LINE RY. CO. v. JENNINGS.** (No. 2,925.)

(Court of Appeals of Georgia. Sept. 28, 1911.)

*(Syllabus by the Court.)*

**RAILROADS (§§ 442, 443, 447\*)—OPERATION—INJURIES ON TRACK—EVIDENCE—INSTRUCTION.**

The plaintiff was driving at night along a way (not a legally established highway, but a road commonly used by the public), close to the tracks of the railroad company and parallel with them, within the corporate limits of a town. At a point just above a cut, his horse, becoming frightened at the headlight of an approaching engine, jumped over the wall of the cut, carrying the plaintiff and the buggy along. The plaintiff rapidly unhitched the horse from the buggy; but, seeing that he would be unable to get it out of the cut before the train would reach him if it continued at its ordinary speed, he (while the train was about 250 yards away) began waving his handkerchief to attract the engineer's attention. The train, without slackening, struck the buttocks of the horse, which was between the track and the wall of the cut on one side of the engine, and also the buggy, which was between the track and the wall on the other side, injuring both. The injury occurred between two public crossings and within 400 yards of one of them. The speed of the train was variously estimated; some stating that it was going very slowly, others that it was running very fast. There was evidence that the usual signals for the station and the crossings were not given. As to many of the physical features the evidence was in conflict. *Held:* (1) The evidence supports the verdict in favor of the plaintiff. (2) The jury was authorized to find that the engineer should under all the surrounding conditions, and especially in view of the locality in which the injury occurred, have maintained a lookout, and that he neglected to do so, or that the engineer, being on the lookout and seeing the danger to the plaintiff's property, did not use ordinary care to avoid injuring it. (3) There was no error in allowing the plaintiff to prove the distance from the place of the injury to the public crossing. (4) The court did not err in instructing the jury as to the statutory duty imposed upon the engineer in approaching the crossing, and in charging them that, while liability could not be established because of any neglect in this respect, still it was a relevant circumstance to be considered in passing upon the other acts of negligence charged against the defendant.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1596-1607, 1608-1620, 1642-1650; Dec. Dig. §§ 442, 443, 447.\*]

Error from City Court of Americus; C. R. Crisp, Judge.

Action by L. E. Jennings against the Seaboard Air Line Railway Company. From a



judgment for plaintiff, defendant brings error. Affirmed.

E. A. Hawkins, for plaintiff in error. J. A. Hixon, for defendant in error.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 722)

J. I. CASE THRESHING MACH. CO. v. HODGES.

HODGES v. J. I. CASE THRESHING MACH. CO.

(Nos. 3,075, 3,100.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 78\*)—DISMISSAL OF WRIT—NECESSITY OF FINAL JUDGMENT.

The case is before us on a main bill of exceptions assigning error on the judgment of the lower court in overruling a demurrer to some of the pleas, and on cross-bill assigning error on the judgment sustaining the demurrer as to one of the pleas and striking it. There was no final judgment in the case, and the bills of exceptions embraced matters only of an interlocutory character, which are not the subject-matter of a final bill of exceptions. The writs of error to this court are therefore premature. Civil Code 1910, §§ 6138, 6139; Kibben v. Coastwise Dredging Co., 120 Ga. 899, 48 S. E. 330; Lyndon v. Georgia Railway & Electric Co., 129 Ga. 353, 58 S. E. 1047.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 78.\*]

Error from City Court of Americus; Chas. R. Crisp, Judge.

Action between the J. I. Case Threshing Machine Company and B. C. Hodges. From the judgment, the Threshing Company brings error, and Hodges assigns cross-error. Dismissed.

Ellis, Webb & Ellis, for plaintiff in error. W. P. Wallis and J. A. Hixon, for defendant in error.

HILL, C. J. The writs of error on both the main and cross bills must be dismissed.

(9 Ga. App. 757)

SOUTHERN RY. CO. v. FLYNT.

FLYNT v. SOUTHERN RY. CO.

(Nos. 3,123, 3,124.)

(Court of Appeals of Georgia. Sept. 28, 1911.)

(*Syllabus by the Court.*)

1. AMENDMENT OF PETITION.

The court did not err in allowing the amendment to the petition. City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318.

2. PLEADING (§ 246\*)—PETITION—AMENDMENT.

A petition containing a single count seeking to recover damages growing out of a transaction brought about by alleged negligence of the defendant may be amended by adding another count in which the same injury is complained of, but in which the details of the transaction are varied. From certain technical standpoints, each count sets forth a distinct

and separate cause of action; but the court will look beyond the fictitious separateness and distinctness of the alleged causes of action, where the interests of justice so require.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 676-683; Dec. Dig. § 246.\*]

Error from City Court of Forsyth; W. M. Clark, Judge.

Action between Mrs. Comye Flynt and the Southern Railway Company. From the judgment, defendant brings error, and plaintiff assigns cross-error. Affirmed on the main bill, and on the cross-bill reversed.

Harris & Harris, for plaintiff in error. Robt. L. Berner and Jas. M. Fletcher, for defendant in error.

RUSSELL, J. Judgment on the main bill affirmed. Judgment on the cross-bill reversed.

(9 Ga. App. 789)

RUDISILL v. HANDLEY. (No. 3,064.)

(Court of Appeals of Georgia. Sept. 30, 1911.)

(*Syllabus by the Court.*)

MONEY RECEIVED (§ 6\*)—WHEN ACTION LIES.

A cashier of a bank, who also acted as bookkeeper, by a mistake in bookkeeping caused a customer of the bank to be credited with \$200 to which he was not entitled. The mistake in entry also caused a shortage in cash to appear. The cashier, insisting that some mistake had been made, but being unable to explain the matter satisfactorily, paid the bank the \$200, and the bank, on the faith of the false entry, delivered to the customer two shares of stock, of the value of \$200, and the latter accepted them to his own use. *Held* that, in an action in the nature of an action for money had and received, the cashier may recover the \$200 of the customer, who took the benefit of the cashier's payment of that sum to the bank.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 21-27; Dec. Dig. § 6.\*]

Error from City Court of Fitzgerald; E. Wall, Judge.

Action by W. F. Rudisill against R. V. Handley. Judgment for defendant, and plaintiff brings error. Reversed.

Otis H. Elkins, for plaintiff in error. Alex. J. McDonald, for defendant in error.

RUSSELL, J. This case comes as a sequel to the case of Citizens' Bank v. Rudisill, 4 Ga. App. 37, 60 S. E. 818, where most of the facts essential to an understanding of the present case are set forth. There it was held that Rudisill had no right of action against the bank, and it was intimated that he might have one against Handley. The headnote shows that we now hold what we then intimated. Handley stands in a very different relation to the transaction from what the bank did. He ought not to keep the stock without paying for it, and Rudisill is the one he ought to pay.

Judgment reversed.

(9 Ga. App. 725)

**PYE v. GILLIS.****GILLIS v. PYE.**

(Nos. 3,193, 3,267.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

*(Syllabus by the Court.)***1. RAPE (§ 67\*)—ASSAULT WITH INTENT TO RAPE—MEASURE OF DAMAGES.**

A female upon whom an assault to rape has been committed may maintain an action to recover damages for the injuries sustained. In such action her right of recovery is not limited simply to pecuniary loss, or actual physical injuries, but may include any and all pain and suffering, whether mental or physical, and may also include punitive or exemplary damages against the wrongdoer; all these damages to be measured by "the enlightened conscience of impartial jurors." Civil Code 1910, §§ 4503, 4504; 3 Cyc. 1066; 33 Cyc. 1521, and cases cited.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 112; Dec. Dig. § 67.\*]

**2. RAPE (§ 67\*)—ATTEMPT—CIVIL LIABILITY—DAMAGES.**

In a suit to recover damages for an assault with intent to rape, brought by the injured female against the wrongdoer, where the evidence for the plaintiff proved the tort as complained of in the petition, and there was apparently no legal insufficiency in the evidence, when considered in connection with the allegations of the petition, it was error to award a nonsuit because no pecuniary loss was shown. It is well settled that a simple assault may give a right of action for damages against the assailant; and an assault to commit rape is an aggravated assault. And in such an action it is not necessary to allege and prove any pecuniary loss, or even actual physical injury, to warrant a recovery. In the present case, however, there was evidence of some actual physical injury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 112; Dec. Dig. § 67.\*]

Error from City Court of Sylvester; J. B. Williamson, Judge.

Action by Mabel Pye, by her next friend, against W. D. Gillis. From the judgment, Gillis brings error, and Pye assigns cross-errors. Reversed.

Claude Payton, for plaintiff in error. Tip-ton & Passmore, for defendant in error.

**HILL, C. J.** Judgment reversed.

(9 Ga. App. 751)

**GREEN v. SOUTHERN RY. CO.**

(No. 2,998.)

(Court of Appeals of Georgia. Sept. 28, 1911.)

*(Syllabus by the Court.)***DAMAGES (§ 49\*)—MENTAL SUFFERING.**

This is a suit to recover damages for the "grossly negligent act" of the defendant company in creating and maintaining a nuisance near the plaintiff's home. No damage to person or property is alleged, and the action is one to recover damages for mental suffering and physical discomfort resulting from mere negligence. The case falls within the principle announced in *Chapman v. Telegraph Co.*, 83 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, and *Seifert v. Tel-*

*egraph Co.*, 129 Ga. 181, 58 S. E. 699, 11 L. R. A. (N. S.) 1149, 121 Am. St. Rep. 210, that damages, when the result of negligence alone, unaccompanied by injury to the person or pecuniary loss, are not recoverable. The petition was properly dismissed on demurrer. See, also, *Railroad Co. v. Liddell*, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169, *Railroad Co. v. Almand*, 116 Ga. 780, 43 S. E. 67, and *Railway Co. v. Davis*, 132 Ga. 812, 65 S. E. 131.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 49.\*]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by A. J. Green against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Eubanks & Mebane, for plaintiff in error. Maddox, McCamy & Shumate, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(9 Ga. App. 789)

**SIRMANS, MORRIS & CO. v. LEWIS ZUCKER IMPORTING CO.**

(No. 3,070.)

(Court of Appeals of Georgia. Sept. 30, 1911.)

*(Syllabus by the Court.)***1. CERTIORARI (§ 42\*)—RECITALS OF PETITION.**

When a certiorari comes on for hearing, the recitals of the petition are not to be taken as true, unless verified by the answer, or by the record sent up in connection therewith. *Taft Co. v. Smith*, 112 Ga. 196 (1), 37 S. E. 424; *Landrum v. Moss*, 1 Ga. App. 216, 57 S. E. 965. The rule applicable in cases of refusal to sanction a petition, that the allegations of the petition are to be taken as true (see *Green v. State*, 4 Ga. App. 261, 61 S. E. 234; *Hood v. State*, 4 Ga. App. 847, 62 S. E. 570; *Bush v. Roberts*, 4 Ga. App. 531, 62 S. E. 92), does not apply when the case comes on for final hearing.

[Ed. Note.—For other cases, see Certiorari, Dec. Dig. § 42.\*]

**2. JUSTICES OF THE PEACE (§ 205\*)—CERTIORARI—DISMISSAL.**

It is proper to dismiss a certiorari where, after the answer is in, it does not affirmatively appear that the writ was applied for within 30 days from the final determination of the case in the magistrate's court. Allunde proof is not admissible to show that the writ of certiorari was applied for within the time prescribed. *Landrum v. Moss*, 1 Ga. App. 216 (1, 4), 57 S. E. 965.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 205.\*]

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action between Sirmans, Morris & Co. and the Lewis Zucker Importing Company. From a judgment dismissing a certiorari, Sirmans, Morris & Co. bring error. Affirmed.

O'Steen & Wallace, for plaintiff in error. B. T. Allen, for defendant in error.

**RUSSELL, J.** Judgment affirmed.

(9 Ga. App. 778)

**HINES v. CURETON-COLE CO.****YOUNG v. SAME.**

(Nos. 2,895, 2,896.)

(Court of Appeals of Georgia. Sept. 30, 1911.)

*(Syllabus by the Court.)***1. FRAUDS, STATUTE OF (§ 115\*)—EVIDENCE (§ 408\*)—OFFER TO SELL PERSONALTY—ACCEPTANCE IN WRITING—PAROL EVIDENCE.**

A writing in which one party agrees to sell to another products at a time in future is to be treated as a mere offer, unless it appears to have been accepted by the other party. If the subject of the sale is of more than \$50 in value acceptance of the person to whom the offer is made must be evidenced in writing, or by some act sufficient to take the case out of the statute of frauds. If the writing recites that a part of the purchase price has been paid, this prima facie takes the case out of the statute of frauds; but it may be shown by parol that this recital as to payment is not true. *Luke v. Livingston*, 9 Ga. App. 116, 70 S. E. 21.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 242-250; Dec. Dig. § 115;\* *Evidence*, Cent. Dig. §§ 1829-1842; Dec. Dig. § 408.\*]

**2. EVIDENCE (§ 437\*)—PAROL EVIDENCE—WAGERING CONTRACTS.**

"Parol evidence is admissible to show that a written contract, which on its face and by its terms purports to relate to a lawful transaction, was in fact entered into as a wagering contract, and that the lawful form was adopted as a guise to evade the law." *Roberts v. Arnall*, 71 S. E. 590.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2025-2029; Dec. Dig. § 437.\*]

**3. CONTRACTS (§ 313\*)—CONTINUING CONTRACT—REPUDIATION—RIGHT OF OPPOSITE PARTY.**

If one party to a continuing contract, consisting of mutual obligations, renounces and repudiates it prior to the date fixed for performance, the other party is at liberty either to immediately treat such renunciation as a breach of the contract and sue for damages sustained therefrom, or to treat the contract as still binding and wait until the time arrives for its performance, in order to give the party who has repudiated the contract an opportunity to comply with its terms. If he adopts the latter course, and at the time fixed for performance demands compliance on the part of the other party, his right of action for a breach depends on whether or not such compliance is then made. *Ford v. Lawson*, 133 Ga. 237, 65 S. E. 444. However, if a contract of sale rests in parol only, the parties may orally make it a part of the agreement that the seller shall have the right to make what is in effect an anticipatory breach, and to require the buyer to protect himself, as of the date thereof, from losses by reason of a subsequent rise in the market.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 313.\*]

Error from City Court of Newnan; W. A. Post, Judge.

Actions by the Cureton-Cole Company against C. A. Hines and against J. T. Young. Judgment for plaintiff, and defendants bring error. Reversed as to Hines case, and affirmed as to Young.

Hall & Jones, for plaintiffs in error. W. C. Wright, for defendant in error.

RUSSELL, J. The syllabus and the cases therein cited state and settle the points involved in both the cases here before us.

In the Hines case the propositions stated in the first two paragraphs of the syllabus are controlling, and show that the court erred in striking the pleas which set up the defenses indicated in these propositions. The proposition stated in the third paragraph of the syllabus controls also another defense presented in the Hines case. The court correctly struck the defense of anticipatory breach without damage, so far as relates to the written contract sued on, and erred in striking it so far as it relates to the other (the oral) contract.

In the Young case the facts pleaded are not sufficient to make the defenses outlined in paragraphs 1 and 2 of the syllabus available; and it follows, from the first proposition stated in the third paragraph of the syllabus, that the defense offered as to the anticipatory breach was not valid.

Judgment reversed in the Hines case (No. 2,895).

Judgment affirmed in the Young case (No. 2,896).

(9 Ga. App. 725)

**NATIONAL REFRIGERATOR & BUTCHERS' SUPPLY CO. v. PARMALEE.**

(No. 3,195.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

*(Syllabus by the Court.)***1. DAMAGES (§ 62\*)—SPECIAL DAMAGES—EVIDENCE.**

Whenever one party to a case claims special damages against the other, he has the burden, not only of showing that he has been damaged as alleged, but also of furnishing to the jury data sufficient to enable them to estimate with reasonable certainty the amount of the damages. It is not necessary, however, that the party on whom the burden thus rests should submit exact figures.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 119-132; Dec. Dig. § 62.\*]

**2. DAMAGES (§ 184\*)—REDUCTION OF DAMAGES.**

The rule which generally requires a party suffering damage from the neglect of another to diminish the damage does not require him to adopt a course which a reasonably prudent man would not have taken under all the circumstances.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 184.\*]

Error from City Court of Griffin; W. M. Clark, Judge.

Action by P. S. Parmalee against the National Refrigerator & Butchers' Supply Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. T. Daniel and Wm. H. Beck, for plaintiff in error. W. E. H. Searcy, Jr., for defendant in error.

POWELL, J. The controversy was over an alleged breach of warranty in the sale of a refrigerator. The plaintiff claimed that it was warranted to produce such a degree of cold as to preserve his meats, and that it would not do so, and that he lost considerable meat through spoilage on that account. The plaintiff did not keep any books or other memoranda as to the weights or values of the different pieces of meat that were spoiled from time to time. He did testify, however, to a general recollection on the subject. He testified that there was a period of 520 days, net, during which he was daily required to take out spoiled meat; the amount being greater on some days than on others. He said it would average 10 pounds per day. He gave the values of the various kinds of meats that were lost, and, after giving these detailed values, claimed an average value of 15 cents per pound. He also swore that his estimate was a low one. His assistant estimated that 3 or 4 pounds per day were lost on an average. He also detailed with more or less generality the sizes and kinds of meats that were lost. The jury allowed \$250, which was approximately equivalent to an allowance for a loss of 12 cents per pound on the basis of 4 pounds per day, or for a loss of 15 cents per pound on the basis of 3 pounds per day. It was substantially a finding according to the minimum estimate which the witnesses gave from their recollection.

[1] Where a party sues for specific damages, he has the burden of showing the amount of the loss, and of showing it in such a way that the jury may calculate the amount from the figures furnished, and will not be placed in the position where their allowance of any sum would be mere guesswork. However, the party does not lose his right of action for the damage because he cannot furnish exact figures. It is often the case that witnesses are called on to testify to the weight of a thing, though they have never weighed it, or to testify to length of time, though they have kept no count of the days or hours, or to testify to value, which is usually a matter of opinion. In all these cases, in the absence of more accurate source of inquiry being available, the witness states his best judgment, and this is regarded as being of evidentiary value. The jurors are not bound to accept the estimate or best judgment of a witness; but

they may do so. If the witness be one of the parties, and he gives his estimate in the form of a maximum and a minimum (as where he says it was not less than so much and not more than so much), that estimate which is most unfavorable to the witness should be taken, in the absence of other testimony. In all cases the witnesses are subject to thorough cross-examination as to the basis on which they have formed judgment, and if the cross-examination discloses that what purports to be an estimate or statement of judgment based on observation is nothing more than a mere guess, the jury should disregard it entirely. The evidence of the witnesses in the present case (taking the witnesses as being credible) showed with reasonable clearness that the plaintiff's loss was not less than the amount allowed by the jury, and therefore the verdict cannot be said to be without evidence to support it.

[2] 2. Another point is that the plaintiff's recovery should not stand, because he failed in the duty of diminishing the damage; that he brought the loss on himself by continuing to use the refrigerator after knowledge that some of his meat would spoil if he used it. Under all the circumstances, we do not think that the verdict should fall on the theory here presented. The jury was correctly instructed as to the law governing this feature of the case. The plaintiff was running a business of considerable size. The refrigerator was not one of the small kinds found in our kitchen or pantries, but was large and expensive. He complained to the defendants, and they from time to time were attempting to remedy the situation and to make the refrigerator work satisfactorily. Now, the duty resting on the plaintiff was to use common prudence—to do what an ordinarily prudent man would have done under the circumstances—in order to make the damage as small as reasonably possible. Would an ordinarily prudent man have abandoned the use of the refrigerator, and have suffered perhaps a greater loss from the suspension of his business until he could get another? The percentage of the plaintiff's meat which was lost was relatively small. Ought he for such a small loss to have abandoned the refrigerator as a thing totally worthless, especially in view of the negotiations which were going on between him and the defendants as to the remedying of the defects? These were jury questions.

Judgment affirmed.

(156 N. C. 536)

## STATE v. STEWART.

(Supreme Court of North Carolina. Oct. 11, 1911.)

## 1. HOMICIDE (§ 171\*)—ADMISSIBILITY OF EVIDENCE.

Evidence as to what took place at the time of the difficulty between defendant and deceased is admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 351-358; Dec. Dig. § 171.\*]

## 2. CRIMINAL LAW (§ 695\*)—OBJECTIONS—EVIDENCE ADMISSIBLE IN PART.

A general objection to evidence, some of which is admissible and some not, will not be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1637; Dec. Dig. § 695.\*]

## 3. HOMICIDE (§ 174\*)—ADMISSIBILITY OF EVIDENCE—CIRCUMSTANCES SUBSEQUENT TO DEFENDANT'S ACT—PHYSICAL CONDITION OF DECEASED.

Evidence as to the physical condition of the deceased, after the blow which was alleged to have caused his death, that his nose was bleeding, and that he staggered and lay down upon the floor, is admissible.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 174.\*]

## 4. CRIMINAL LAW (§ 483½\*)—EXAMINATION OF EXPERTS—HYPOTHETICAL QUESTION.

It is not necessary that a medical expert, who has himself made a post mortem examination of the deceased, and who is expressing an opinion as to the result of his own examination, and not one based on the evidence of other witnesses, be asked a hypothetical question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1072; Dec. Dig. § 483½.\*]

## 5. CRIMINAL LAW (§ 485\*)—OPINION EVIDENCE—HYPOTHETICAL QUESTION.

It is not necessary, in the statement of a hypothetical question to an expert, that all the facts should be stated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.\*]

## 6. CRIMINAL LAW (§ 489\*)—OPINION EVIDENCE—HYPOTHETICAL QUESTION—CROSS-EXAMINATION.

Where defendant thinks that an answer elicited to a hypothetical question would have been different but for the omission of a fact, he may incorporate such fact in a question on cross-examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1079; Dec. Dig. § 489.\*]

## 7. CRIMINAL LAW (§ 1054\*)—NECESSITY OF EXCEPTIONS—RULINGS AS TO COMPETENCY OF WITNESS.

Where defendant takes no exception to the action of the court in setting aside a witness eight years old, offered by him, as disqualified because of age and understanding, an objection thereto, first made in defendant's case on appeal, cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2663; Dec. Dig. § 1054.\*]

Appeal from Superior Court, Sampson County; Peebles, Judge.

Ed. Stewart was convicted of manslaughter, and he appeals. No error.

The defendant is charged in the indictment with the crime of murder, and was convicted of manslaughter.

Cleveland Bronson, a witness for the state, gave the following account of the killing, which was corroborated by several witnesses: "The prisoner was teaching school at the colored Herring schoolhouse, in Lisbon township. I was passing by there at the morning recess. It was raining when I got there. I was hunting and had my gun, and I set my gun down at the schoolhouse door; this was about the 26th of last January. The scholars were out of school at that time. I went in the schoolroom, and was talking with the defendant. He soon rang his bell for the scholars to come in again. After they had all come in and taken their places, he asked Bishop Wright, the deceased, why he did not march out right at recess. Bishop Wright said he thought he did march out like he had been marching out before. The teacher told him, 'No,' he did not; that he turned off at one side, when the rule was that he should march straight in front of the door far enough for all the other scholars to clear the steps. Then the prisoner asked deceased: 'Are you too grown up to obey orders?' Deceased said: 'No; I am not; I came here to obey orders.' The prisoner then said: 'Obey my orders, or I will beat you down to the floor.' The teacher then ordered Bishop to come out to him. The teacher then ran into Bishop and threw him on the floor; they tussled awhile, and the teacher reached and got a piece of lightwood, about the size of my arm, and about two feet long, and hit deceased with it two or three licks on the head, and got up off him. Bishop Wright went to pull up by side of house, and the teacher struck him again with the piece of lightwood on the side of the head. He stood a few minutes like he was stunned. He trembled just like when you hit a hog, and was bleeding at the nose. (Defendant objects. Objection overruled, and defendant excepted. First exception.) Bishop staggered around in schoolhouse like drunken person; he staggered up against stove and chairs in the room. (Defendant objects. Objection overruled. Defendant excepted. Second exception.) Bishop Wright went out the door, bleeding at the nose, and told the teacher that he did not think he had the right to beat him up that way. (Defendant objects. Objection overruled. Defendant excepted. Third exception.) Bishop Wright was about 16 or 17 years old; he did not hit or offer to hit the teacher during the fight."

Victoria Herring testified as follows: "I am sister-in-law to Bishop Wright. Bishop's mother was dead, and he lived with us since he was five years old. About 11 o'clock a. m., Bishop Wright came home, walking fast; head thrown back. He was crying, and his nose was bleeding, and he staggered about the room, and lay down on the bed; he was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

first up and then down. (Defendant objected. Overruled, and defendant excepted. Fifth exception.) He stayed about a half hour. He lived with my husband and myself. My husband soon came home, and nooked up a horse and buggy and took him off. The doctor lived about five miles. I saw him next at D. L. Herring's store, about two hours afterwards, about two miles from my house, lying down on the floor, kinder struggling. He was nearly dead. (Defendant objected. Overruled and excepted. Sixth exception.) Three or four o'clock he died."

Dr. Cooper, who was found by the court to be an expert, stated that he made the post mortem examination of the deceased, and that he died from cerebral hemorrhage—effusion of blood on the brain (the defendant excepted), caused presumably by a blow or fall. (The defendant excepted.)

The defendant testified in his own behalf, and his honor told the jury if they believed him to return a verdict of not guilty.

J. D. Kerr and Fowler & Crumpler, for appellant. Attorney General Bickett and Geo. L. Jones, for the State.

ALLEN, J. We have examined all of the exceptions appearing in the record, and find nothing of which the defendant can justly complain. It appears to us that he has been dealt with mercifully, as the evidence would have sustained a verdict of murder in the second degree, if not one in the first degree.

[1] Many of the exceptions were evidently taken as matter of precaution, during the progress of the trial, and not with the expectation that they could be successfully urged as ground for a new trial. The first three exceptions belong to this class, as the witness had to tell what took place at the time of the difficulty, if permitted to testify at all.

[2] The exception to the evidence of McKinley Herring is equally untenable. He was an eyewitness, and the objection is to the whole of his evidence. We do not think any part of his evidence incompetent; but if it were otherwise, and some of the evidence was competent and some not, a general objection to the whole evidence could not be sustained. *State v. Ledford*, 133 N. C. 722, 45 S. E. 944.

[3] The exceptions to the evidence of Victoria Wright are without merit, and require no discussion.

[4] It was not necessary to propound a hypothetical question to Dr. Cooper, as he was expressing an opinion as the result of his own examination, and not one based on the evidence of other witnesses.

[5, 6] Dr. Sloan, an expert, was asked his opinion as to the cause of death, upon the assumption that the jury found certain facts

in evidence to be true. The defendant objected because one fact, as to which there was evidence, was not incorporated in the question. We said at the last term, in *State v. Holly*, 155 N. C. 485, 71 S. E. 450: "It is not necessary in the statement of a hypothetical question that all the facts should be stated. Opinions may be asked for upon different combinations of facts, on the examination in chief, and on the cross-examination." If the defendant thought the fact, which was omitted, would have elicited a different opinion from the witness, it was his right and duty to incorporate it in a question on cross-examination.

[7] The defendant offered Mattie Andrews, a girl eight years old, as a witness. The court refused to permit her to testify, and makes the following statement as to the witness: "The exception in regard to Mattie Andrews was made the first time in the statement of appellant's case on appeal. The court asked Mattie Andrews who made her; she said she did not know. The court asked her if she knew anything about the obligation of an oath. She said, 'No.' The court then asked her what they would do to her if she told a lie on the witness stand. She said she did not know. The court found as a fact that she was not qualified as a witness, and stood her aside. No exception taken at the time, and no statement made to the court as to what they expected to prove by the witness." We cannot go outside the case on appeal; and, as no exception was taken, we cannot consider the objection. Besides, the evidence sustained the findings and ruling of the court. It was discretionary with the judge to allow or to refuse further examination of the witnesses.

The prayers for instruction were substantially given. We find no error.

No error.

(156 N. C. 253)

ELLINGTON et al. v. DURFREY.

(Supreme Court of North Carolina. Oct. 11, 1911.)

EXECUTORS AND ADMINISTRATORS (§ 496\*)—COMPENSATION.

One of the two executors appointed by a will, providing that they should receive as compensation the single sum of \$2,000 each, and a commission of 5 per cent. on receipts of income, and 2 per cent. on disbursements thereof, having died pending the administration, he is not entitled to the \$2,000, nor to a prorata share thereof, but his services should be measured by the rule of quantum meruit, to be gauged by the compensation allowed by law, had the will fixed no compensation, one-half of the commissions not exceeding 5 per cent. on the receipts of the estate, and not exceeding 5 per cent. on the disbursements.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2107-2116; Dec. Dig. § 496.\*]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Controversy between F. K. Ellington and another, executors of Thomas B. Womack, deceased, as plaintiffs, and Cary K. Durfrey, surviving executor of Florence P. Tucker, deceased, as defendant. From a judgment for plaintiffs for less than claimed, they appeal. Reversed.

This is a controversy submitted without action to determine the amount due plaintiff's intestate as one of the executors of Florence P. Tucker, who died December 15, 1909, leaving a last will and testament appointing Thomas B. Womack and Cary K. Durfrey executors. This paragraph in the will is the only part of it pertinent to the controversy: "My said executors shall receive out of my estate, in full compensation for all services and responsibilities to be by them rendered and incurred, whether as executors or trustees, the single sum of two thousand dollars each, and in addition thereto, they shall be allowed a commission of five per cent. on the receipts of income, and two per cent. upon disbursements thereof, and may employ such reasonable clerical assistance as may be necessary. Owing to the trust and confidence I have in Cary K. Durfrey, it is my desire that my executors shall continue him in his present position with the same salary I shall be paying him at the time of my death." There was a judgment that plaintiffs' testator was entitled to \$188.31, being one-half of the commissions on income fixed by the will, but no part of the \$2,000.

Aycock & Winston, for appellants. Holding & Snow, for appellee.

**BROWN, J.** The facts set out in the case substantially show that Mrs. Tucker died December 15, 1909, leaving a will and appointing Thomas B. Womack, her legal adviser, and the defendant as executor. Judge Womack and his coexecutor transacted the business of the estate up to the death of the former, February 18, 1910.

The question presented is the just compensation due the estate of plaintiff's testator. It is stated in the record that during the time he acted as executor the receipts of the estate amounted to \$46,920.22, not including sales of any real estate, and the disbursements \$7,347.66. The question presented is one of first impression, and we are without precedent or authority to guide us. We agree with his honor below that the plaintiffs' intestate is not entitled to the \$2,000, and, as the time when it was to be paid is not fixed by the will, it is impossible to prorate it. The plaintiffs' intestate was prevented by death from fully discharging the duties as executor for which the \$2,000 was plainly intended as compensation for all services to be performed by the executor in

addition to the commissions on income fixed by the will.

We think, however, that plaintiffs' intestate failed to perform all the services, not by his own fault, but because of his untimely death. Consequently we are of opinion that his services should be measured by the just and reasonable rule of quantum meruit, and that should be gauged by the compensation allowed by law, had the will fixed no compensation. We are of opinion that plaintiffs' intestate is entitled to one-half of the commissions, not exceeding 5 per cent., upon the sum of \$46,920.22, the receipts of the estate, and not exceeding 5 per cent. upon the sum of \$7,347.66 disbursements. This, of course, will not apply to the executor Durfrey, who is living and discharging the duties of sole executor. His compensation will be adjusted by the terms of the will.

The superior court will fix the percentage of commissions, and allow plaintiffs' intestate one-half of the whole.

Reversed.

(156 N. C. 119)

# PETTIT v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 4, 1911.)

## 1. INFANTS (§ 14\*)—EMPLOYMENT—APPLICATION OF STATUTE.

Acts 1903, c. 473, now Revisal 1903, § 1981a, providing that no child under 12 years of age shall be employed in any manufacturing establishment or factory, only applies to employment in the places named, and not to the employment of an infant by a railroad company as a messenger.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 14.\*]

## 2. MASTER AND SERVANT (§ 91\*)—NEGLIGENCE—INFANTS.

In the absence of statute, a recovery cannot be had for injuries to an infant employed under 12 years of age, merely because he was an infant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 91.\*]

## 3. MASTER AND SERVANT (§ 276\*)—INJURIES—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a railroad company for the death of plaintiff's child claimed to have been employed by it as a messenger when injured, evidence held not to show that intestate was performing any duty for defendant when injured.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.\*]

Clark, C. J., dissenting.

Appeal from Superior Court, Edgecombe County; Whedbee, Judge.

Action by Sallie Pettit, administratrix, against the Atlantic Coast Line Railroad Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

This is an action brought by the administratrix of Joe Pettit to recover damages.

The complaint alleges the death of the in-

testate, his employment by the defendant as a messenger boy, the nature of his duties, a description of the place where he had to work, and then alleges specifically the acts of negligence complained of as follows: "On the 28th day of April, 1907, the said infant was given a message by the defendant, and carelessly and negligently directed by the defendant to deliver the same to another one of its employes, and to do so required the infant to go somewhere on the yard to track No. 9 or 10. About this time an engine with a number of cars of defendant, going south, passed, when the said infant undertook to go upon said slowly moving train to the point where the message was to be delivered. He stood upon the iron steps of a flat car in the said train, and suddenly the said car upon which he was standing, failing to clear another car standing on a track of the defendant, said infant was knocked from his position by coming in contact with the said car on the adjoining track, he was thrown between the wheels of the moving train, and was so badly injured that he died the same afternoon."

The following evidence was introduced by the plaintiff:

Mrs. J. W. Splers, formerly Mrs. Sallie Pettit, testified as follows: "Q. Your name is Mrs. J. W. Splers? A. Yes. Q. You are the mother of the young man, Joe Pettit, that was killed at South Rocky Mount? A. Yes. Q. When were you married the last time? A. Last December, three years ago. Q. At the time of your son's death, you were Sallie Pettit? A. Yes, sir. Q. You have a record of the date of the birth of your son Joe? A. Yes, sir. Q. Will you please open this Bible and turn to the page in question; is this a memorandum as to the date of the birth of your son, Joe? A. Yes. Q. And that record is that he was born on the 22d of June, 1895 or 1896? A. I can't tell. Q. Do you remember the date? A. No, sir. Q. Do you know who made this record? A. Yes. Q. Who? A. Next to my oldest daughter. For about four years it was my brother's Bible, and I had her draw mine off from his. He had the old record of all his children and mine. Q. The date was recorded in your brother's Bible? A. Yes. Q. And these dates were recorded at the time of the birth of the children? A. Yes. Q. Do you know of your own knowledge how old he was? A. Yes, he was 11 years; would have been 12 in June, 1907. Q. Did you ever give your consent that this boy should go to that company to engage in this work? A. No. Q. How was the boy dressed, with reference to long or short pants? A. Short, knee pants. Q. What number of clothes did he wear, with reference to pants? A. No. 12; No. 11 all the time before. Q. Was he large or small for his age? A. He was not large at all; just ordinary size. Q. About what time in the day was he killed? A. Somewhere about 12; I was sitting at the

dinner table. Q. How long after that before your child died? A. I think it was somewhere about 4 that same afternoon." Cross-examination: "Q. When was the first time, Mrs. Splers, that you heard that your boy was working for the railroad? A. When he got his job he told me. Q. How long before this accident did he tell you he had a job? A. He told me as soon as he got his job. Q. See if you can't remember how long before his accident? A. At the last time he had been at work for a week. Q. How long the first time? A. About two months. Q. It is alleged that he had been in the employment about four days? A. Well, somewhere about a week, the last time I think it was on a Tuesday he began, and was killed Sunday. Q. But before he had been working about two months? A. Somewhere about that time. Q. When he went there the second time, did you tell him not to take it? A. No, sir; I don't think I did, but he said, 'I am going back and take my same job and' — Q. Did you say not to do it? A. I don't remember what I said to him. Q. The first time, did you tell him not to take it? A. I don't know, sir." Redirect examination: "Q. Did you know just what duties he had? A. He told me he was a messenger boy; but I didn't know anything about it. Q. Did you know anything about the danger attached to the job? A. No, sir; I had never been on the yard, and I didn't know anything about it. Q. Did you know how many tracks or trains there were there? A. No. Q. Mrs. Pettit, how many other children have you? A. I have seven besides him." Recross examination: "Q. He told you he took messages from one office to the other? A. Yes. Q. Brought his money home? A. Yes, to me."

Mr. J. W. Splers testified as follows: "Q. Mr. Splers, you are the husband of the lady who left the stand? A. Yes, sir. Q. Mr. Splers, you have been in the employment, off and on, in the railroad at Rocky Mount? A. Yes. Q. You knew the condition of the yard at South Rocky Mount in April, 1907? A. Yes, sir. Q. Do you happen to know what duties Joe Pettit was discharging at the time of his employment? A. Messenger boy. Q. In the office of Mr. E. S. Dodge? A. Yes, chief train dispatcher. Q. And where were most of the messages to be carried? A. To the yardmaster's office; his office was placed diagonally across from the dispatcher's at that time. Q. And over how many tracks did he have to go? A. At that time he had to cross somewhere between 8 or 10 tracks; I don't exactly know at that time. Q. The yard has been torn up and removed and these tracks have been torn up? A. Yes. Q. Over these 10 or 12 tracks between Dodge's office and the other office, how many trains moved, and how often? A. I can't tell; there was continuous shifting all the time. All the yard engines from the roundhouse had to be delivered there.



Q. When the trains come in, were not all trains handled over these tracks? A. Norfolk and Charleston passenger trains were. Q. What about the making up of these trains? A. Well, they were made up in the south yard and were left down in south yard; they had to go over these tracks; all trains leading north. Q. What became of the cars going north? A. They passed through the same tracks; they were made up in the northern end of the yard and passed over the main line track. Q. To what extent were these tracks being used? A. For classifying freight, loading and shipping freight, etc. Q. How often? A. Continuously. Q. What did you say Joe's duties were? A. Messenger boy. Q. Took messages from the dispatcher's office to the yardmaster? A. Yes."

Mr. J. R. Pettit testified as follows: "Q. Look at that; do you remember that? A. Yes. Q. Speaking with reference to that, that is what year? A. 1907. Q. A wire that your brother has been hurt? A. Yes. Q. You were living here at that time? A. No, sir; I was living at Rocky Mount; but I was over here that day. Q. Did you know what your brother's duties were? A. Messenger boy, to carry messages to any office he was sent. Q. Court: Were there any other duties? A. He was supposed to deliver messages to Mr. Robinson, Mr. Trueblood, and other offices on the yard. Q. Just locate where these offices were and how many trains and tracks there were? A. Mr. Gorham's office was in the end of the principal shed, and there were 12 tracks, I think, or more, there at that time, and he had to cross these tracks to his office. Mr. Trueblood's office was across these tracks over between Mr. Gorham's office and the shop. Q. What about the tracks there? A. He had to cross these same tracks. There was continued shifting and making up trains all the time during the day. Q. What about Mr. Robinson's office? A. Robinson's office was back of the shop. Q. How many tracks would he have to cross going to Robinson's office from the dispatcher's office? A. About 15 or 16; it was behind the shop. Q. Where was the office of the chief train dispatcher, Mr. Dodge, with reference to the main tracks of the A. C. L.? A. It was above the Coast Line restaurant. Q. How far away from the main line tracks? A. I don't really know exactly. Q. As far as what? A. It was the distance of this building or may have been more. Q. About 50 feet? A. I suppose it was 50 feet or more. Q. These tracks were in front of Dodge's office? A. Yes. Q. How many of these tracks were there? A. There were only two main line tracks and other tracks leading to them. Q. How many of these? A. A good many of them; I don't remember how many. Q. How many trains and shifting engines and engines and cars passed over these tracks? A. There was continuous shifting by trains for different

points, Richmond, Florence, and Norfolk, over these tracks. Q. Mr. Pettit, do you happen to know what your brother was receiving? A. \$12.50 per month." Cross-examination: "Q. Mr. Pettit, you have spoken of his duties and the messages to take to the offices; how would he proceed to carry it there? A. Well, I suppose he would walk. Q. Don't you know it was his business to walk from the point? A. Yes, I suppose that was the point of it. Q. That was his business? A. Yes, that was part of it. Q. Now, was there anything in his duty that required him to undertake to go upon a slowly moving train to the point where the message was to be delivered and ride upon iron steps of a freight car? A. I don't know. Q. So when he attempted to ride a slowly moving train he did that because he wanted to? A. He did as all the others did. Q. Didn't he do that because he wanted to? A. Yes, sir; and not only him but all the others that age. There were more than him." Redirect examination: "Q. There were other young children employed around the shop? A. Yes. Q. The dispatches this boy had to deliver were telegrams? A. Yes." Cross-examination: "Q. There were orders as well as telegrams? A. Any messages he might be given from the dispatcher's office. Q. He would take any message? A. Yes."

Mr. Batts testified as follows: "Q. What is your name? A. J. W. Batts. Q. Where do you reside? A. South Rocky Mount. Q. What is your employment? A. Train engineer. I was fireman at the time of this accident. Q. Fireman in April, 1907? A. Yes. Q. In whose service? A. Atlantic Coast Line. Q. Where were you on the day that Joe Pettit was killed? A. I was on the yard; had been out at work and just started home. Q. At what time? A. Between 11 and 12. Q. Did you see Joe Pettit that day? A. Once; I saw him on the corner of the car. Q. State what position he occupied on the car? A. He was standing on the steps and holding to the lower round. Q. What kind of a car? A. Box car. Q. In motion? A. Yes, moving. Q. In what direction was it moving, and where was the engine? A. At the southern end; the car was moving north. Q. Did you see Pettit again this day? A. Yes, after he was run over. Q. What attracted your attention? A. I heard some one scream out. Q. Where did you find Pettit? A. He was lying on the track. Q. What was his condition? A. One leg off. Q. Do you know to what extent the tracks are used for the making up of trains and the classification of cars of the Coast Line? A. Yes. Q. What was it; go ahead and state to the jury for what purpose they were used? A. They were put there for incoming trains and for making up trains going out. Q. How frequently are engines and trains passing back and forth through the yard? A. Most all the time."

Mr. K. S. Lancaster testified as follows:

"Q. Mr. Lancaster, do you know the condition of the yard of South Rocky Mount in April, 1907? A. I think so. Q. Go ahead and tell the jury, describe it? A. Well, there was trains continually over the tracks; it was going and coming all the time; hardly ever more than two or three minutes without trains going backwards and forwards; about 15 tracks there at that time. Q. You are in the employment of the Coast Line at that time? A. Yes. Q. Your duties called you upon the yard? A. Yes."

The plaintiff rested. The defendant moved for judgment of nonsuit. Motion allowed, and plaintiff excepted. The court signed the judgment of nonsuit as set out in the record, to which plaintiff excepted and in open court appealed to the Supreme Court.

The plaintiff contends that the employment of the intestate, a child between 11 and 12 years of age, was so dangerous that it alone was evidence of negligence, and that he was killed in the performance of his duty.

The defendant contends: (1) That there is no evidence of negligence. (2) That, if the employment of the intestate is evidence of negligence, there is no evidence that the intestate was on duty when killed, and therefore the negligence of the defendant was not the real cause of death.

H. A. Gilliam and Aycock & Winston, for appellant. F. S. Spruill, for appellee.

ALLEN, J. (after stating the facts as above). The question presented by the record has, within a few years, been considered by this court in six cases. *Ward v. O'Dell*, 126 N. C. 948, 36 S. E. 194; *Fitzgerald v. Furniture Co.*, 131 N. C. 645, 42 S. E. 946; *Hendrix v. Cotton Mills*, 138 N. C. 170, 50 S. E. 561; *Rolin v. Tobacco Co.*, 141 N. C. 310, 53 S. E. 891, 7 L. R. A. (N. S.) 335; *Leathers v. Tobacco Co.*, 144 N. C. 342, 57 S. E. 11, 9 L. R. A. (N. S.) 349; and *Starnes v. Manf. Co.*, 147 N. C. 563, 61 S. E. 525, 17 L. R. A. (N. S.) 602. The last three were against manufacturing establishments, and were based on the statute (chapter 473, Acts 1903, now Rev. 1908, § 1981a), which provides: "That from and after January 1st, 1908, no child under twelve years of age shall be employed in any factory or manufacturing establishment in this state," and we deduce therefrom the following principles:

- (1) That the statute is constitutional.
- (2) That it applies to employment in factories and manufacturing establishments, and to no other.
- (3) That the employment of a child under 12 years of age in a factory or manufacturing establishment is negligence per se.
- (4) That such negligence is proximate, if the child is injured as the result of his employment.
- (5) That there is no assumption of risk by the child.
- (6) That the negligence of the parent, if

any, in permitting the employment, cannot be imputed to the child.

(7) That, in addition to the usual presumption against contributory negligence, there is a presumption that the child has not the capacity to appreciate the dangers of his employment.

(8) That this presumption may be rebutted.

[1] These decisions are not however, authoritative in this case, because the employment of the intestate is not within the statute, and is not forbidden by it, and we are not at liberty to extend the statute to include employments not within its letter or spirit.

In the *Hendrix Case*, the boy was employed to work at the complicated machinery of a cotton mill; but, as he was 12 years of age, the case was decided on the principles of common law, and not on the statute, and it was held that there was a failure of proof as to negligence and proximate cause.

In the *O'Dell and Fitzgerald Cases*, there was evidence of the negligence of the employer outside of the dangerous character of the employment, in that in each there was evidence of a failure to instruct the child, and in both the question discussed was the correctness of instructions on contributory negligence. The opinion in the *Fitzgerald Case* was written by Chief Justice Clark. He quotes with approval the following language from *Thompson on Negligence*: "The law puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business, and of instructing him how to avoid them. Nor is this all; the master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the same state as if he were an adult." He also refers to the statutes from many of the states, and from Europe, giving the ages at which children may be worked in factories, and concludes: "With this consensus of opinion in nearly the entire civilized world, it might be that it would not have been error if the judge had held that it was negligence per se to put a child of the tender age of nine years to work on a dangerous machine which he had never seen before, without any instructions or warning, and to leave him there by himself without stopping the machine. But, however that may be, it certainly was not error to leave the question of negligence to the jury with the charge given in connection therewith, which was very favorable to the defendant."

[2] Accepting this as a correct statement of the law, we must abide by it, and cannot permit a recovery of damages for no reason except that a child has been injured. We may have pity and may be inclined to heed "the sob of the child in its helplessness";

but we must accept the law, as we understand it, as our guide in determining the rights of litigants, bearing in mind the admonition of Judge Daniel: "The courts should not be wiser than the law."

[3] The question is not presented in this record, and therefore it is not necessary to decide it; but we might go further than the Fitzgerald Case and hold that, when the employment is dangerous, it is not necessary to prove a failure upon the part of the employer to instruct, and still there would be no evidence of actionable negligence in this case, because there is nothing in the evidence to show that the intestate was on duty, or was performing a duty for the defendant. The evidence is vague and unsatisfactory. No witness swears on what day the intestate was killed; but we assume it was on a Sunday in April, 1907. No one swears he was killed by a train of the defendant; but we accept this as proven, although it would have been easy to show signs of blood on the rails or track, which was not done. The only statement as to how the intestate was injured is contained in the answer of the defendant, which was not in evidence: "That the said Joe Pettit, at the time he received the injuries alleged in the complaint, was rendering no service to the defendant, and was where he had no right to be. That said Pettit, of his own will and accord, and against the warning of his companions, attempted to get on a passing flat car, missed his catch, fell, and the wheel of the car passed over and mashed his feet, without any fault of the defendant."

No witness says that the intestate was on duty the day he was killed, or that he was performing a duty for the defendant at the time of his death.

These facts were not peculiarly within the knowledge of the defendant, as his mother and stepfather knew whether or no he was on duty that day. Both knew he was employed by the defendant, and the mother received his wages.

The evidence, accepting it as true, shows that he was a messenger boy to carry messages, and that he had to cross the tracks; but there is no suggestion that he had to ride passing freight trains to perform these duties.

We repeat here the evidence of the witness Batts, who is the only witness who testifies to any fact connected with the killing: "Q. What is your name? A. J. W. Batts. Q. Where do you reside? A. South Rocky Mount. Q. What is your employment? A. Train engineer. I was fireman at the time of this accident. Q. Fireman in April, 1907? A. Yes. Q. In whose service? A. Atlantic Coast Line. Q. Where were you on the day that Joe Pettit was killed? A. I was on the yard; had been out at work and just started home. Q. At what time? A. Between 11

and 12. Q. Did you see Joe Pettit that day? A. Once; I saw him on the corner of the car. Q. State what position he occupied on the car? A. He was standing on the steps and holding to the lower round. Q. What kind of a car? A. Box car. Q. In motion? A. Yes, moving. Q. Did you see Pettit again this day? A. Yes, after he was run over. Q. What attracted your attention? A. I heard some one scream out. Q. Where did you find Pettit? A. He was lying on the track. Q. What was his condition? A. One leg off. Q. Do you know to what extent the tracks are used for the making up of trains and the classification of cars of the Coast Line? A. Yes. Q. What was it; go ahead and state to the jury for what purpose they were used? A. They were put there for incoming trains and for making up trains going out. Q. How frequently are engines and trains passing back and forth through the yard? A. Most all the time."

The clear inference from this evidence is that the intestate, acting outside of the line of duty, jumped on a passing train, fell off, and was injured.

If we confined the plaintiff strictly to the allegations of the complaint, the case would be stronger against her, as no one could urge that there is any evidence that the intestate was knocked off the car by coming in contact with a car on another track.

The plaintiff was not inadvertent to the necessity of proving that the intestate was on duty, because he alleges that the intestate was in the discharge of his duty, and was engaged in delivering a telegram; but he offered no evidence to sustain these allegations.

After a careful consideration of the case, we conclude that his honor committed no error in ordering a nonsuit.

No error.

WALKER, J. (concurring). I concur fully in the opinion of the court, as delivered by Justice ALLEN, and it has had my unhesitating assent from the beginning. He has stated the facts of the case, as I understand them, with such literal excerpts from the testimony as were necessary to show the exact situation when the boy was injured. It may, under certain circumstances, be negligent to employ, in a dangerous occupation, a boy of tender years, and without sufficient experience and intelligence to understand and avoid the danger; but, however this may be, the question is not even remotely involved in this case, and the decision proceeds upon the facts of the case, as disclosed by the undisputed evidence, and not upon any hypothetical matter. The youth of the child and the danger must, in any possible view of the question of negligence, have been, not only the cause, but the proximate cause, of the injury, and there is nothing in this record that, in my judgment, tends to present any

such case. The boy was riding on the stirrup of the moving car for his own amusement and diversion, and not in the discharge of any duty as messenger, or in the course of his employment as such. Not only this, but it appears that his companions and playmates, who were of his own age, warned him not to ride on the car, so that he was not too young to be unaware of the danger, even if he had been in the line of his employment, and, in the absence of a statute making it unlawful to employ a boy of his age in such business, it would have been a question for the jury to determine, upon the evidence, the degree of his intelligence and his capacity to know and understand the risk, even if the question of negligence had been in any way involved in the case. It is clear that the mere fact of his employment, coupled with his youth, does not show actionable negligence, even though the extreme view of the law be adopted, unless the injury can be referred to those facts as its proximate cause, and this, we see, cannot be done. He was not carrying a message, but playing, and the company is no more liable for his injury than if he had been hurt while engaged in any other sport or pastime. His being under age is therefore an irrelevant matter, as it did not cause the injury. This is a case where there has been a loss without an injury (*damnum absque injuria*). The railway company is no more liable to the plaintiff than if the boy had not been in its employ, but was injured while engaged in some sport or play, such as shinney or baseball. There is an entire lack of cause and effect. If a man or boy is hurt, he is not entitled to recover, even of a railway company, because he was employed by it, unless the injury was brought about by some neglect of duty to him on the part of the company. The latter must have owed him a duty and failed to perform it, thereby causing the injury. But there is no such case here, and none that bears any resemblance to it. The boy was hurt by accident resulting from his own daring, for which the railway company is in no way responsible. We sympathize with the plaintiff, but in deciding his case we must not be influenced by our feelings. It is not a matter of sentiment, but a question of law to be solved by the consideration alone of the cold and unyielding facts of the case. It is the safe and only rule, when making a decision, never to lose sight of the facts, but to keep them steadily and constantly before us, for whatever is outside of the facts is also outside of the law of the case, which consequently becomes a mere abstraction.

BROWN, J. I concur fully in the opinion of the court written by Mr. Justice ALLEN. As he has clearly demonstrated, I think the question as to whether the defendant company had the right to employ a boy of 11½ years of age as a messenger in its telegraph dispatcher's office at South Rocky

Mount is not presented in this case. I do not think the court should pass on matters not necessary to a decision of a case. When courts go further than this their expression of views is regarded as not authoritative and mere obiter dicta.

The matter of the employment of child labor in certain vocations is very largely a matter for the wisdom of the General Assembly and not for the courts. I think we should be careful not to enter the domain of the law-making power.

The matter of child labor has been discussed at several sessions of the Legislature, and so far it has not interfered, except in the case of manufacturing establishments.

There is no legislative restriction upon the employment of boys even under 12 years as messengers in telegraph offices, whether such offices are operated by railways or other corporations. Such employment is very general.

CLARK, C. J. (dissenting). The plaintiff was not accorded the privilege of a jury trial to determine the facts. Therefore the evidence must be taken in the most favorable aspect for him and in the light of the most favorable inferences which could have been drawn therefrom by the jury. His intestate was a child, small for his age which was under 12, and had not taken off knee pants. He was employed at South Rocky Mount to carry messages across a yard filled with 18 or 20 tracks, with engines and trains moving backwards and forwards every few minutes. Among these were through trains, and also the shifting engines, moving freight and passenger cars to make up trains. His duties required him to carry messages over and across this yard. A more deadly and perilous place could not be imagined. Such duty would have taxed the discretion and judgment of a much maturer person. The defendant did not attempt to show that they had given the child any caution or instruction whatever.

In *Fitzgerald v. Furniture Co.*, 131 N. C. 640, 42 S. E. 947, this court cited with approval the following language from Thompson on Negligence: "The law puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business and of instructing him how to avoid them. Nor is this all; the master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him and to place him, with reference to it, in substantially the same state as if he were an adult." This being a duty devolving upon the defendant, the burden was upon it to show that such caution was given and its nature. But nothing of the kind was even attempted to be shown. It follows that the presumption is not removed that such caution was not given.

In *Ward v. O'Dell*, 126 N. C. 948, 36 S. E. 195, a child 11 years old, employed in a factory, in passing from one part of the mill to another stopped for a moment at a bench where a wire was being cut, when a piece of wire flew off and put out his eye. It was held that the injury was conclusive that the work was dangerous, and that in such case "these little creatures exposed to such dangers against their will cannot be held guilty of contributory negligence." Nor was it a defense that the child was hired to the company by the father. "It was the child's eye which was put out, not the father's. The father could not sell his child nor give the company the right to expose him to danger. The superintendent put these children to work, knowing their immaturity of mind and body, and, when one of them thus put by him in places requiring constant watchfulness is injured, every sentiment of justice forbids that the corporation should rely on the plea of contributory negligence." If that is true as to cutting wires in a factory when the child was not on duty at the time, it is necessarily so as to the danger 10 times more deadly of crossing 18 to 20 tracks with engines and cars constantly moving backwards and forwards and when the child's duties required him to cross the tracks.

On this occasion there was no eyewitness how the child was killed, but he was found dead upon one of these tracks with his leg cut off. The inference is irresistible that he was killed by a passing train. *Powell v. Railroad*, 125 N. C. 370, 34 S. E. 530. If there could be any possible doubt about it, the evidence was certainly sufficient to be submitted to a jury to draw the inference. The little child being found dead with his leg cut off in such a network of tracks, among constantly shifting trains, creates as strong a presumption that his leg was cut off by one of these trains as, when a soldier is found dead on a battle field with a bullet through his head, that he was killed by the enemy.

It is urged that it is not shown that the little boy in his knickerbockers was on duty because there is evidence tending to show that he was killed on Sunday morning. The opinion of the court says: "No one testifies that the boy was killed on Sunday. We assume it." Yet nothing is better settled than that nothing can be assumed against plaintiff on a nonsuit. The evidence is that he was employed to carry dispatches across these tracks. The very nature of the work as a necessity in operating trains is conclusive that it was carried on every day. There is no evidence whatever that these messages were not required to be sent on Sunday as well as on other days. It is well known that these through trains, and that also the shifting of cars and engines on these tracks, are operated on Sunday, as well as on other days. His duty was such as could not cease on Sunday. Reference to the decisions of this court will show cases in which this defendant was sued for the penal-

ty in sending out its freight trains from this very yard on Sunday, and the defense was upheld that it had a right to send out through freight trains. The statute also permits the dispatching of both local and through passenger trains. It is in evidence in this case that other laborers were present on the yard that morning. Taking the evidence in the light most favorable to the plaintiff, as the law requires us to do on a nonsuit, it is a reasonable inference that the child was there in the performance of the duty of carrying messages from one office to another across these tracks at the time of his death. It is not shown that he had occasion to go there for any other purpose, nor is it reasonable to suppose that after his arduous labors on these other days he would have revisited this spot on the morning in question as a matter of sport or play. The child was killed where he was required to do his work. If for any reason he was not at work at that spot on that day, it was the duty of the defendant to show it, and it could have readily done so, if such was the fact. It did not attempt to make such proof.

It was also suggested that the child might have been killed by jumping up on one of the passing trains. One witness testified that he saw him riding on one of the shifting trains that morning. But there is no evidence that he was killed while doing so, and, even if it had been shown that he was killed while so riding, this would have been contributory negligence, which this court held in *Ward v. O'Dell*, 126 N. C. 948, 32 S. E. 194, could not be set up against a child under 12 years of age. Besides, contributory negligence must be proven by the defendant. *Revisal*, § 483. The court refers to "statements in the answer" as if the answer was evidence.

If we are to observe Judge Daniels' wise injunction, quoted by the court, "that we should not be wiser than the law," we will not reverse the humane decisions of this court, above quoted, in order to defeat a recovery for the death of the little sufferer who by the avarice of the defendant was sent to his death by exposure to an accumulation of perils greater to him in his unguarded and unwarned innocence than that which met the charging column of brave men on Cemetery Ridge. Many soldiers survived four years of war. This child was slain on the fourth day of his employment.

It may be asked, and it will be asked, by future ages as well as by the present, why an innocent child of this immature age should have been subjected to such perils, so far beyond his comprehension. This record gives the answer. His mother had seven other children to support. He had a stepfather. And, in this combination of circumstances, the mother testifying that she did not know the dangerous nature nor the character of the employment, and indeed did not consent to his being employed, the defendant was able to procure this child's services for the munifi-

cent sum of \$12.50 per month. This was truly "the price of innocent blood." Had the defendant employed a man or a boy of maturer years, it would have had to pay a sum for his services more in proportion to the peril. Such a person would have known the dangers and would have charged for the risk.

By employing these little children the defendant is able to cheapen to that extent, by the competition, the price of other labor.

Nor is there any reason shown why the defendant company should not have put telephones across these tracks, and thus transmitted the messages without exposing any one to such dangers. The only answer to this is the one that was ineffectually made in the *Troxler Case* (124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580) and *Greenlee Case* (122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734) that it would have cost the defendant company some expenditure to put in the automatic couplers, as here it would cost a little something to put in the telephones. This court held, without any statute, but upon the principles of right and justice, in the *Troxler* and *Greenlee Cases*, that it was negligence per se to subject a grown man to the danger of making a coupling without using automatic couplers, even when the man was instructed as to the danger, and that in such cases the railroad company could not set up the defenses of assumption of risk or contributory negligence. This decision has been followed in other states and is a well-settled law in our own courts. Our law is humane.

Chief Justice Fuller not long before his death, in a case of personal injury, in words of burning conviction said: "It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subject to a peril of life and limb as great as that of a soldier in time of war." *Johnson v. R. R.* 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. A conservative estimate of the number of workmen killed or maimed in this country every year in industrial accidents is about 500,000. It is said that the total number killed and wounded in the Union Army during the Civil War was 385,325. In other words, the whole Confederate Army was unable to kill and cripple as many Union men in four years as are now killed and crippled in industrial employment in a single year.

We cannot expect this condition to improve if the courts can be induced to place the blame upon those killed and wounded, because in order to make a livelihood, and with a purpose of obeying those for whom they labor, they venture in dangerous pursuits, while under such conditions the same courts relieve the master, who created the condition and gave the orders, of all liability and blame whatsoever.

The courts elsewhere have not yielded their assent to the validity of the considerations urged by the defendant in this case.

In *Melasko v. Coal Co.*, 86 Wis. 220, 56 N.

W. 475, it was held: "The presumption is that a boy under 14 years of age is not competent to perform duties involving personal safety and requiring the exercise of a good degree of judgment and constant care and watchfulness; and, in an action for injuries resulting from negligence of a boy so employed, the burden is upon his employer to show that he was in fact competent. Further, no usage to employ boys of such tender years to perform such duties can be upheld." Here the boy was under 12, instead of 14, no negligence by him was shown, and no usage to employ boys of such age for such duties.

In *Wynne v. Conklin*, 86 Ga. 40, 12 S. E. 183, it was held: "Whether a boy of 13 employed by the defendant to work in a tinshop was of sufficient age and capacity to appreciate his hazard and provide against danger is for the consideration of the jury." In this case the boy was under 12, and the danger to which he was exposed was full an hundredfold greater than that in a tinshop, and a North Carolina jury in all justice should have considered and determined the question whether he was "of sufficient age and capacity to appreciate his hazard and provide against the danger" to which he was exposed.

In *Goff v. Railroad* (C. C.) 36 Fed. 299, it was held an act of negligence on the part of a railroad company to take into its employment as a brakeman a minor of such tender years as to not know the risk of the service.

The rule established by *Bare v. Coal Co.*, 61 W. Va. 28, 55 S. E. 907, 8 L. R. A. (N. S.) 284, 123 Am. St. Rep. 966, that "It is actionable negligence for an employer to engage and place at a dangerous employment a minor who lacks sufficient age and capacity to comprehend and avoid the dangers of such employment, even though the employer instructs him as to the dangers incident to the work," is a well-established rule, being laid down in *Labatt on Master & Servant*, § 251; *S. & Redf. Neg.* (5th Ed.) § 219; 4 *Thomp. Neg.* §§ 3826, 4093, 4689; *Bailey, Pers. Inj.* §§ 2758-2777; *Dresser, Employers' Liability*, 460; *Buswell, Pers. Inj.* § 203; 2 *Cooley, Torts* (3d Ed.) 1130, 1131; 20 *A. & E. Enc.* (3d Ed.) 299.

It is a question for the jury to say whether or not the deceased could appreciate the dangers and knew how to avoid them. *Turner v. Railroad*, 40 W. Va. 675, 22 S. E. 83; 4 *Thomp. Neg.* § 4098.

The place where the child was put to work being a dangerous one, the question was open for the jury to pass upon the negligence of the defendant. *Cahill v. Stone Co.*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094; *Lynch v. Nurdin*, 1 Q. B. 29; *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69.

In this case a child under 12 years of age, undergrown, and therefore known to be immature, was set to work by the defendant in a most dangerous place, exposed to be run over by the constantly passing trains and shifting engines crossing 18 or more tracks,

to carry messages which might have been sent by telephone. He was found dead on the track in the yard with his leg cut off. Under our decisions the company could not show contributory negligence and did not offer to show any. It was the duty of the company to show that they had instructed any employé, much more a child placed in such employment, of its dangers. The defendant did not show this. The work was of a nature which required employment on Sunday as on other days. The child being found dead where he would be passing in carrying his messages, if he was not at work that day the burden was upon the defendant to show it. The defendant did not offer to do so. Upon all the evidence, taken in the light most favorable to the plaintiff, it would seem impossible to conclude that there was not more than a scintilla of evidence tending to show negligence on the part of the defendant.

HOKE, J., concurs in result.

(156 N. C. 624)

#### STATE v. SANDLIN.

(Supreme Court of North Carolina. Oct. 4, 1911.)

#### 1. JURY (§ 70\*)—DRAWING JURORS—SPECIAL VENIRE.

Jurors drawn for service during the second week of a term, as authorized by Laws 1909, c. 342, relating to juries in New Hanover county, and providing that jurors so drawn shall be regular jurors and subject only to the challenges allowed by law to regular jurors, were properly tendered to sit in a capital case to complete the panel, on exhaustion of the panel of regular jurors drawn for the first week of the term.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 70.\*]

#### 2. CRIMINAL LAW (§ 773\*)—ISSUES—INSANITY—SUBMISSION.

Where, in a prosecution for homicide, the trial judge at the instance of the prisoner allowed an amendment of his plea of not guilty so as to allege insanity, it was not error to submit a double issue as to insanity and guilt.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 773.\*]

#### 3. CRIMINAL LAW (§ 1056\*)—OBJECTIONS—WAIVER.

Error, if any, in submitting to the jury the double issue of not guilty and insanity, was waived where no exception was taken thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668-2670; Dec. Dig. § 1056.\*]

Appeal from Superior Court, New Hanover County; Cline, Judge.

L. M. Sandlin was convicted of murder, and he appeals. Affirmed.

L. Clayton Grant, for appellant. T. W. Bickett, Atty. Gen., and G. L. Jones, Asst. Atty. Gen., for the State.

CLARK, C. J. The prisoner was convicted of murder in the first degree in killing his wife. The evidence is that the wife had left her husband after a quarrel and moved to another house where she kept boarders.

On the day of the homicide the prisoner went to his wife's house. After some conversation, he commenced beating his wife. She screamed and ran from the dining room into the parlor. The defendant followed, beating her. She ran from the parlor into the hall, and the prisoner still followed her. When she got into the hall, the prisoner pulled out his pistol and shot her three times, twice in the back and once in the neck. The doctor testified that either shot would have killed her. She fell, and the prisoner stepped over the body and out into the porch and shot himself in the head but not seriously. One Moss, who occupied an adjoining room, said to him, "Throw that pistol down." He threw it down on the porch, and Moss picked it up. The prisoner then said, "I killed her, and I intended to kill her." The coroner, who was also a physician, testified as to the pistol shots, and on cross-examination testified that he did not consider the prisoner at all insane. The prisoner offered no testimony, asked for no special instructions, and took no exceptions to the charge.

[1] The prisoner in his brief relies upon the second assignment of error. The trial began on Saturday of the first week of the term. The regular panel of that week was exhausted. When the court met again on Monday, the regular jurors who had been drawn, for service during the second week, by virtue of a special act for New Hanover (chapter 342, Laws 1909), were called. The first juror who was tendered was challenged on the ground that this act did not apply to capital cases, but that a special venire should have been drawn under Rev. §§ 1973, 1974. The act in question provides that jurors so drawn "shall be regular jurors and subject only to the challenges now allowed by law to regular jurors." This also disposes of the assignments of error 3, 4, 6, and 7, which were because the judge held that such jurors were regular jurors and not subject to challenge as talesmen.

[2] The other assignments of error which were not abandoned need not be mentioned, except the fifteenth, which was because, insanity at the trial being insisted on, the judge at the instance of the prisoner allowed his plea to be amended to allege it, and thereupon submitted to the jury the double issue as to the prisoner's insanity at the trial and as to his guilt.

[3] The double issue was submitted without exception at the time, and was therefore waived unless it was inherently prejudicial. In *State v. Haywood*, 94 N. C. 847, the court, while not approving such practice, held that it was not error in law, stating that this practice had been pursued in other trials, citing *Rex v. Little*, Russ. & R. 430; *Regina v. Southey*, 4 Foster & Fin. 864; *Buswell on Insanity*, § 461.

We do not see how any prejudice could

have arisen to the prisoner on this occasion. Insanity at the time of the homicide could of course be set up as a defense on the other issue as to the prisoner's guilt.

The record as sent up recited that the jury returned a verdict "guilty of the felony and murder in manner and form as charged in the bill of indictment." The brief of the prisoner objected to a judgment on such verdict as his last assignment of error. The court *ex mero motu* sent down an *instantier certiorari*, to which the clerk returned that the entry on the docket showed that the jury returned their verdict in writing as follows: "(1) Is the defendant now insane? Answer: No. (2) Is the defendant guilty of the felony and murder of which he stands charged? Answer: Guilty of murder in the first degree."

As the judge filed as a part of the record his formal judgment in which he recited that the jury "rendered the verdict as appears of record, finding the said L. M. Sandlin guilty of murder in the first degree," it is not easy to understand how so material an error in the transcript could have occurred. This being an appeal in forma pauperis, it is possible that the transcript may have been copied by another, and the very careful and painstaking clerk must have been inadvertent to the omission of the exact form of the verdict as rendered. It is the duty of the clerk to certify that the transcript is "a true, full, and perfect transcript of the record," and too much care cannot be taken by clerks to verify the correctness of the transcript in all cases, both civil and criminal.

The homicide in any phase of the evidence, if believed by the jury, was murder in the first degree, and one of peculiar atrocity. If there are extenuating circumstances, they do not appear in this record. There could hardly be any extenuating circumstances, if the evidence sent up is a true statement of the occurrence.

No error.

(156 N. C. 159)

#### CARTERET LODGE v. JAMES et al.

(Supreme Court of North Carolina. Oct. 4, 1911.)

#### INJUNCTION (§ 163\*)—TEMPORARY INJUNCTION—STATUTORY AUTHORITY TO GRANT.

Where plaintiff, suing to restrain the cutting of timber on land claimed by him, shows an apparent title, and satisfies the court that his claim is made in good faith, the court, under Revisal 1905, §§ 806-809, will continue the restraining order preventing the cutting of timber until the hearing; and it is not necessary to show the insolvency of defendant.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 357-371; Dec. Dig. § 163.\*]

Appeal from Superior Court, Carteret County; Ferguson, Judge.

Action by Carteret Lodge against John T. James and another. From an order deny-

ing a motion to dissolve a restraining order pending hearing, defendants appeal. Affirmed.

Civil action heard on motion to dissolve a restraining order issued to prevent the cutting of timber by defendants, on lands alleged to belong to plaintiff. There was judgment, continuing the restraining order to the hearing, and defendants excepted and appealed.

W. D. McIver, E. H. Gorham, C. R. Wheatley, and Abernethy & Davis, for appellants. F. L. Fuller and Guion & Guion, for appellee.

HOKE, J. The statutes of the state, in reference to cases of this character (Revisal, §§ 806-809), as construed and interpreted by the court, are to the effect that when a litigant shows an apparent title, and satisfies the court that his claim is made in good faith, the restraining order will be continued to the hearing; and there is special provision made that an allegation of insolvency, on the part of the defendant, to that time usually regarded as essential is no longer required. The purpose and policy of this legislation are well stated by Associate Justice Brown, in *Moore v. Fowler*, 139 N. C. 52, 51 S. E. 797, as follows: "The rapidly increasing value of timber trees doubtless prompted the Legislature of 1885 to enact chapter 401; but the efficacy of this act was diminished by the general practice of permitting the defendant to give bond and to cut the timber *pendente lite*, or otherwise to appoint a receiver and permit the rental value or stumpage to be paid to him. The Legislature of 1901 has thrown greater safeguards around the rights of such litigants, and now, when the plaintiff satisfies the judge that his claim is *bona fide*, and that he can show an apparent title to the timber, the judge should not dissolve the injunction, but continue it until the title can be finally determined." In same opinion it is further said: "On such hearings, the title is not required to be proved with that strictness and certainty as upon the trial." And there are several decisions of the court in accord with the position. *Lumber Co. v. Cedar Co.*, 142 N. C. 418, 55 S. E. 304; *Alleghany Co. v. Lumber Co.*, 131 N. C. 6, 42 S. E. 331. Applying the principle, we are of opinion that his honor made a correct ruling in continuing the restraining order to the hearing.

As the case goes back for trial, we do not consider it desirable to make any detailed statement of the relevant facts in evidence; but, speaking generally, a perusal of the testimony will disclose that in August, 1891, one N. M. Journey and wife executed to plaintiff a deed for a large body of land in Carteret county, and purporting to cover the locus in quo by metes and bounds, and the evidence on part of plaintiff tended to show that said plaintiff, through its tenants, agents,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



and employes, had been in the continuous possession and occupation of the property from the date of the deed. There were several affidavits on the part of plaintiff, from which it was made to appear further that this deed from Journey covered the same property that had formerly belonged to David S. Jones and his son, Julius F. Jones, under whom the plaintiff claimed, and that these parties occupied the land since 1851, under deeds describing same, not by course and distance, as in the Journey deed, but by natural boundaries, stated in the deeds, and which would accord with the descriptions in the Journey deeds and cover the same land. There was much evidence, on part of defendant, controverting these allegations and tending to show that plaintiff's deeds, prior to the Journey deed, did not cover the land in controversy, and further that neither before nor since said deed had there been any such occupation and possession by plaintiff or its agents as would serve to mature the title; but it clearly appears, as stated, that the claim of plaintiff is made in good faith and with sufficient evidence, tending to show title, to require that the restraining order be continued to the hearing.

The judgment of his honor to that effect is therefore affirmed.

Affirmed.

(156 N. C. 162)

# BISSETT v. BRYANT LUMBER CO.

(Supreme Court of North Carolina. Oct. 4, 1911.)

## 1. SALES (§ 358\*)—ISSUES—EVIDENCE.

Where, in an action for the price of lumber, the issue involved the quantity of lumber shipped, evidence of the quantity of lumber on the cars at the buyer's mill was admissible.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 358.\*]

## 2. EVIDENCE (§ 166\*)—BEST AND SECONDARY.

Where, on the issue of the quantity of lumber in several cars, a witness testified that he had measured the lumber, and the tally book showing the measurements of the various pieces of lumber made by the witness was received in evidence, it was error to prevent a competent witness from making calculations as to the quantity of lumber from the book and give the result.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 556, 557; Dec. Dig. § 166.\*]

Appeal from Superior Court, Wilson County; Peebles, Judge.

Action by C. F. Bissett against the Bryant Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

This is an action to recover \$164.66, alleged to be due for nine cars of lumber, sold by the plaintiff to the defendant. Eight cars of the lumber were shipped by rail to the mill of the defendant, and one car was shipped elsewhere. The principal controversy between the parties was as to the quantity

of lumber in the shipment of eight cars; the defendant claiming it was 19,660 feet less than the quantity claimed by the plaintiff. The plaintiff offered evidence tending to prove that the lumber was measured and counted as it was placed on the cars, and that the full amount claimed by him was delivered. In rebuttal the defendant introduced J. W. Burnette, who testified that he was employed by the defendant at the time the lumber was received from plaintiff, and that it was his duty to tally and measure the lumber received by the defendant; that he measured and tallied each car of lumber received from plaintiff as the lumber was taken from the car, except the one car sold at \$11, which was not unloaded at the mill of the defendant; that the aggregate amount of lumber taken from the eight cars measured and tallied by him was 85,638 feet; that each piece of lumber taken from the car was measured and tallied on the books produced by the witness and put in evidence by the defendant. Witness stated that he called off from the tally of said lumber made off said books the amount of each piece of lumber so measured and tallied by him to W. W. Briggs; that he and Mr. Briggs worked up the amount of lumber taken from the tally made by witness; that the amount aggregated 85,638 feet; that the tallies on the books offered in evidence showed all the lumber received from plaintiff by defendant (not taking into account the car which was not counted at the mill but was shipped elsewhere without being unloaded), save and except less than 1,000 feet which was less than 4 inches wide (the contract calling for more than 4 inches), or that had so much bark on it that it was not merchantable. The defendant offered W. W. Briggs as a witness. He testified that he had been over the figures in the tally book with Burnette, and had worked out the amount of lumber, according to the tally, but that he had no recollection of the amount, independent of the book, which was in the handwriting of Burnette and was in evidence. He was then asked to state how the figures, as he worked them out, compared with the figures testified to by Burnette. Upon objection, the court would not permit the witness to answer. The tally book was handed to the witness with the request "to figure up each piece and tell how much was in each car according to the tally made by Burnette, and read over to him, and say from the tally in the books how it corresponded with the testimony of Burnette." His honor excluded this evidence, and the plaintiff excepted. There was a judgment for the plaintiff, and the defendant appealed.

Daniels & Swindell, for appellant. Pou & Finch, for appellee.

ALLEN, J. (after stating the facts as above). In our opinion the evidence excluded by the court was important and material.

[1] The evidence of the quantity of lumber on the cars at the mill was not conclusive as to the quantity shipped by the plaintiff, but it was a fact which, if established according to the defendant's contention, would have been entitled to consideration by the jury.

[2] The witness Burnette had testified that he counted and measured the lumber on the cars, and that it aggregated 85,638 feet. There were eight cars of the lumber, necessarily of various sizes and dimensions, and the plaintiff was contesting the correctness of the count. When the quantity of lumber is considered, it is apparent that it was impossible for the jurors to remember the tallies of lumber as they were read from the book, and to make their own calculations from memory, and it has been held by us, at this term, in *Nicholson v. Lumber Co.*, 72 S. E. 86, that his honor, who presided at the trial, did not have the right to permit the jury to take the book to their room. If, therefore, the defendant could not introduce a competent witness and let him make the calculations and give the result to the jury, it would have to rely entirely on the evidence of Burnette. The evidence throws light upon the question in issue, and tends to corroborate the statement of the defendant's witness as to the correctness of his calculations.

A similar question was considered by the Supreme Court of Maryland in *Lynn v. Cumberland*, 77 Md. 459, 26 Atl. 1004, and the court there says: "It would have been impossible for the jury to carry these figures in their minds if they had been merely read off by the witness to them; and, had the jurors undertaken to transcribe them for the purpose of adding them up themselves, the trial would have been greatly and needlessly protracted."

Also in *West Chicago v. Sheer*, 8 Ill. App. 370: "It is further objected that the court erred in allowing a witness to make a computation and testify as to the amount of interest due. This objection is without any force. The evidence is admitted merely to aid the jury in making a more speedy computation, and thereby to facilitate the dispatch of business. The jury are not bound by the computation thus made by the witness, as it seems they were not in the present instance, but are themselves to ultimately determine what is the true amount of the plaintiff's damages."

There are other exceptions in the record, which we need not consider, as they are not likely to arise on another trial.

There must be a new trial.

New trial.

(156 N. C. 100)

### MORGAN v. MORGAN.

(Supreme Court of North Carolina. Oct. 4, 1911.)

#### EXECUTORS AND ADMINISTRATORS (§ 35\*)—REMOVAL—GROUNDS.

In the absence of bad faith by an administrator, a mere claim by a distributee that intestate owned a half interest in personalty in the administrator's possession was not ground for the administrator's removal, where the value of such property had been ascertained and evidence thereof preserved, and the administrator had given a solvent bond sufficient to cover the value of intestate's property, including that in the administrator's possession.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 35.\*]

Appeal from Superior Court, Nash County; Carter, Judge.

Proceeding by J. H. Morgan against W. G. Morgan. From a judgment for complainant, defendant appeals. Reversed.

This is a proceeding under section 38, Rev. 1905, for the removal of defendant administrator, commended by J. H. Morgan, a brother of the defendant and a distributee of the intestate. The clerk of the superior court of Nash county denied the motion. Petitioner appealed. His honor, Judge Carter, made this ruling: It is therefore found as a fact by the court from the evidence that, in respect of the ownership of said property, the administrator has and asserts a personal interest adverse to that of the estate of his intestate, and the court is therefore of opinion, as matter of law, that the said W. G. Morgan is not a proper party to administer said estate on account of his adverse personal interest as aforesaid. The defendant appealed.

E. B. Grantham, for appellant. Finch & Vaughan and Jacob Battle, for appellee.

BROWN, J. As his honor rests his judgment solely upon a matter of law, it is not denied that it is reviewable upon appeal.

The petitioner and the defendant are the only heirs at law and distributees of Patsy Morgan, deceased. The record discloses that Patsy M. Morgan owned a one-half undivided interest in a tract of land of about 100 acres, and, as the defendant contends, only a very small amount of personal property. The defendant is a man 50 years old, who has never married. He and his sister, intestate, resided together after the death of their parents upon the old homestead, and their younger brother, J. H. Morgan, married when a young man and moved away. Some weeks after this defendant qualified as administrator, and after the defendant had filed his inventory in the course of his said administration, the plaintiff raised the contention that certain personal property in the possession of this defendant belonged jointly to the late Patsy M. Morgan and to the

defendant, W. G. Morgan. The defendant denied that Patsy M. Morgan had any interest in the personal property in controversy, consisting of mules, hogs, farming implements, etc. The record shows that, when this claim was made by the petitioner, the defendant allowed the plaintiff to have an inspection and appraisal of all the property which the plaintiff contended belonged jointly to the said late Patsy M. Morgan and the defendant. The appraisal committee inspected, valued, and took an itemized statement of all of the property, and every portion of same has been held intact by the defendant and is still so held by him. It is admitted that the defendant has given a solvent bond amply sufficient to cover the full value of his intestate's estate, including the value of the property in dispute.

There are no findings of bad faith upon the part of the defendant, and we are of opinion that his honor erred in his conclusion that he was incompetent to act as administrator simply because a distributee claimed that the intestate owned a half interest in certain personal property in possession of the defendant. The items and value of that property have been carefully ascertained and the evidence of it preserved. There is a good and sufficient bond to protect the petitioner, and upon a final settlement he will have opportunity to make good his claim, and charge the administrator with the intestate's share of the property in dispute, if he succeeds.

The defendant was properly appointed by the clerk as administrator in obedience to a statute which in many respects is mandatory and provides who is entitled to letters of administration in case of intestacy. The administrator cannot be removed solely because he has personal property in his possession in which it is claimed his intestate had a half interest, in the absence of any findings of bad faith and fraudulent concealment. We think the learned judge below mistook the true purport of the case upon which he relied. *Simpson v. Jones*, 82 N. C. 323, 325. In that case the administrator was removed because his fidelity and good faith was successfully challenged. He failed to make a defense to a suit brought against his intestate's estate, because he had a personal interest in the recovery, and the administrator alone could make such defense. The court said, "The distributees are entitled to have an efficient defense to the action made in both answer and proofs, and it is apparent the defendant has not come up to his measure of official obligation." In the case at bar the distributee is at no disadvantage. He may contest the title to this property in dispute in a proceeding by himself against the defendant and his bond for a final accounting and settlement of the estate.

In the case of *In re Dixon*, 72 S. E. 72, at this term, we directed the removal of a guardian because he set up an unwarranted claim to his ward's real property and gave no account of its rents and profits. His ward is his own child and helpless to assert her claim to the present income of her property against him. It was manifest she needed some disinterested person to assert her rights for her.

The judgment of the judge of the superior court is reversed, and the judgment of the clerk affirmed.

Reversed.

(156 N. C. 130)

### HOWIE v. SPITTLE.

(Supreme Court of North Carolina. Oct. 4, 1911.)

#### 1. EXECUTION (§ 431\*)—EXECUTION AGAINST THE PERSON—JURISDICTION TO ISSUE.

Revisal 1905, § 727, provides for arrest in an action of tort, and section 625 provides that when execution against a judgment debtor, in an action in which defendant might have been arrested, is returned unsatisfied, an execution against his person may issue, and section 598 provides for a stay of execution by a bond. After judgment for a tort against defendant and the return of an execution against property unsatisfied, the court issued execution on which defendant, who had not given the bond provided by section 598, was arrested. *Held*, that the only method of staying execution was that provided by section 598, and that the superior court had jurisdiction to issue the final process for arrest.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1212; Dec. Dig. § 431.\*]

#### 2. HABEAS CORPUS (§ 17\*)—PROCEEDINGS REVIEWABLE — COMMITMENT ON EXECUTION AGAINST PERSON.

Under the express provisions of Revisal 1905, § 1822, subsec. 2, a petitioner imprisoned under a final process of a court of competent jurisdiction cannot sue out a writ of habeas corpus.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 13; Dec. Dig. § 17.\*]

#### 3. EXECUTION (§ 442\*)—RELEASE FROM COMMITMENT ON EXECUTION AGAINST PERSON.

A petitioner confined upon a writ of execution against the person is not entitled to give bail pending his appeal to this court in a civil action.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1254; Dec. Dig. § 442.\*]

**Certiorari to Superior Court, Union County; Ferguson, Judge.**

**Certiorari by Henry Spittle, by his guardian ad litem, to revise the action of the superior court in denying a writ of habeas corpus. Affirmed.**

The following is the order sought to be reviewed: "The above guardian ad litem having filed his petition that his ward be discharged from the custody of the sheriff of Union county, and upon said petition being heard, and it appearing to the court that the action was for tort, and that final judg-

ment was rendered at the August term of Union superior court, in which judgment it was provided for execution to issue against the property of said Henry S. Spittle, and, if the judgment could not be collected by execution against his property, that execution should issue against the person of the said Henry Spittle, the execution against the property having been returned, showing that no property of the said Henry Spittle could be found subject to such execution, execution issued against the person, by reason of which and the said final judgment the sheriff of Union county has the said Henry Spittle in custody in the common jail of Union county. The court is of the opinion that it has not the power under law to grant the writ of habeas corpus whether prayed for by the guardian ad litem or the said Henry Spittle. The petitioner excepts and appeals to the Supreme Court. The petitioner prays the court to grant bail pending the appeal to the Supreme Court. The court is of the opinion that under the law it has not the power to grant bail, to which the petitioner excepts, and appeals to the Supreme Court."

Williams, Lemmond & Love, for petitioner. Stack & Parker, opposed.

BROWN, J. [1] The petitioner is the defendant in a civil action brought against him by Ruth Howie for an injury to her person, a tort, according to the complaint. Upon issue joined she obtained a verdict and judgment for \$250. The petitioner appealed to the Supreme Court, which appeal has not yet been heard. He gave no bond to stay execution, so an execution was issued against his property, which was returned unsatisfied. An execution was issued against his person under which he was taken in custody and confined in the jail of Union county. Before he was arrested, he filed an inventory of his property and a list of his creditors, as provided by section 1930, Revisal 1905, and attached his affidavit thereto, and asked to be exempt from arrest. We will not review the correctness of the judgment rendered, nor consider the exceptions taken on the trial. They will be passed upon, and the assignments of error considered when the appeal is heard.

The only question we can now consider is as to the jurisdiction of the court to render the judgment and issue the final process under which the petitioner has been arrested. The cause of action, as set out, is an injury to the person of the plaintiff in the execution, which is a tort, and under Revisal, §§ 625, 727, when an execution against property is returned unsatisfied, an execution against the person may issue upon such judgment. When the appeal was taken, the law provided but one method of staying execution, and that was by giving a bond securing

the judgment. This the petitioner has failed to do. Revisal, § 598, and cases cited.

[2] The superior court had complete jurisdiction to render the judgment, and therefore the petitioner is imprisoned under the final process of a court of competent jurisdiction. Under such conditions the writ of habeas corpus may not successfully be sued out. The statute forbids it. Revisal, § 1822, subsec. 2; *Ledford v. Emerson*, 143 N. C. 536, 55 S. E. 969, 10 L. R. A. (N. S.) 362. The petitioner contends that he is entitled to his discharge under the insolvent debtor's law. There are two methods provided in the Revisal for the discharge of insolvent debtors. One relates to those under arrest. Section 1920 et seq. The other relates to defendants in civil actions not under arrest. Section 1930 et seq. The petitioner was not under arrest when he filed his petition, and there is nothing in the record to show that he has complied with the provisions of sections 1930 to 1933. To avail himself of that act he must show a valid order of discharge from imprisonment under sections 1932 and 1933. It is not claimed that he has complied with sections 1920 to 1929.

[3] We agree with the judge below that the petitioner is not entitled to give bail pending his appeal to this court in the civil action, but he may give bond to stay execution. There is no provision of law authorizing bail in lieu of such bond, although there is a provision for his giving bail before the clerk of the superior court of Union county during the pendency of and until the final determination of the proceedings under the insolvent debtor's act. Rev. § 1936.

The judgment is affirmed.

(156 N. C. 174)

ADAMS v. KINSTON & C. R. & L. CO.  
(Supreme Court of North Carolina. Oct. 4, 1911.)

1. MASTER AND SERVANT (§ 265\*)—DEATH OF SERVANT—RAILROADS—COLLISION—PRESUMPTION OF NEGLIGENCE.

In an action against a railroad for the death of a servant due to a collision, the collision itself raises a presumption of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 881; Dec. Dig. § 265.\*]

2. MASTER AND SERVANT (§ 137\*)—DEATH OF SERVANT—RAILROAD COLLISION—OPERATION OF TRAIN.

That the train on which decedent was working at the time he was killed was running backward, before daylight, with no man or light on the rear car, was evidence of negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 137.\*]

3. MASTER AND SERVANT (§ 281\*)—DEATH OF SERVANT—RAILROADS.

In an action for death of a servant while riding on one of defendant's trains to his work, evidence held sufficient to warrant a finding that the man who ordered decedent to go on the train was in charge thereof and had authority to control its movements, and that decedent in obeying such directions was not violating orders

of defendant's superintendent, a superior servant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 281.\*]

#### 4. APPEAL AND ERROR (§ 1002\*)—QUESTIONS OF FACT—REVIEW.

The Supreme Court cannot pass on a conflict of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

#### 5. APPEAL AND ERROR (§ 927\*)—PRESUMPTIONS—RULING ON MOTION FOR NONSUIT.

In reviewing a denial of a motion for a nonsuit, the Supreme Court must assume the truth of the evidence for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2912; Dec. Dig. § 927.\*]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Action by Josephine F. Adams against the Kinston & Carolina Railroad & Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This action is to recover damages on account of the death of the plaintiff's intestate, which it is alleged was caused by the negligence of the defendant. The defendant denies negligence, and alleges that the intestate was guilty of contributory negligence. The intestate was killed on the 24th day of January, 1910, which was on Monday, while on the train of the defendant, by a collision between the train and two box cars, which had been left on the track of the defendant on the preceding Saturday evening. There was evidence that the intestate was foreman of the track of the defendant, and that he was going out on the train to work on the track. The plaintiff contended that he was on the train by direction of one Weeks, a representative of the defendant, and that he knew nothing of the two cars on the track. The defendant contended that Weeks had no authority to act for it; that the intestate had been ordered by one Hayes to go out Monday morning with the regular engineer Sanderson; that he disobeyed this order and went with the fireman, one Davis; that the intestate was in charge of the train on Monday, and on the Saturday preceding; and that he knew the cars were on the track. At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted. There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

G. V. Cowper and Rouse & Land, for appellant. E. R. Wooten, McLean, Varser & McLean, and Loftin & Dawson, for appellee.

ALLEN, J. There is ample evidence of negligence on the part of the defendant.

[1] The collision raises a presumption of negligence. Kinney v. Railroad, 122 N. C. 361, 30 S. E. 313; Marcom v. Railroad, 126

N. C. 200, 35 S. E. 423; Wright v. Railroad, 127 N. C. 229, 37 S. E. 221; Stewart v. Railroad, 187 N. C. 689, 50 S. E. 312.

[2] In addition to this presumption, there is evidence that the train was running backward, before daylight, with no man or light on the rear car, which is evidence of negligence. The defendant says, however, that these principles do not militate against its contention, and that, upon the whole evidence, a judgment of nonsuit ought to have been entered.

[3] Its counsel says in his brief: "The vital questions, therefore, arising in this appeal, are: (1) Did Weeks assume authority to act as conductor on the morning in question? (2) If so, did the defendant authorize him to so act or knowingly acquiesce in his assumption of authority to such an extent as to ratify what he did and become responsible for his conduct? (3) Even granting, for the sake of argument, that the first and second propositions could be answered affirmatively, then as a matter of law could Adams, knowing that Hayes was superintendent and was the representative of the defendant who had employed him, disobey the express and specific orders of Hayes, a superior officer, in order to carry out the orders of Weeks, admittedly an inferior to Hayes (even if it could be said that he had any connection with the defendant)? (4) It appearing in the plaintiff's own testimony that Adams knew Weeks was not conductor on the morning of the injury, the testimony of the plaintiff showing that one Singleton had been employed the Friday before and that Weeks was no longer assuming to hold the position, could said Adams proceed to obey Weeks' orders except at his own peril?" If we understood the evidence as the defendant's counsel construes it, we might agree with his conclusion, but we do not. In our opinion there is evidence that Weeks had authority to control the movement of the train, and that the intestate was not acting in violation of directions given him by Hayes. There is also evidence that the intestate did not know that the cars were on the track. A witness for the plaintiff, C. C. Bell, testifies that Weeks was acting as assistant conductor and manager of the defendant; that he gave instructions to Davis, who was the acting engineer, as to the movements of the train; that Davis acted on his orders; that Weeks had been acting as conductor of the train; that the train was running backward at the time of the collision, with no light or man on the rear; and that he was on the train with the intestate on Saturday, and that the intestate was at that time making up his pay rolls, and did not know the cars were left on the track. He also testifies to being present on Sunday and hearing the conversation between the superintendent, Hayes, and the intestate, as follows: "Q.

Where was it Mr. Hayes gave you instructions on Sunday? A. At the office. Q. Who else? A. Mr. Adams and myself. Q. You say Mr. Hayes told Mr. Adams to take Davis as engineer? A. No, sir; I didn't say so. Q. Did he tell you to put the hand car on top of the flat car? A. Yes. Q. What time was this? A. Somewhere between 11 and 12 o'clock. Q. Why did you go there on Sunday? A. It was the usual thing. Mr. Adams would go down on Sunday between 11 and 12 o'clock to get orders for Monday. That was Mr. Hayes' order to go down on Sunday and get orders for Monday." The regular engineer was sick, and for this reason did not run the train on Monday, and Weeks knew this. Another witness testified he had heard Weeks give orders as to the running of the trains in the presence of Hayes without objection or protest.

[4, 5] There was evidence on the part of the defendant directly contradicting the evidence of the plaintiff, but we cannot pass on this conflict of evidence, and for the purpose of the motion for nonsuit must accept the evidence of the plaintiff to be true.

Upon a review of the record, we find no error.

No error.

(156 N. C. 155)

#### HOOKER v. NORFOLK & S. R. CO.

(Supreme Court of North Carolina. Oct. 4, 1911.)

#### 1. WATERS AND WATER COURSES (§ 119\*)—SURFACE WATER—DIVERSION.

Where defendant railroad company, in constructing its roadbed, conveyed water from its natural course by lateral ditches into a stream flowing through plaintiff's land, and thereby caused the stream to overflow onto plaintiff's land, to his damage, defendant was liable for permanent damages so caused.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 131-134; Dec. Dig. § 119.\*]

#### 2. TRIAL (§ 267\*)—REQUESTED CHARGE—INSTRUCTIONS GIVEN.

A prayer for instructions need not be given in its exact language, if the general charge is sufficiently responsive, and gives a correct statement of the law applicable to the question presented.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672; Dec. Dig. § 267.\*]

#### 3. PARTIES (§ 52\*)—NEW PARTIES—ADDITION PENDING SUIT.

Where land, alleged to have been damaged by a railroad's increase of the flow of a water course, was held under a deed to H. and wife, and the question determined related to permanent damages, the wife was a proper, if not a necessary, party, and, in the absence of any suggestion of surprise by defendant, it was proper to permit her to be joined after the jury was impaneled.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 83; Dec. Dig. § 52.\*]

Appeal from Superior Court, Pitt County; Geo. W. Ward, Judge.

Action by T. E. Hooker against the Norfolk & Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

There was allegation, with evidence, on the part of plaintiff, tending to show that defendant company, in the construction of its roadbed, had wrongfully diverted surface waters from their natural watershed, "caused same to flow into Patrick's branch or Hardee's run," rendering same "insufficient and incapable of discharging said waters by reason of the increased servitude put upon them by said wrongful act, thereby causing said branch or run to overflow and pond back its waters upon plaintiff's land, to his great damage," etc. The allegations were denied, and evidence offered by defendant to support such denial, and tending further to show that the injuries complained of were in great part caused by a failure to clear out the run below said land, and were not properly attributable to any wrongful diversion of water by defendant. On issues submitted, the jury rendered the following verdict: "(1) Did the defendant, in digging its lateral ditches in the construction of its railroad, wrongfully cause water to be diverted in and down Patrick's run, and thereby injure and damage the lands of plaintiff, as alleged in the complaint? Answer: Yes. (2) What permanent damages has plaintiff sustained thereby? Answer: \$600." Judgment on the verdict, and defendant excepted and appealed.

Moore & Long, for appellant. F. G. James & Son, for appellee.

HOKE, J. (after stating the facts as above). [1] It is now well established with us that "water cannot be diverted, but may be increased and accelerated." The principle obtains in respect to both corporations and individual owners of property, and has been applied and illustrated in many well-considered decisions of the court. *Roberts v. Baldwin*, 151 N. C. 407, 66 S. E. 346; *Mizell v. McGowan*, 129 N. C. 93, 39 S. E. 729, 85 Am. St. Rep. 705; *Hocutt v. Railroad*, 124 N. C. 214, 32 S. E. 681; *Parker v. Railroad*, 123 N. C. 71, 31 S. E. 381. Stated in a way more directly relevant, it was held, in *Hocutt's Case*, supra, that: "Neither a corporation nor an individual can divert water from its natural course, so as to damage another; neither can they cut ditches through a watershed and conduct water to a water course, insufficient to carry it off, whereby the water is flooded upon the lands of another." There was testimony on the part of plaintiff, tending to show that the defendant company, in making its roadbed, had, by lateral ditches, conveyed water from its natural course and watershed into a stream called Patrick's branch, or Hardee's run, a natural water course, flowing through plaintiff's lands, and

had thereby overcharged said stream, causing same to overflow and pond back upon said lands, to plaintiff's great damage. There was much testimony on the part of defendant in denial and rebuttal of plaintiff's evidence, and tending to show that there had been no diversion of water into said run, and that the injury complained of was caused in fact and in truth by a failure to properly clear said run of obstructions therein, upon and below the lands of plaintiff. Under a clear and comprehensive charge, in which the principles applicable were correctly stated by the court, the jury have accepted the plaintiff's version of the case, and we find no error that gives defendant any just ground of complaint. We cannot approve the position that recovery should be denied because the diverted water, before reaching plaintiff's lands, where the damage occurred, first passed through the ditches of an adjoining proprietor. Under the charge, the jury have found that the injury was caused by reason of the water being diverted, and on the facts in evidence we do not see that the existence of these ditches could prevent the said diversion from being the proximate cause of the injury. The position, however, is not open to defendant, on this testimony, for it appeared that the ditches in question were enlarged by the neighbor, at the instance of defendant, and the work was paid for by the company, in order to provide for the increased flow of water. The court also laid down the correct rule as to the admeasurement of damages, and the charge was fully responsive to defendant's prayer for instruction on that question.

[2] It is well recognized that a prayer for instructions need not be given in its exact language, if the general charge is sufficiently responsive, and gives a correct statement of the law applicable to the question presented. *Patterson v. McIver*, 90 N. C. 493; *Edwards v. Phifer*, 121 N. C. 391, 28 S. E. 548.

[3] Nor is the objection well founded that the wife of the original plaintiff, T. E. Hooker, was joined as coplaintiff after the jury was impaneled. True it has been held in this state "that a court has no power to convert a pending action that cannot be maintained into a new one by admitting a new party plaintiff, who is solely interested." *Merrill v. Merrill, Adm'r*, 92 N. C. 657. But no such case is presented here. The land alleged to be damaged was held under a deed to T. E. Hooker and his wife, and, while it seems the husband might have proceeded alone, if the same had been prosecuted for a simple trespass (*West v. Railroad*, 140 N. C. 620, 53 S. E. 477), inasmuch as the question was submitted and determined on an issue as to permanent damages, the wife was a desirable, and perhaps a necessary, party, in order that on payment of permanent damages an easement might pass to the defendant.

*Porter v. Railroad*, 148 N. C. 563, 62 S. E. 741. There was no suggestion, certainly no indication, of any surprise by reason of this change of parties. So far as appears, the witnesses on the issues were the same in the one case as in the other, and the entire matter seems to have been fully presented to the jury. We find no reason for disturbing the conclusion they have reached, and the judgment on the verdict must be affirmed.

No error.

(156 N. C. 107)

McLAWHORN et al. v. HARRIS et ux.  
(Supreme Court of North Carolina. Oct. 4, 1911.)

1. JURY (§ 83\*)—QUALIFICATIONS—DEPUTY SHERIFF.

While it is improper for a deputy sheriff, who summons jurors, mingles with, and has charge of, them, to serve as a juror during the term of court he is acting for the sheriff, his duties as such do not disqualify him to so serve.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 403; Dec. Dig. § 83.\*]

2. MORTGAGES (§ 362\*)—TRUST DEEDS—FORECLOSURE—PURCHASE BY BENEFICIARY.

Where a sale under a deed of trust was made to the highest bidder without any fraud, it was no objection that the property was purchased by one of the beneficiaries under the deed, under the rule that the holder of the bonds secured by a deed of trust may bid at a sale by the trustee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1060-1084; Dec. Dig. § 362.\*]

3. MORTGAGES (§ 372\*)—DEED OF TRUST—FORECLOSURE—CONVEYANCE BY PURCHASER.

Evidence that one of the beneficiaries under a deed of trust purchased the land at a sale by the trustee on foreclosure, on March 24, 1894, and conveyed the land to one of the grantors in the deed on the 28th of the following May, for the same price that the grantors in the deed had agreed to pay for the land, did not require a finding, as a matter of law, that the purchaser at the sale purchased for his subsequent grantee, and not for himself.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 372.\*]

4. TENANCY IN COMMON (§ 19\*)—OUTSTANDING TITLE.

A cotenant, while the relation exists, may not acquire an outstanding title or lien on the common property and hold it for his exclusive benefit; and if he acquires title from a sale under a deed of trust, made by all the cotenants for a debt binding all, and the sale is caused by his failure to pay his share of the debt, he cannot hold the land against his cotenants.

[Ed. Note.—For other cases, see *Tenancy in Common*, Dec. Dig. § 19.\*]

5. TENANCY IN COMMON (§ 8\*)—DEED OF TRUST—FORECLOSURE—TERMINATION OF TENANCY—PURCHASE BY COTENANT.

Where land held in common was sold on foreclosure of a deed of trust, and purchased by one of the beneficiaries under the deed for the benefit of himself or his firm, the unity of possession essential to the cotenancy was thereby dissolved, after which one of the original cotenants could purchase the land for his own benefit.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 20; Dec. Dig. § 8.\*]

Appeal from Superior Court, Pitt County; Ferguson, Judge.

Action by Tobe McLawhorn and others against Wm. Harris and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

The plaintiffs, children and heirs of Robert A. McLawhorn, deceased, bring this action against the feme defendant, Bettie Harris, only child and heir of L. Francis McLawhorn, deceased, to set up and establish a parol trust as against said Francis McLawhorn in the lands described in the pleadings, claiming to own one undivided half of the lands in common with the said Francis. His honor submitted these issues: "First. Did L. F. McLawhorn take title to said land from J. P. Elliott in trust, to hold one-half of the same for the benefit of plaintiffs? Answer: No. Second. At the time of the purchase of the land described in the complaint by L. F. McLawhorn, did he agree to take and hold said land as trustee for himself and the children of R. A. McLawhorn? Answer: No." The plaintiffs moved for a new trial. Motion overruled. The plaintiffs excepted and appealed from the judgment rendered.

Harry Skinner, for appellants. F. G. James & Son and L. I. Moore, for appellees.

BROWN, J. The land in controversy was conveyed to Robt. and Francis McLawhorn, brothers, in 1890, by Harry Skinner; the purchase price payable in cotton bonds. To secure the delivery of the cotton, certain bonds were taken, payable to the copartnership of Latham & Skinner, and secured by deed in trust to Harry Skinner. Before the death of Robert McLawhorn, which occurred in 1893, the cotton bonds were duly assigned by Latham & Skinner to Elliott Bros., of Baltimore. In default of the discharge of the bonds, the land was advertised and sold under the trust on March 24, 1894, by Harry Skinner, who conveyed it on said date to J. P. Elliott, of said firm. On May 28, 1894, J. P. Elliott conveyed the land to L. Francis McLawhorn, defendant Bettie's father, and took from him on same day a mortgage on the land securing the purchase price, to wit, 100 bales, 500 pounds each, merchantable lint cotton. This is the same price in cotton which the brothers, Robert A. and Francis McLawhorn, contracted to pay Latham & Skinner for the land.

There are nine assignments of error, all of which have received our consideration. None of them are of sufficient importance to justify an extended discussion, except the sixth.

[1] As one exception relates to a juror, we say that we do not think it is well that deputy sheriffs who summon jurors, mingle with, and have charge of, them, should serve as such during the terms of court when they are acting for the sheriff. In their discretion, the trial judges may well excuse them; but there is no statute, of which we are aware, which disqualifies them. But in this

case Manning, the juror challenged, was not a deputy sheriff, but had been an officer in charge of another jury.

There were certain deeds and records introduced, over plaintiff's objection, which are excepted to as irrelevant and incompetent; but it is manifest that they did not bear upon the real issue, and, if erroneously received, the error was entirely harmless. If there is any error, it lies in the refusal of the court to charge the jury that if they believe the evidence in the case to answer the first issue, "Yes."

The plaintiffs rest their case upon two contentions, viz.: (a) That Francis McLawhorn purchased the land from J. P. Elliott in May, 1894, upon an express agreement that he would hold the land in trust for himself and the plaintiffs, his brother's children. This claim is embodied in the second issue. Under this issue, the plaintiffs attempted to establish an express trust; and it must be admitted that they introduced parol evidence which would have well warranted the jury in finding it for them. But the fact was controverted, and other evidence offered tending to deny the existence of any such agreement. The charge of the court upon this phase of the case presented the plaintiffs' contention with fullness and clearness, and was as favorable to them as they were entitled to. (b) The other contention is based upon two theories: First, that J. P. Elliott bought at his own sale, and consequently the sale was void; that the relation of mortgagor and mortgagee continues to exist; and that, therefore, the tenancy in common between the plaintiffs and Francis McLawhorn has never been severed.

[2] We do not find anything in the record upon which to found such claim. The pleadings state that the sale was made by Skinner, the trustee in the deed, and the deed to Elliott executed by him and introduced by plaintiffs contains every essential recital, among others, that Skinner advertised the land according to the terms of the deed, and sold it to Elliott, the highest bidder. There is no evidence whatever which tends to controvert this, or to show that Elliott or his attorney made the sale, or controlled it. As the holder of the bonds secured in the deed, Elliott had a right to bid at the sale by the trustee. It was not his sale, but Skinner's, the person appointed by the mortgagors to make it, and in whom reposed the legal title. There is no evidence or even suggestion of any fraud, undue advantage, or oppression. So far as the record discloses, the sale was fair, open, and "above board," and made by the person vested with the power to sell.

[3] The second theory is that J. P. Elliott purchased the land, not for himself, but for Francis McLawhorn, and that, inasmuch as he could not legally acquire title to the land adverse to his cotenants at said sale, Elliott could not do so for him. The only evidence



upon which to base this contention is that Elliott bought the land on March 24, 1894, and conveyed it to L. F. McLawhorn on the 28th of the following May, and the further fact that he sold it for 100 bales of cotton, the same price that the two brothers had agreed to pay Latham & Skinner for it. These may be suspicious circumstances, but it is manifest they do not warrant the charge asked for by plaintiffs. They are open to explanation, and different inferences may be drawn from them. They were properly submitted to the jury for what they were worth.

[4] Assuming that Elliott purchased the land for himself or his firm, to save his debt, we cannot agree with the learned counsel for plaintiff that Francis McLawhorn could not afterwards acquire title adverse to the plaintiffs, his former cotenants. We recognize the just principle that a cotenant, while such relation exists, may not acquire an outstanding title or lien upon the common property, and hold it for his own exclusive benefit. His cotenants may share it with him. *Jackson v. Baird*, 148 N. C. 29, 61 S. E. 632, 19 L. R. A. (N. S.) 591. But, nevertheless, a tenant in common as such is not a trustee for his cotenant. *Saunders v. Gatlin*, 21 N. C. 92. It is also true that where a cotenant in common acquires title from a sale under a deed of trust made by all the cotenants, for a debt binding all, and the sale is caused by his failure to pay his share of the debt, he cannot, under his rights so derived, hold the land against his cotenants. *Read v. Bachman*, 61 W. Va. 452, 57 S. E. 789, 123 Am. St. Rep. 996.

[5] But the jury has not accepted the theory that Elliott purchased for Francis McLawhorn; and there was very little evidence, so far as Elliott was concerned, to support that claim. Therefore, when the trustee conveyed all the land to Elliott, the unity of possession was destroyed, and the tenancy in common ended. Unity of possession is the only unity essential to such cotenancy; anything that operates to destroy this unity will dissolve the cotenancy in common. *Sutton v. Jenkins*, 147 N. C. 16, 60 S. E. 643; 17 Am. & Eng. Ency. 711. After the tenancy in common is actually dissolved, there is nothing in the law which forbids a former tenant in common from acquiring the entire property. He then has the same rights as any other individual. *Sutton v. Jenkins*, supra; *Jackson v. Baird*, 148 N. C. 29, 61 S. E. 632, 19 L. R. A. (N. S.) 591.

Upon a review of the record, we find no error.

(156 N. C. 589)

MORTON et al. v. BLADES LUMBER CO.  
et al.

(Supreme Court of North Carolina. Oct. 4, 1911.)

Appeal from Superior Court, Craven County; Ward, Judge.

Action by W. F. Morton and others against the Blades Lumber Company and others. From a judgment rendered after decision by the Supreme Court, defendant Mollie E. Morton appeals. Affirmed.

For former opinion, see 154 N. C. 337, 70 S. E. 623.

W. D. McIver, for appellant. Guion & Guion and Moore & Dunn, for appellees.

PER CURIAM. This case is reported in 154 N. C. 337, 70 S. E. 623. When our opinion was certified down, his honor, Judge Ferguson, rendered a final judgment, to which the defendant Mollie E. Morton excepted and from which she appealed.

We are of opinion that the judgment is strictly in accord with the opinion of this court; but we suggest that the court fix a time within which the timber described in the judgment be removed, which should not exceed probably 12 months from the beginning of the next civil term of the superior court of Craven county. Let the costs of this appeal be taxed against defendant Mollie E. Morton.

Affirmed.

(156 N. C. 112)

BROCK v. METROPOLITAN LIFE INS.  
CO.

(Supreme Court of North Carolina. Oct. 4, 1911.)

1. INSURANCE (§ 665\*)—MISREPRESENTATIONS—BREACH OF WARRANTY—PRIMA FACIE CASE.

In an action on a life policy, evidence held to rebut a prima facie case of misrepresentations made by the written statement of the claimant, and to authorize a verdict for him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1713; Dec. Dig. § 665.\*]

2. EVIDENCE (§ 584\*)—WEIGHT—"PRIMA FACIE CASE."

A "prima facie case" is only evidence, stronger than ordinary proof, which the party against whom it is raised is not bound to overthrow by the greater weight of evidence, but which, if he fails to introduce proof to overcome it, will be sufficient to sustain an adverse verdict, though not conclusive.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 584.\*]

For other definitions, see Words and Phrases, vol. 6, p. 5549.]

3. EVIDENCE (§ 471\*)—PHYSICAL CONDITION—DISEASE.

In an action on a life policy, evidence of nonexpert witnesses that they did not know whether insured had suffered from pneumonia prior to her application was not objectionable, as allowing nonexpert witnesses to testify that assured had never had pneumonia.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.\*]

4. INSURANCE (§ 655\*)—MISREPRESENTATION—EVIDENCE.

Where insurer pleaded misrepresentation as a defense to an action on a life policy, in that assured had falsely stated in her application that she had never had pneumonia or consumption, evidence of the medical examiner that he

recommended the risk, not on her statement that she had never had pneumonia or consumption, but on his own examination and diagnosis of her physical condition, was admissible as some evidence that she had never suffered from pneumonia, consumption, or any other serious disease.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 655.\*]

Appeal from Superior Court, Lenoir County; Justice, Judge.

Action by James E. Brock against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Aycock & Winston and Geo. V. Cowper, for appellant. D. L. Ward, Loftin & Dawson, and McLean, Varser & McLean, for appellee.

WALKER, J. This action was brought to recover the aggregate amount of two policies of insurance, one for \$500 and the other for \$154, which were issued, in July and September, 1908, by the defendant company on the life of Emma Davis, the daughter of the plaintiff. The case was tried upon issues to which there was no exception, and which, with the answers thereto, were as follows: "(1) Did the insured, Emma Davis, represent in her application for the policy for \$500 that she had never had pneumonia? Answer: Yes. (2) Had Emma Davis had pneumonia prior to the filing of her application for the policy for \$500? Answer: No. (3) Did the insured, Emma Davis, represent in her application for the policy for \$500 that she had never had consumption? Answer: Yes. (4) Had the insured, Emma Davis, prior to said application, ever had consumption? Answer: No. (5) Did the insured, Emma Davis, in her application for the policy for \$500, represent that she had not been under the care of any other physician within two years, for any serious illness, than Dr. Tull, for chills, May 19, 1908? Answer: Yes. (6) Was the insured under the care of any physician within two years, for any serious illness, other than Dr. Tull, for chills, May 19, 1908? Answer: No. (7) Did the insured, in her application for the policy for \$154, represent that she had not been attended by a physician for any serious disease or complaint? Answer: Yes. (8) Had the insured, Emma Davis, prior to said application, been attended by any physician for any serious disease or complaint? Answer: No. (9) What amount, if any, is plaintiff entitled to recover of defendant on said policies? Answer: \$654, with interest from June 9, 1909." Judgment was given for the plaintiff, and defendant appealed.

[1] It appears that in the application for the policy the insured represented and stated that she had never had pneumonia or consumption; nor had she ever been treated by a physician for any serious illness. She

was not able to pay the premium on the policy, or even to take out the policy, and her father did this for her, and after her death, as her next of kin and the beneficiary under the policy, he filed with the company a proof of loss, in which he stated that she had an attack of pneumonia, in February, 1908, prior to the date of her application, of about three weeks duration, and had chills and fevers occasionally all the time. There was evidence, we think, to show that this was a mistake, though it must be admitted that the state of the entire evidence was such as to justify the claim of the defendant's counsel that it preponderated in his favor. But we are not permitted to interfere with verdicts, by determining with whom the mere weight of the evidence lies. If there is any testimony fit for the jury to consider upon the issue made by the pleadings, we must abide by the verdict, and consider and decide only upon questions or inferences of law. The court charged the jury, substantially, with reference to the statement of the plaintiff in the proof of loss, or in what is called in the case his written claim for the insurance, that it was prima facie evidence of the fact that the deceased had pneumonia in 1908, and was otherwise ill, as stated, but that it devolved upon the plaintiff to satisfy them, upon all the evidence, that she did not have pneumonia prior to the date of her application. The defendant's counsel, in their able and learned brief, state that "it was around this point that the battle waged from the beginning to the end of the case." They requested the court to charge that there was not sufficient evidence to rebut this prima facie case made by the statement of the plaintiff in the application. Assuming, for the sake of discussion, that the judge laid down a correct rule of law, as to the force and effect of plaintiff's statement in the proof of loss, as to the deceased having had pneumonia—and we do not mean to question it in the least—we yet are of the opinion that there was evidence to rebut or overthrow the prima facie case thus raised. There was testimony, for example, which tended to show that the plaintiff was mistaken, and was speaking from hearsay, and not from his personal knowledge, when he made the statement, besides other competent and sufficient proof that the insured had not been a victim of pneumonia or consumption, or any other serious malady.

[2] The case, in this respect, was fairly submitted to the jury by Judge Justice, with his accustomed lucidity and accuracy in stating legal principles, as applied to the essential facts of a case; and, moreover, in this particular instance, the charge of his honor, if anything, placed the burden a shade too much upon the plaintiff; for where a prima facie case is established by the proof of a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

single fact, or a series or concatenation of facts (a chain of evidence, as we call it), it is, at last, as we will see has been said by the Supreme Court of the United States, only proof, though it may be strong, of the ultimate fact or facts to be shown, as necessary to the party's recovery or success. It is not conclusive, but must be submitted to the jury, either by itself or along with the other evidence, for them to find the ultimate, final, and constituent facts which, in law, are the true basis of recovery, whether by plaintiff or defendant. In other words, and to make this doctrine clearer, if possible, the prima facie case is only evidence, stronger, to be sure, than ordinary proof, and the party against whom it is raised by the law is not bound to overthrow it, and prove the contrary by the greater weight of evidence; but if he fails to introduce proof to overcome it he merely takes the chance of an adverse verdict, and this is practically the full force and effect given by the law to this prima facie case. He is entitled to go to the jury upon it and to combat it, as being insufficient proof of the ultimate fact under the circumstances of the case; but he takes the risk in so doing, instead of introducing evidence. We believe this is thoroughly in accord with our authorities.

In *Shepard v. Telegraph Co.*, 143 N. C. 244, 55 S. E. 704, 118 Am. St. Rep. 796, the present Chief Justice, citing *Board of Education v. Makely*, 139 N. C. 35, 51 S. E. 786, and adopting as a correct statement of the law what is quoted in that case from 1 Elliott on Evidence, § 139 (not only a standard work, but one of the best we have on the law of evidence), said: "The burden of the issue—that is, the burden of proof—in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts; but the burden or duty or proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a prima facie case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a prima facie case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence; for the actor must fail, if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party, or because the scales are equally balanced." The Chief Justice, in commenting upon this rule, stated the law of this state thus: "The burden of the issue as to negligence was ap-

on the plaintiff. If no evidence had been offered in rebuttal, the court might have told the jury that if they believed the evidence to answer that issue, 'Yes.' But, when evidence was offered in rebuttal, it was not incumbent upon the defendant to prove it by a preponderance of testimony; but upon all the testimony it was the duty of the plaintiff to satisfy the jury by a preponderance of the evidence that the defendant was guilty of negligence." This agrees with what was said in *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493, and *Stewart v. Carpet Co.*, 138 N. C. 66, 50 S. E. 562, and *Winslow v. Hardwood Co.*, 147 N. C. 277, 60 S. E. 1130, except in this: That the jury must be satisfied upon the prima facie case of the right to a verdict. So in this case the judge might well have submitted the prima facie case alone to the jury, if there had been no other evidence, for their consideration, and still he should have charged them that it is not conclusive, but they must say whether it is really according to the truth of the matter; or, to adopt the idea as expressed by the Supreme Court of the United States, a prima facie case is, at the most, merely sufficient proof to establish the fact, and if not rebutted it remains sufficient, but is not conclusive. In the recent case of *Bailey v. State of Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191, the court says: "Prima facie evidence is sufficient evidence to outweigh the presumption of innocence, and, if not met by opposing evidence, to support a verdict of guilty. 'It is such as, in judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose.'" But the court also held that prima facie evidence is at last only some evidence of the main facts, sufficient, it is true, to support a verdict, but not absolutely controlling upon the jury, who may convict or not upon it, as they may see fit, or who, in a civil case, may find a verdict in accordance with it, or, by disregarding it as being insufficient to convince them, may return the opposite verdict. And so, in *Bailey v. State*, 161 Ala. at page 78, 49 South. at page 887 (same case), the court says: "It must be borne in mind that the rule of evidence fixed by the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment, if unrebutted, whether satisfied thereby of the guilt of the accused beyond a reasonable doubt or not. On the contrary, with such evidence before them, the jury are still left free to find the accused guilty or not guilty, according as they may be satisfied of his guilt, or not, by the whole evidence."

[3] It was objected and argued by defendant's counsel that the court had permitted nonexpert witnesses for the plaintiff to testify that the deceased had never had pneumonia; but we do not think their negative testimony can bear this construction. They

merely said, as we understand them, that they did not know whether or not she had suffered from this disease. They did not profess to say, or to give a medical opinion, upon facts known to them or otherwise, as to whether she had pneumonia. A fair interpretation of what they said would lead us to the inference that they simply had not heard of any such thing.

[4] The testimony of Dr. Pollock, the medical examiner of the company, that he recommended the risk, not upon her statement that she had never had pneumonia or consumption, but upon his own examination and diagnosis of her physical condition, was clearly competent. Of course, as contended by defendant's counsel, the question was, not whether the medical examiner was influenced in giving his certificate of her physical soundness by any statement she had made, but rather whether the *defendant* was induced thereby to issue the policy, or to enter into the contract of insurance with her; and his testimony was competent and relevant in this view to rebut the allegation that she had ever actually been afflicted with the diseases mentioned, for he stated, also, that she had not been so affected, and the very fact that he examined and "passed her," in view of the questions asked in the application, was some evidence, under all the circumstances of this case, that she had never suffered from pneumonia or consumption, or any other serious disease. We have found no error in the trial.

No error.

(156 N. C. 144)

**SHERROD v. MAYO et al.**  
(Supreme Court of North Carolina. Oct. 4, 1911.)

**1. PARTNERSHIP (§ 246\*)—FIRM REAL ESTATE—RIGHTS OF SURVIVING PARTNERS.**

Partners may, in the articles of copartnership, provide that firm real estate may be treated as personality, and sold by the surviving partner for the settlement of the firm affairs.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 519-523; Dec. Dig. § 246.\*]

**2. PARTNERSHIP (§ 246\*)—FIRM REAL ESTATE—RIGHTS OF SURVIVING PARTNER.**

Where real estate is purchased with firm funds, for firm purposes, a partner's share therein on his death descends to his heirs as realty, in the absence of any stipulation in the articles of copartnership providing that the realty may be treated as personality, and in the absence of firm debts.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 519-523; Dec. Dig. § 246.\*]

**3. PARTNERSHIP (§ 246\*)—FIRM REAL ESTATE—RIGHTS OF SURVIVING PARTNER.**

Where a partner in a firm purchased real estate with firm funds, for firm purposes, and conveyed his interest therein to a son, the son, on the partner's death, was entitled to the partner's share of the land after the payment of firm debts, in the absence of any stipulation in the articles of copartnership that real estate should be treated as personality, and sold by

the surviving partner for the settlement of the firm affairs.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 519-523; Dec. Dig. § 246.\*]

**Defendant's Appeal.**

**4. PARTNERSHIP (§ 245\*)—FIRM PERSONALTY—RIGHTS OF SURVIVING PARTNER.**

The surviving partner has the right to close up the firm affairs, reduce the personality to cash, and, under Revisal 1905, § 1579, the title to the personality vests in him, and not in the personal representative of the deceased partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 514-518; Dec. Dig. § 245.\*]

**5. PARTNERSHIP (§ 227\*)—FIRM INTERESTS—SALE BY PARTNER—RIGHTS OF PURCHASER.**

A buyer of a partner's share in the firm takes only the partner's interest, which is his share of the surplus remaining after payment of debts and the settlement of accounts between the partners; and where such partner's interest has no pecuniary value the buyer takes nothing.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 227.\*]

Appeal from Superior Court, Martin County; Geo. W. Ward, Judge.

Action by W. L. Sherrod, surviving partner of J. W. Sherrod & Bro., against N. J. Mayo, administrator of J. W. Sherrod, deceased, and another. From a judgment for plaintiff, granting insufficient relief, both parties appeal. Affirmed.

This is a civil action, brought by the plaintiff as surviving partner, against the administrator and the heir at law and son of John W. Sherrod, for a settlement of the copartnership estate, which consisted of a large number of tracts of land and a large quantity of personal property, used principally in farming operations. The plaintiff asked to be put in possession of all the lands and personal property belonging to the copartnership, some of which was in the possession of defendants, claiming the right to sell both lands and personal property as surviving partner, for the purpose of settling up the partnership. It is admitted that there are no copartnership debts outstanding due third parties. The cause was heard upon the pleadings and affidavits.

Upon the pleadings, affidavits, and admitted facts, plaintiff asked (1) that the plaintiff be decreed entitled to the possession of the entire partnership property, both real and personal; (2) that the defendants be restrained from interfering in any way with the plaintiff in custody, control, or management of the partnership property; (3) if the plaintiff is not entitled to a decree adjudging him the owner and entitled to the entire property of the partnership, for the purpose of winding up and settling the same, then that a receiver be appointed to take charge of the entire partnership property, and wind up and settle the partnership affairs under the

order of this court; (4) for reference and statement of account between the parties.

His honor ordered a reference to state the copartnership account since the last settlement, admitted to have been made between the partners in 1904; decreed that plaintiff, as surviving partner, is entitled to possession of the personal property, for the purpose of selling it and administering the same; and the court further decreed: "The motion of the plaintiff that he be placed in possession of that part of the real estate, which is above described as being in Edgecombe and Nash counties, as surviving partner, is denied."

The facts with respect to the real estate, are not in dispute, and are as follows: "(1) The lands described in the complaint, however conveyed in the deeds, were bought by J. P. W. Sherrod & Bro. with partnership funds. (2) It is also not in dispute, but is really admitted, and the court so finds, that there is sufficient personal property on hand, when sold and the proceeds collected, to pay every debt owing by J. W. Sherrod & Bro., including the debt owing each member of the firm by the firm. The court further finds that the only debts there are owing by the firm of J. W. Sherrod & Bro. are the debts owing to the members of said firm. (3) That on the 12th day of September, 1904, J. W. Sherrod, deceased partner of J. W. Sherrod & Bro., executed and delivered deed for all of his rights, title, and interest in the farms in Edgecombe county, known as Pittman place, Cutchin place, Pilpen place, and Watkins place, and all his interest in the personal property on each of said farms, to defendant John M. Sherrod. That said deed was registered in Edgecomb county on the ——— day of April, 1910. That the plaintiff in this cause had no knowledge or information as to the execution or delivery of said deed until after the institution of this suit, and shortly prior to the April term, 1911, of Edgecombe court. (4) It thus being a fact that it will take none of the real estate, under any circumstances, to settle any of the indebtedness or expenses incurred in winding up the estate, but that it would go entirely to the partners and their heirs, as tenants in common, the court is of opinion that it ought not to go into the hands of the surviving partner as such, and that he is not entitled to the possession of same as such surviving partner, nor ought he to be permitted to sell the real estate as such surviving partner for partition, but that the said surviving partner and heirs at law of the deceased partner are tenants in common, and either has a right to insist upon partition of the land in kind. Whereupon it is ordered that the motion of the plaintiff that he be put in possession of said lands as surviving partner is denied."

To so much of the order as denied the right of the plaintiff to take possession and

sell all the real estate of the copartnership, the plaintiff excepts and appeals.

W. J. Sherrod, G. H. A. Gilliam, and Justice & Broadhurst, for plaintiff. G. M. T. Fountain & Son and Bunn & Spruill, for defendants.

BROWN, J. It is the doctrine of the English courts that, as between partners and their heirs and representatives, for the purposes of the copartnership, real estate will be treated as personalty, if the partners have by the articles of copartnership so treated it and impressed upon it the character of personalty.

[1] There is no doubt that in this country, copartners may, by articles of copartnership, provide that the firm's real estate may be treated as personalty, and sold by the surviving partner for the settlement of the copartnership.

[2] In the absence of any such stipulation, it was a vexed question for a long time whether, after the dissolution of the firm by the death of one of the members, the debts being paid, the share of the deceased partner should be treated as personalty, and pass to the surviving partner for the settlement of the copartnership, or descend to his heirs at law as real estate.

Judge Story refers to the great diversity of juridical opinion upon this subject. The question was considered by this court in Summey v. Patton, 60 N. C. 601, 86 Am. Dec. 451, and it was then decided that, "where land is purchased by partnership, with partnership funds, and used for partnership purposes, upon dissolution of the firm by the death of one of the partners, his share of the land descends to his heir at law as real estate, and does not pass to his representative as personalty, in the absence of any agreement in the articles of copartnership." This case was approved and followed in Stroud v. Stroud, 61 N. C. 525, where it is held that real estate belonging to a copartnership is subject to dower of the widow of a deceased partner, subject, of course, to the payment of the partnership debts, in the absence of any provision to the contrary in the articles of copartnership. Patton v. Patton, 60 N. C. 572, 86 Am. Dec. 448. These cases are all cited and approved in Mendenhall v. Benbow, 84 N. C. 650. These decisions have settled the question in this state, and they are in accord with the great weight of authority in this country.

In the case of Shearer v. Shearer, 98 Mass. 107, the subject is elaborately discussed, and what is regarded as the American rule is embodied in the opinion, the substance of which is that the change of character of real to personal estate is worked, if at all, only for the purpose of adjusting and settling the affairs of the partnership, and when the debts are paid

the interest of the deceased partner will descend to his heirs.

The following authorities support the decisions of this court: *George on Partnership*, pp. 126, 127; *Story on Partnership*, § 92, p. 146; *Way v. Stebbins*, 47 Mich. 297, 11 N. W. 166; in which it is said: "Partnership lands are to be equally divided among survivors and the heirs of a deceased partner, when there are no partnership debts to be satisfied." *Foster's Appeal*, 74 Pa. 392, 15 Am. Rep. 553; *Yeatman v. Woods*, 6 Yerg. (Tenn.) 20, 27 Am. Dec. 452, and note 454; notes to 86 Am. Dec. 454.

So it has been held that upon the dissolution of a firm real estate may be divided by compulsory partition, when it is shown that it is not required to satisfy the liability of the partnership. *Pepper v. Pepper*, 24 Ill. App. 316; *Strong v. Lord*, 107 Ill. 25; *Lang v. Waring*, 25 Ala. 625, 60 Am. Dec. 533; *Shearer v. Shearer*, 98 Mass. 107; *Scruggs v. Blair*, 44 Miss. 406; note to 27 L. R. A. 353.

[3] The fact that the son and heir of the deceased partner claims his father's interest in a portion of the lands by deed, instead of inheritance, makes no difference. He is entitled to the deceased partner's share of the land after the debts are paid, whether he takes by purchase or by descent. *Wells v. Mitchell*, 23 N. C. 489, 35 Am. Dec. 757.

The judgment is affirmed.

#### Defendant's Appeal.

[4] The defendants excepted to so much of the judgment of the superior court as required the surrender by them to plaintiff as surviving partner, of the personal property in their possession belonging to the copartnership. It is well settled that the surviving copartner has the closing up of the partnership affairs, the reduction of its personal property to cash, and the settlement of the partnership affairs. *George on Partnership*, page 135. The reasons which in this country are regarded as sufficient to forbid the sale of real estate, except when necessary to pay the debts of the copartnership, or for its proper settlement, do not apply to personalty. The title to that vests at once in the survivor, and not in the personal representative of the deceased partner, and he is entitled to its possession. *Revisal*, § 1579; *Walker v. Miller*, 139 N. C. 448, 52 S. E. 125, 1 L. R. A. (N. S.) 157, 111 Am. St. Rep. 805; *Weisel v. Cobb*, 114 N. C. 22, 18 S. E. 943; *Hodgin v. Bank*, 128 N. C. 110, 38 S. E. 294.

[5] Purchasers of the share of an individual partner can only take his interest. That interest, and not a share of the partnership personal effects, is sold, and it consists of the vendor's share of the surplus

which remains after payment of the partnership debts and the settlement of accounts between the partners; and if, upon the winding up of the firm, the transferring partner's interest has no pecuniary value, the transferee takes nothing by his transfer. *Cyc.*, vol. 30, p. 458; *Daniel v. Crowell*, 125 N. C. 519, 34 S. E. 684; *Ross v. Henderson*, 77 N. C. 170.

The judgment is affirmed.

(156 N. C. 165)

#### MORSE & RODGERS, Inc., v. SCHULTZ.

(Supreme Court of North Carolina. Oct. 4, 1911.)

#### 1. HUSBAND AND WIFE (§ 232\*)—MARRIED WOMAN CONDUCTING BUSINESS IN OWN NAME—LIABILITY OF HUSBAND—BURDEN OF PROOF.

A seller shipping goods to a married woman conducting business in her own name, and displaying at her place of business a sign in conformity with *Revisal* 1905, § 2118, has the burden of proving, to hold the husband liable, that he, by false representations relied on by the seller, had imposed on the seller or his agent as being the buyer, and that he, and not his wife, was the real debtor.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 232.\*]

#### 2. TRIAL (§ 253\*)—INSTRUCTIONS—IGNORING TESTIMONY.

Where, in an action against a husband for goods sold to his wife, conducting business in her own name, in conformity with *Revisal* 1905, § 2118, the agent effecting the sale testified that he dealt with the husband, who was in sole control of the store, and negotiated the trade, and believed that he was the proprietor of the business, that after the sale he advised the seller not to ship the goods, but that the seller shipped them, and the husband testified that more than five months before the order was taken he had personally informed the seller that he was only a buyer for his wife, to whom the goods were billed and shipped, a charge that, unless the husband at the time of the purchase told the agent of his agency for his wife, or unless the agent ascertained the fact, the husband was personally liable was objectionable, as ignoring the husband's testimony.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

Appeal from Superior Court, Nash County; Ward, Judge.

Action by Morse & Rodgers, Incorporated, against Louis Schultz. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Civil action to recover \$341, with interest from October 4, 1909, as the contract price of goods sold and delivered. The jury rendered verdict as follows: "Is defendant indebted to plaintiff as alleged in the complaint, and, if so, in what amount? Answer: Yes; \$341, with interest from October 4, 1909." Judgment on the verdict, and defendant excepted and appealed.

T. T. Thorne, for appellant. E. B. Grantham, for appellee.

HOKE, J. On the trial and after the jury was impaneled, admissions were made as follows: "It was admitted, for the purposes of the trial, that on September 4, 1909, the time when the goods were sold for the purchase price for which the suit was brought, that the goods were billed out to and shipped to M. Schultz, the wife of the defendant, who at that time was conducting business in her own name, and who had conspicuously displayed at her place of business a sign in conformity with section 2118, Revisal 1905. It was further admitted that the goods shipped and amounting to \$341.50 had not been paid for." Evidence was then offered, on the part of plaintiff, tending to show that in April, 1909, at Rocky Mount, N. C., the place of business of M. Schultz, plaintiff sold the goods to defendant, for delivery in September following. That the sale was made, and credit given to defendant, personally, under the impression that defendant himself was the M. Schultz to whom the goods were afterwards shipped, and that this impression was caused by representations of the defendant, as inducements to the trade, reasonably relied upon by plaintiff company. C. C. Alcorn, a witness for plaintiff, testified that he was the agent who effected the sale. That he dealt with defendant and sold the goods under the impression that he was the proprietor of the business, and that his name was M. Schultz. That he did not observe the sign referred to in the admission, but defendant alone was there, in apparent charge and control of the store, and negotiated the trade. That plaintiff thought defendant's name was Max, called him Max, and billed the goods to Max, but stated further that defendant rubbed the name out and substituted M. Schultz. This witness further stated that he knew defendant's wife was named Mamie. The deposition of Arthur Pattison, vice president and one of the managers of plaintiff company, was then offered in evidence, in which it was stated, among other things, that in November, 1908, defendant was in plaintiff's place of business in New York, and represented that he was named M. Schultz, and the proprietor of this business, and bought a bill of goods in that name, which were paid for, and that the present bill was sold under the impression so caused that the sale was being made to defendant, etc. Defendant, a witness in his own behalf, denied that he had represented himself to be M. Schultz, said that the salesman, Alcorn, knew that defendant's name was Louis, and was fully aware of the fact that the business belonged to his wife, and was conducted in her name of M. Schultz. He denied further that he had represented himself, in New York, to

be M. Schultz, the proprietor of the business, but that he had then told plaintiff's officers that he was only a buyer for the firm. On this and other relevant testimony, the court charged the jury: "That unless the defendant, at the time of making the bill for which the suit was brought, told the witness, Alcorn, that he was the agent of M. Schultz, or unless the witness ascertained such fact from the sign displayed in accordance with section 2118 of the Revisal, at M. Schultz's place of business, or by some other reasonable means such fact was made known to Alcorn at or before the time of making the sale, then the defendant would be personally liable for the plaintiff's account, and the jury should so answer the issue;" and we are of opinion that this was not a correct rule to guide the jury in their determination of the issue.

[1, 2] The plaintiff, at the beginning of the trial, had admitted that the goods had been billed out and shipped to M. Schultz, the wife of defendant, who was there conducting the business in her own name, and in the presence of this admission, and on general principles, if plaintiff sought to charge defendant personally, whose name was Louis Schultz, the burden was on the company to show that the present defendant, by false representations, reasonably relied upon by them, had imposed himself upon the company or its agent as being M. Schultz, and that he, and not M. Schultz, was the real debtor; and the charge in question, duly excepted to, erroneously places on defendant the burden of exculpating himself, thereby assuming that essential portions of plaintiff's evidence should be accepted as true; and is further objectionable in restricting the jury to what took place between the defendant and the salesman, Alcorn, thereby ignoring the testimony of defendant to the effect that, on the November previous, not more than five months before this order was taken, he had personally informed the owners and managers of plaintiff company that he was only a buyer for M. Schultz, to whom the goods were billed and shipped. This objection is emphasized by the fact that the witness, Alcorn, in his testimony, further stated that after negotiating the sale, when he went back to New York, he advised the house not to ship the goods, showing that, in completing the sale, the management acted to some extent on their own knowledge of conditions, and were not influenced altogether by the account this witness may have given them. There is error which entitles defendant to have the cause tried before another jury, and it is so ordered.

New trial.

(156 N. C. 172)

**In re SAVILLE.**

(Supreme Court of North Carolina. Oct. 4, 1911.)

**1. EXECUTORS AND ADMINISTRATORS (§ 17\*)—RIGHT TO APPOINTMENT—RENUNCIATION—EFFECT.**

Under Revisal 1905, § 3, subd. 2, providing that, where there is no husband or widow, the clerk shall appoint at his discretion one or more of the next of kin of equal degree, a person recommended by the eldest of four children may be appointed administrator where all the children have renounced the right to act as administrator, though the other children recommended another as administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 35\*)—REMOVAL OF ADMINISTRATOR—GROUNDS.**

Where the eldest of four children of a mother dying without leaving a husband renounced his right to the appointment as administrator, and asked the appointment of a third person, and the third person was appointed at the time a younger child had asked for the appointment of an administrator without naming any one, the younger children, who also renounced, could not compel the removal of the person appointed, in the absence of any cause shown for removal.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 35.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 17\*)—APPOINTMENT OF ADMINISTRATOR—DISCRETION OF COURT.**

Where all the children of a decedent renounced the right to act as administrator, and the person suggested as administrator by the eldest child was as well qualified as the person recommended by the other children, the clerk could in his discretion appoint either of the persons recommended.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 17\*)—APPOINTMENT OF ADMINISTRATOR—QUALIFICATION.**

Where the children of a decedent leaving no husband are unable to read and write, it is proper to refuse to appoint any of them as administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.\*]

Appeal from Superior Court, Franklin County; Cooke, Judge.

Proceedings for the removal of W. H. Hudson as administrator of Martha Saville, deceased, and the appointment of Haley Perry in his stead. From a judgment affirming the judgment of the clerk refusing to remove the administrator, the parties aggrieved appeal. Affirmed.

N. Y. Gulley, for appellant. B. T. Holden, for appellee.

CLARK, C. J. Martha Saville died intestate July 11, 1911, leaving her surviving two brothers and two sisters as her next of kin. On July 18, 1911, the younger brother applied in writing to the clerk to appoint some one administrator. On the next day the

elder brother filed his renunciation with the clerk, and asked that W. H. Hudson be appointed administrator, which was done. On July 26th the younger brother asked that Hudson be removed, on the ground that his appointment was illegal. Hudson was cited to appear before the clerk on August 11, 1911, to answer the motion for removal. On August 2d the younger brother and the two sisters had filed their renunciation, and asked that one Perry be appointed administrator. At the hearing no evidence was offered to show why Hudson should be removed; the motion being entirely based upon the above facts.

[1] Revisal, § 3 (2), provides that, when there is no husband or widow, the clerk shall appoint the next of kin according to their degree, and, if of equal degree, shall appoint one or more of them at his discretion. It was competent, therefore, for the clerk to have appointed the elder brother. All four of the brothers and sisters having renounced, it was equally in the discretion of the clerk to appoint the person recommended by the elder brother, instead of the nominee of the others.

[2] Certainly the younger brother and the two sisters having renounced could not demand the removal of the administrator who had been appointed by the clerk at a time when Hudson was the only person recommended, and when the younger brother had asked the appointment of an administrator without naming any one. There being no cause shown for the removal of Hudson, the clerk was within his powers in refusing to do so.

[3] Even if Hudson had been set aside and the appointment had come up de novo, Hudson, being recommended by one of the next of kin, was fully as eligible as Perry, who had been recommended by the others. Upon such state of facts, it would be in the discretion of the clerk to choose between them.

[4] All four of the next of kin renounced. But, if they had not done so, it would have been proper for the clerk to refuse to appoint either one of them, as they were all unable to read and write. *Stephenson v. Stephenson*, 49 N. C. 472. His honor properly affirmed the judgment of the clerk in refusing to remove the administrator.

Affirmed.

(156 N. C. 248)

**DUNN v. PATRICK.**

(Supreme Court of North Carolina. Oct. 11, 1911.)

**LANDLORD AND TENANT (§ 315\*)—SUMMARY PROCEEDINGS—DAMAGES—TIME OF RECOVERY.**

Under the direct provisions of Revisal 1905, § 2006, on appeal to the superior court in summary proceedings by a landlord, the jury should render judgment for rents and damages



for the detention up to the time of the trial in that court.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 315.\*]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Action by Charles F. Dunn against George Patrick. From a judgment for plaintiff for a less amount than claimed, he appeals. Reversed and remanded for new trial upon one issue.

Charles F. Dunn, in pro. per.

**WALKER, J.** This action was brought under Revisal 1905, §§ 2001-2011, and is a summary proceeding in ejectment by the plaintiff, as landlord, against the defendant, as his tenant. It appears from the testimony of the plaintiff, the only witness examined, that he leased the land to the defendant in May, 1909, at 50 cents a week, and that the rent was regularly paid until November of that year, when the defendant, upon demand, refused either to pay rent or to quit the premises. The plaintiff thereupon brought this proceeding against him before a justice of the peace, who, after hearing the case, gave judgment in favor of the plaintiff for \$5.25 and costs. The defendant appealed, and gave bond to stay the execution, conditioned that "he would pay any judgment which in this or any other action the plaintiff may recover for rent of the said premises and damages for the detention thereof," which condition is in accordance with the statute in such cases made and provided. Revisal, § 2008. W. C. Fields is surety on the bond. The case was tried in the superior court upon two issues: "(1) Are the plaintiffs entitled to the possession of the property described in the complaint? Answer: Yes. (2) What amount, if any, are the plaintiffs entitled to recover of the defendants? Answer: \$5.25." The court instructed the jury that, if they believed the evidence, they should answer the first issue, "Yes," and the second issue, "\$5.25" (the amount of rents to the time of the justice's trial), which was accordingly done, and from the judgment upon the verdict the plaintiff appealed, being content with the charge as to the first issue, but alleging error as to the second.

We gather from the record, which is not made up in a regular and orderly way, though sufficiently so for our decision upon the merits of the case, that the defendant did not enter his appeal to the justice's judgment within the time prescribed by the statute (Revisal, §§ 1491 and 2008); but in the view we take of the case this is not a material or practical question. We are unable to determine upon what ground or for what reason the court denied the plaintiff's right to an assessment of the rents and damages

accrued to the date of the trial. Revisal, § 2006, expressly provides for such an assessment in this kind of proceeding, and directs that the verdict shall include, and the judgment shall be entered for, such rents and damages, and this is in addition the general rule, regardless of any special statutory provision. This court said, in *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754, that "under the present method of procedure rents are recoverable up to the time of the trial," and this is allowed in order to avoid circuity of action, or multiplicity of suits, and so that the entire controversy, as far as it may be done, will be settled in one action; this being in accordance with the very spirit and purpose of our Code. See, also, *Whissenhunt v. Jones*, 78 N. C. 361; *Burnett v. Nicholson*, 86 N. C. 99; *Grant v. Edwards*, 88 N. C. 246. The plaintiff duly excepted to the erroneous instruction upon the measure of damages, and his exception must be sustained, and the case remanded for a new trial upon the second issue alone. In other respects the verdict will stand until it is completed by a correct finding upon that issue. The judgment upon the verdict will be entered, both against the defendant and his surety, for the amount assessed. Revisal, § 2006.

New trial.

(156 N. C. 618)

#### STATE v. COLE.

(Supreme Court of North Carolina. Oct. 4, 1911.)

#### 1. ELECTIONS (§ 120\*)—PRIMARY ELECTION LAW—CONSTITUTIONALITY.

Laws 1909, c. 749, providing for and regulating the holding of primary elections in W. county, is constitutional.

[Ed. Note.—For other cases, see *Elections*, Dec. Dig. § 120.\*]

#### 2. ELECTIONS (§ 328\*)—INDICTMENT—SUFFICIENCY.

Where an indictment against a primary election manager accused him in a plain and explicit manner of refusing to count ballots legally deposited in the box, an exception that it did not charge any offense within Laws 1909, c. 749, nor Revisal 1905, § 3576, regulating primary elections, nor the common law, was unsustainable.

[Ed. Note.—For other cases, see *Elections*, Dec. Dig. § 328.\*]

#### 3. ELECTIONS (§ 310\*)—"PUBLIC ELECTION"—OFFENSES.

A primary election for nomination of county officers is a "public election," and any conduct on the part of the managers thereof which interferes with the freedom or purity thereof is punishable at common law.

[Ed. Note.—For other cases, see *Elections*, Dec. Dig. § 310.\*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5787.]

#### 4. ELECTIONS (§ 328\*)—PRIMARY ELECTION—OFFENSES—FRAUD—INDICTMENT.

Where an indictment for violating the primary election law alleged that defendant was

manager of the election, and that he refused to count certain ballots deposited for a certain candidate, his duties under the statute made him an officer, and it was not necessary to charge that he was a state or county officer, or to allege that the duties it was claimed he did not properly perform devolved on him by virtue of his office, or that he took an oath.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 328.\*]

5. ELECTIONS (§ 126\*)—PRIMARY ELECTION—MANAGER—DUTY TO COUNT BALLOTS.

Where ballots voted at a primary election have passed the challenger and been cast, one of the managers of the election has no right to refuse to call and count them.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 126.\*]

6. INDICTMENT AND INFORMATION (§ 132\*)—COUNTS—JOINDER.

An indictment against a primary election manager, in two counts, one alleging that he did unlawfully, etc., count and call but 14 votes for T., a candidate for county treasurer, when, in fact, 20 votes were duly and lawfully cast for T., and another charging a like failure to call and count votes cast at the same primary for A. for the same office, was not objectionable as multifarious, the two counts pertaining to defendant's conduct at the same time and place with reference to the counting of votes for the same office, and it was proper to refuse to require an election.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 425-453; Dec. Dig. § 132.\*]

7. CRIMINAL LAW (§ 429\*)—EVIDENCE—RECORDS—PROOF.

In a prosecution of a manager of a primary election for failure to call and count ballots, the secretary of the county board of elections and deputy register of deeds was permitted to testify that a paper purporting to be the return of the primary election of the township in question, signed by defendant as one of the managers, was filed and recorded in the office of the register of deeds. *Held*, that such paper, being shown to have been merely filed and recorded and not probated, and its filing and registration not being required by a statute, did not prove itself, and was improperly admitted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 429.\*]

Appeal from Superior Court, Warren County; Jos. S. Adams, Judge.

W. J. Cole was convicted of violating a primary election law, and he appeals. Reversed.

B. B. Williams, T. T. Hicks, and Thos. M. Pittman, for appellant. T. W. Bickett, Atty. Gen., Geo. L. Jones, Asst. Atty. Gen., and J. C. Little, for the State.

CLARK, C. J. The defendant was a manager of a primary election held in Smith Creek township, Warren county, August 9, 1910, under the provisions of chapter 749, Laws 1909, "to provide for and regulate the holding of primary elections in Warren county." He is indicted upon two counts in one bill: (1) That he "did unlawfully, willfully, and fraudulently count and call but 14 votes for W. S. Terrell, \* \* \* a candidate for the office of treasurer of said Warren county,

when in fact and truth 20 votes were duly and lawfully cast for said W. S. Terrell"; and (2) a like charge in respect of fraudulently not calling and counting votes cast at such primary for M. B. Alston for the office of treasurer. From a verdict of guilty and judgment thereon the defendant appeals to this court (1) for errors committed upon the trial; (2) because the statute providing for such primary election is unconstitutional and void.

The indictment was under section 3576 of the Revisal of 1905 and the common law. If the act is unconstitutional, it would be unnecessary to consider the other exceptions, but we take it that it is scarcely necessary to discuss the proposition.

[1] The primary system has been so long and so generally recognized that it has become an essential part of our political system. "In the early days of the republic the nominating system, as now known, did not exist," says Merriam on Primary Elections, "Candidates for local office were presented to the electorate upon their own announcement, upon the indorsement of a mass meeting or upon nomination by informal caucuses, while aspirants for state office were generally named by a 'legislative caucus' composed of members of the party in the Legislature." Candidates for President were named by the congressional caucus. After a long struggle the legislative caucus and the congressional caucus were overthrown largely by the influence of Andrew Jackson, under whose leadership the nominating convention system was adopted. The evils which have grown up under the latter system are too well known to be discussed. The primary system was inaugurated as a relief from those evils. The first primary law was enacted in California in March, 1866 (St. 1865-66, p. 438), and was closely followed by the New York act in April of the same year (Laws 1866, c. 783). In 1871 Ohio (68 Ohio Laws, p. 27) and Pennsylvania (P. L. 1871, p. 1000) followed their lead, and in 1875 a similar law was passed in Missouri. (Laws 1875, p. 54.) From that time on the primary system has spread to all parts of the country, and various changes and modifications have been adopted from time to time to cure the evils therein which became apparent.

In this state the first primary laws were enacted in 1901, the first act (chapter 524) applying to Mecklenburg county. Chapter 752 in the same year provided the primary system for the counties of Anson, Cabarrus, Dare, Durham, Forsyth, Granville, Haywood, Henderson, Johnston, Northampton, Orange, Pamlico, Richmond, Tyrrell, Wake, and Washington. In 1903 chapter 123 provided primaries for Richmond county, and chapter 793 for Henderson county. In Laws 1905, primaries were provided (chapters 795, 837) for New Hanover county and city of Wilmington.

In 1907 primaries were provided: Chapter 116, for Union and Onslow counties; chapter 190, for Rowan and Camden counties; chapter 247, for Buncombe county and Asheville township; chapter 374, for Robeson county; chapter 399, for Scotland county; chapter 405, for Guilford county and city of Greensboro; chapter 761, for Columbus county; chapter 926, for the counties of Anson, Beaufort, Bladen, Columbus, Davidson, Durham, Halifax, Lenoir, Madison, Martin, Nash, Onslow, and Wake. In 1908 (Special Session) chapter 57 provided for a primary election in New Hanover county. In 1909 statutes in regard to primaries were enacted: Chapter 494, for Halifax and Nash counties; chapter 771, for Hertford county; chapter 850, for Union county; chapter 876, for Cumberland county; chapter 883, for Scotland county. In 1911, primaries were enacted: Pub. Local Laws, c. 309, for Wilson county; chapter 342, for Warren county; chapter 412, for Nash county; chapter 572, for Richmond county; chapter 620, for Wake county and the city of Raleigh; chapter 624, for the counties of Currituck, Camden, and Chowan; chapter 633, for Beaufort county; chapter 635, for Wayne county; chapter 719, for Johnston county; chapter 749, for Cumberland county; chapter 764, for the counties of Bladen, Dare, Gaston, Greene, Northampton, and Pamlico. Several of the above acts were amendments to correct defects which by experience had been found in prior acts. There may be other primary acts, but those cited are sufficient to show that the primary system and its regulation by law has become an integral part of our political system in North Carolina as well as elsewhere.

While the primary system has not heretofore been before this court, it has been discussed in numerous decisions in other states, and the constitutionality of statutes regulating primary elections has been fully recognized. Among such cases are *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 198; *Britton v. Com'rs*, 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115; *McCarthy v. Moore*, 87 Minn. 308, 92 N. W. 4, 59 L. R. A. 447, 94 Am. St. Rep. 702, and cases cited in the notes thereto; *Breckon v. Com'rs*, 221 Ill. 9, 77 N. E. 321, 5 Am. & Eng. Ann. Cas. 562. In the notes to the last case the citations are numerous, giving adjudications upon almost every feature of the primary system. The constitutionality of a subject which has been so fully, so long, and so widely recognized by the courts and by legislation cannot be seriously discussed.

[2] As to the exceptions for alleged errors during the trial: Exception 1, for refusal to quash the bill, was properly denied. The indictment expressed the charge against the defendant in a "plain, intelligible and explicit manner." The grounds urged for quashing savored "of informalities or refinements"

for which no bill can be quashed. Revisal, § 3254. The defendant moved to quash the bill because (1) the bill of indictment does not charge any offense within the terms of Act 1909, c. 749, nor of section 3576, Revisal, nor at common law; (2) that it does not allege that the defendant was a state or county officer; (3) that it does not allege that the acts and omissions complained of devolved upon him by virtue of his office; (4) that it does not allege by what authority he was made pollholder and manager for the alleged primary; (5) that it does not allege for what, if any, political party such primary was held; (6) that it does not allege that defendant failed or refused to count the votes of any bona fide member of the political party for which such primary was held, nor that he was a qualified elector and had taken the prescribed oath that he was a resident of the precinct, was a duly qualified elector, and had not voted before in said primary election; (7) that it is not alleged that the persons for whom such votes were cast and not counted were qualified candidates, entitled to receive votes in such primary for nomination to the office of treasurer of Warren county.

[3] This primary election was a public election, and any conduct which interferes with the freedom or purity of the election is punishable at common law. *Bishop, Cr. Law*, § 471; *State v. Jackson*, 73 Me. 91, 40 Am. Rep. 342; *Commonwealth v. Silsbee*, 9 Mass. 417; *Commonwealth v. McHale*, 97 Pa. 397, 39 Am. Rep. 808.

[4] As to the other exceptions, it is not necessary to charge that the defendant was a state or county officer. The bill alleges that he was manager of the election, and his duties under the statute make him an officer. It was unnecessary to allege that those duties devolved upon him by virtue of his office, or that he took an oath. *State v. Wynne*, 118 N. C. 1206, 24 S. E. 216; *State v. Powers*, 75 N. C. 281. It is sufficiently charged that it was a Democratic primary election.

[5] It is unnecessary to discuss the qualification of the electors whose votes the defendant failed to count. These votes had been cast. They had passed the challenger, and, when the defendant reached these ballots in the box, it was his plain duty to call and count them. He had no right to rule out the votes if he believed they were invalid, and it is not pretended that he did so.

[6] The two counts in the bill of indictment pertained to the conduct of the defendant at the same time and place and of the same nature and in the same matter of counting votes for the same office. The joinder was proper, and did not make the bill multifarious, and it was not error to refuse to require the solicitor to elect. It is not unusual in an indictment for larceny to lay the property in one count in A. and in an-

other count in B., or to join counts for an assault upon different persons when parts of the same act.

[7] The only exception which has given us any difficulty is the second exception. The secretary of the county board of elections and deputy register of deeds was permitted to testify that a paper purporting to be the return of the primary election of Smith Creek township held August 9, 1910, signed by H. F. Hooker and W. J. Cole (defendant), managers, was filed and recorded in the office of the register of deeds. This return was not proven at the trial, and its filing and registration, not being required by the statute, could add nothing to its validity, and could not be proof of its execution, particularly as it had not been probated, but was merely shown to be on file and recorded.

It was error therefore to receive it, for which error there must be a new trial.

(89 S. C. 492)

#### FARMER v. SELLERS.

(Supreme Court of South Carolina. Oct. 2, 1911.)

#### 1. SHERIFFS AND CONSTABLES (§§ 10, 11\*)—BOND—NECESSITY.

A constable appointed by the Governor under Dispensary Act Feb. 16, 1907 (25 St. at Large, p. 463), is not required to give bond, and, when acting under a commission from the Governor without having given bond, is a de facto officer, even if a bond were required.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 24, 25; Dec. Dig. §§ 10, 11.\*]

#### 2. APPEAL AND ERROR (§ 251\*)—EXCEPTIONS—NECESSITY.

The Supreme Court will not decide on appeal in an action for the wrongful killing of plaintiff's husband while entering defendant's house as constable whether decedent's appointment by the Governor gave him authority as dispensary constable without a formal commission, where that question was not made by the exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1476-1484; Dec. Dig. § 251.\*]

#### 3. INTOXICATING LIQUORS (§ 249\*)—SEARCHES.

Under Dispensary Act Feb. 16, 1907 (25 St. at Large, p. 472) § 22, providing that a search warrant shall empower any officer or person who may be deputized to make the search, an officer appointed for the purpose of enforcing the dispensary law was authorized to execute a search warrant in the course of his duties without a special appointment therefor by the magistrate.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 249.\*]

#### 4. TRIAL (§ 136\*)—JURY QUESTIONS—DELAY.

It is the province of the jury to determine what is reasonable promptness in discharging any legal or contractual duty, unless but one conclusion can be drawn from the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 318-327; Dec. Dig. § 136.\*]

#### 5. SEARCHES AND SEIZURES (§ 3\*)—WARRANT—ENFORCEMENT.

A search warrant cannot be legally enforced so long after its issuance that the search

could not be reasonably considered a bona fide effort to recover the property described, though there is no absolute time fixed by law for enforcing the warrant.

[Ed. Note.—For other cases, see *Searches and Seizures*, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.\*]

#### 6. SEARCHES AND SEIZURES (§ 3\*)—ENFORCEMENT OF WARRANT—TIME.

The time of executing a search warrant depends upon the character of the person charged with having the stolen or contraband goods, the nature of the crime charged, etc.; there being no absolute time fixed by law for its execution.

[Ed. Note.—For other cases, see *Searches and Seizures*, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.\*]

#### 7. INTOXICATING LIQUORS (§ 249\*)—SEARCH WARRANT—DESCRIPTION OF PROPERTY—SUFFICIENCY.

A search warrant describing the property to be seized as the "following contraband intoxicating liquors now unlawfully in the possession, storage, and keeping of and on the premises occupied by S., the said place being known as No. 1216 G. street in the city of C., to wit, a lot of whisky, brandy, wine, rum, gin, and beer in barrels, demijohns, bottles, and other vessels," sufficiently described the premises and property.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 376-385; Dec. Dig. § 249.\*]

#### 8. SEARCHES AND SEIZURES (§ 3\*)—SEARCH WARRANT.

It is immaterial in an action for damages for a constable's death while executing a search warrant on defendant's premises that the affidavit described the premises as a certain street number, while the warrant directed the officer to enter the building at that address "or other place appurtenant thereto," where the killing occurred at that address which decedent undertook to enter.

[Ed. Note.—For other cases, see *Searches and Seizures*, Dec. Dig. § 3.\*]

#### 9. SEARCHES AND SEIZURES (§ 3\*)—SEARCH WARRANT.

It is immaterial in an action for damages for the killing of plaintiff's husband while executing a search warrant that the warrant directed the search to be made "by day or by night," when the statute forbids searching a dwelling at night; the search having been actually prosecuted in the daytime.

[Ed. Note.—For other cases, see *Searches and Seizures*, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.\*]

#### 10. DEATH (§ 60\*)—ACTIONS—ADMISSION OF EVIDENCE.

In an action for damages for the killing of plaintiff's husband by defendant, evidence that plaintiff was the prosecuting witness on defendant's trial for murder was not admissible, not being necessary to show plaintiff's feelings against defendant.

[Ed. Note.—For other cases, see *Death*, Dec. Dig. § 60.\*]

#### 11. TRIAL (§ 296\*)—ACTIONS—INSTRUCTIONS.

In an action for damages for killing plaintiff's husband while he was executing a search warrant at defendant's dwelling, the court charged that a person's dwelling was his castle, which he had a right to protect from unlawful invasion, and that he could use such force as was necessary to protect an invasion of his home, opposing force with force, and, "if a person invades your home, you have the right to eject him. Your duty in the first instance is to go and lay your hand on him gently, and, if he resists you, then you have the right to oppose sufficient force to overcome his resistance." The

court also instructed that, if decedent was in defendant's house without authority, defendant could oppose him by force to the extent of taking his life if necessary. *Held*, that the quoted part was not prejudicial error for requiring a house owner under all circumstances to lay his hands gently on an intruder; the question for the jury's decision being whether defendant was justified in shooting decedent while he was forcing his way into defendant's house in order to prevent entry or injury to defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.\*]

#### 12. TRIAL (§ 194\*)—INSTRUCTIONS—CHARGES ON FACTS.

In an action for damages for the death of plaintiff's husband while executing a search warrant at defendant's house, defendant requested the court to charge that if decedent had threatened defendant's life, and defendant honestly believed that decedent intended to carry out the threat by taking his life, etc., and the jury, viewing the circumstances from the standpoint of the defendant at the time of the fatal encounter, conclude as reasonable men that he was justified in the belief, then defendant was entitled to be more watchful, and to interpret decedent's acts more harshly than he would otherwise have done. *Held*, that the requested charge was properly refused, as instructing what force the jury should give to evidence of threats.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.\*]

#### 13. APPEAL AND ERROR (§ 1087\*)—HARMLESS ERROR—INSTRUCTIONS—REFUSAL.

The proposition submitted by the requested instruction was so obvious that to omit it could not have affected the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1087.\*]

Appeal from Common Pleas Circuit Court of Richland County; S. W. G. Shipp, Judge.

Action by May W. Farmer against Wade H. Sellers. From a judgment for plaintiff, defendant appeals. Affirmed.

Nelson, Nelson & Gettys and Frank G. Tompkins, for appellant. J. E. McDonald, J. K. Henry, and Christie Benet, for respondent.

**WOODS, J.** On the 22d day of February, 1908, in the city of Columbia, the defendant, Wade H. Sellers, shot to death James P. Farmer. The plaintiff, May W. Farmer, the widow of James P. Farmer, having administered on his estate, recovered a judgment of \$5,000 for the benefit of herself and his children against the defendant under the allegation that the homicide was committed "unlawfully, willfully, wantonly, recklessly, and maliciously." The defenses set up in the answer were, first, a general denial; second, that the defendant shot Farmer in the protection of his dwelling; third, self-defense; and, fourth, that the defendant had been tried for the murder of Farmer and had been acquitted. The exceptions relate to the second and third defenses.

The material undisputed facts are that early in the morning of February 22, 1908, Farmer went to defendant's dwelling, and

as a dispensary constable several times demanded admittance for the purpose of searching the house for contraband liquor. The defendant bolted the doors and refused to open them. Farmer called to his assistance Policeman Nettles, who came up in the piazza, and then with a pistol in one hand forced open the door, and was shot to death by the defendant with a rifle. The plaintiff introduced evidence tending to prove that, before forcing an entrance, Farmer read to defendant a search warrant issued by Magistrate Fowles on January 4, 1908, authorizing and directing the sheriff or any constable to search the premises for a lot of contraband liquor, and that he broke open the door with the warrant in one hand and his pistol in the other only after solicitation had proved unavailing. The plaintiff introduced also documents signed by the Governor purporting to appoint Farmer a constable under the dispensary laws of the state. The defendant testified that he recognized Farmer as a dispensary constable, but denied that the search warrant was presented or read to him. He testified, further, that he told Farmer he would be admitted and could search the house as soon as the women in the house could dress, so that he could be admitted to their apartment, and that he shot when Farmer refused to wait, broke open the door, and pointed at him with his pistol. The substantial issues on the trial were: First. Was Farmer an officer whose authority to execute a search warrant the defendant was bound to respect or a mere trespasser? Second. Was Farmer's entrance into defendant's house under a search warrant which defendant was bound to respect, or was the paper a nullity? Third. Assuming Farmer to have been a mere trespasser, was it necessary for the defendant to kill him in self-defense or in the protection of his dwelling house? By objections to evidence and by requests to charge, the defendant asked the circuit judge to lay down as the law the utterly untenable proposition that the defendant could treat Farmer as a mere intruder in the office of constable and a bald trespasser on his premises because of certain alleged irregularities in his appointment and qualification as a constable. Section 38 of the dispensary statute of 1907 provided: "It shall be the duty of the sheriffs and their deputies, magistrates, constables, rural police, city and town officials, to enforce the provisions of this act. If they fail to do so, it is hereby made the duty of the governor to enforce the same, and he is hereby authorized to appoint such deputies, constables, and detectives as may be necessary." 25 Stat. 477. Under this law his excellency, the Governor, on December 22, 1907, issued a commission to Farmer as a constable,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

signed by the Governor and the Secretary of State, and sealed with the great seal of the state. This commission being by its terms limited to 30 days, the Governor on January 8, 1908, over his own signature alone, reappointed Farmer for 30 days, and again on February 6, 1908, in the same manner, reappointed him for another period of 30 days. If these appointments were valid, then Farmer held a legal appointment on February 22, 1908, the day of the homicide. The point is not made that a commission was necessary to the validity of the appointment; but the objection is that there was no official bond of Farmer in force at the date of the homicide.

[1] The court expressly decided in *State v. Messervy*, 86 S. C. 503, 68 S. E. 766, that constables appointed by the Governor under the act of 1907, above quoted, were not required to give bond, and that, even if they were, one holding the appointment of the Governor without giving the bond must be respected as a de facto officer. As against the objections made by the defendant, Farmer was a de jure officer entitled to exercise the powers of a dispensary constable.

[2] Respondent's argument embraces the point that the appointment of Farmer by the Governor was sufficient to clothe him with authority as a dispensary constable without a formal commission, but we pass that by because it is not made by the exceptions.

[3] It is obvious that no special appointment of Farmer by the magistrate was necessary. Section 22 of the act of 1907 (25 Stat. 472) provides that the search warrant shall empower "any officer or person who may be deputized" to make the search. Farmer, being an officer appointed for the express purpose of enforcing the dispensary law, was an officer within the terms of the law, and as such officer was authorized to execute the warrant without special appointment by the magistrate.

The position of most importance urged in support of the appeal is that a search warrant must be executed and returned within a reasonable time, that the question of what is a reasonable time is one of law to be decided by the court, and that the circuit judge should have held as a conclusion of law that the search warrant issued in this case on January 4, 1908, by reason of undue delay in its execution, was a nullity on February 22, 1908, when Farmer was killed in the effort to execute it. The only case to be found supporting this position is *State v. Guthrie*, 90 Me. 448, 38 Atl. 368. There a warrant issued for the arrest of defendant and the search of his premises was held to have expired before its execution three days after its date; and the defendant was accordingly discharged. The Maine statute required the officer to "make immediate return of the said warrant"; and the court held that the question whether the

delay was unreasonable was a question of law for the court, and that, as there was no reason shown for the delay of three days, such delay must be declared unreasonable. It is important to observe that the question before the Maine court was whether the defendant should be discharged from arrest under the warrant, not whether he would have been justified in shooting an officer undertaking to enforce the warrant. The Constitution of South Carolina provides: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." Article 1, § 16. This section is itself a declaration of the danger to the liberty of the citizen from searches and seizures of private property by public authority, and it imposes on officers the duty of issuing search warrants with careful discretion and executing them with reasonable caution and promptness. Having in view this provision of the Constitution, judges and juries, when such warrants are under review, should scrutinize them with care, to the end that there may be no unreasonable search or seizure of private property. But in deciding what is reasonable it is to be borne in mind that searches and seizures under the authority of law have been found by all civilized peoples necessary to protect life and property against the attacks of the criminal classes; and such process should not be set aside or declared void on slight or technical grounds. Here the ground of attack is that the warrant was not promptly executed, and it is insisted that the court should have charged the jury as a proposition of law that it had no force.

[4] Under the general rule adopted in this state, it is the province of the jury to determine what is reasonable promptness in the discharge of any duty imposed by law or by the act of the parties, unless only one conclusion can be drawn from the evidence. *Edgefield Mfg. Co. v. Maryland Casualty Co.*, 78 S. C. 73, 58 S. E. 969; *Obesterfield v. Ratliff*, 52 S. C. 563, 30 S. E. 593, 41 L. R. A. 503; *Hays v. Hays*, 10 Rich. 419; *Gray v. Bell*, 2 Rich. 67, 44 Am. Dec. 277.

[5] It is true that in this case the delay of 48 days in serving the warrant seems long, but we are not prepared to say that no other conclusion can be drawn than that the delay was so unreasonable as to destroy the force of the warrant. A warrant cannot be legally enforced by an officer so long after its issuance that the search could not be reasonably referred to a bona fide effort for the recovery of the particular property therein mentioned. It cannot be held back by an executive officer as a menace to the citizen. But manifestly there can be no hard and fast limitation of time fixed by ju-

dicial authority as unreasonable in all cases and under all circumstances.

[6] Every case must depend on its own facts. The character of the person charged with having the stolen or contraband goods in possession, the nature of the crime charged, and other circumstances are to be taken into account. It is obvious to all men that a sporadic or untrained criminal and a professional criminal would stand on a different footing. In the case of an ordinary man suspected of being in possession of stolen goods or contraband liquor it might well be held beyond all doubt reasonable that a search warrant should be enforced within a few days. On the other hand, when the officer has the task of recovering stolen goods or taking contraband liquor from a trained and disciplined criminal, the enemy of society, it may take weeks of patient observation to ascertain the moment when a search would be of any avail. In such a case the enforcement of the law might be rendered impossible by a judicial holding that a reasonable time for the execution and return of a warrant is the same as in the case of an ordinary criminal. The distinction applies strongly in this case. There was evidence from the defendant himself that he was a professional criminal—one of that degraded class of men who apply their talents and energy to the acquisition of money in a nefarious business based on secret or defiant violations of law, and thus prey upon society. Under this evidence and other facts appearing in the case, the circuit judge properly submitted to the jury the question whether the execution of the warrant had been unreasonably delayed.

This conclusion makes unnecessary the consideration of the question whether the defendant would not have shot at his peril in resisting an officer demanding admittance under a search warrant even after the expiration of a reasonable time from the date of its issuance.

[7] Objection is also made to the warrant that it does not sufficiently describe the premises and the property. The following clause of the warrant describes the property to be seized about as definitely as it is possible to describe a lot of contraband liquor. "That the following contraband intoxicating liquors are now unlawfully in the possession, storage, and keeping of and on the premises occupied by W. H. Sellers in the state and county aforesaid, the said place being known as No. 1216 Gadsden St., in the city of Columbia, S. C., to wit, a lot of whisky, brandy, wine, rum, gin, and beer in barrels, demijohns, bottles, and other vessels, in the city of Columbia, S. C."

[8] There is no force in the objection that the affidavit describes the premises as 1216 Gadsden street, while the warrant directs the officer to enter into and search 1216 Gadsden street, "or other place appurtenant thereto." The point would be worthy of consid-

eration if the homicide had occurred in the effort to enter and search any other place than the house known as 1216 Gadsden street; but the place which the officer undertook to enter was 1216 Gadsden street and no other.

[9] Nor is there any merit in the objection that the warrant directed the search to be made by day or by night when the statute forbids search of a dwelling house in the nighttime. No effort was made to search the dwelling house of the defendant in the nighttime, and there is therefore no ground to allege that the statute was violated. If courts gave heed to such extremely technical objections, the law would indeed be weak in its struggle with crime.

[10] We are unable to perceive how evidence that Mrs. Farmer, the plaintiff, was the prosecuting witness on the trial of defendant, Sellers, on the charge of murdering Farmer, could be of value to the defendant. It did not require such evidence to show that Mrs. Farmer had strong convictions against the defendant, for that was evident from the fact that she was the widow of the man whom defendant had killed, and that she had brought this action.

[11] Exception is taken to the italicized portion of the following instruction on the ground that it imposes the duty under all circumstances on the owner of a house to lay his hands gently upon an intruder: "I charge you that a person's home, his dwelling, is his castle, and he has the right to protect his own home from unlawful invasion. He has the right if the person comes into his home against his will to use such force as is necessary to protect himself from invasion—unlawful invasion of his home. He has no right to use any more force than is necessary, but has the right to oppose force with force, to protect his home by the exercise of just so much force as is necessary to protect it, or appears to be necessary from the circumstances surrounding him at the time. *If a person invades your home, you have the right to eject him. Your duty in the first instance is to go and lay your hand on him gently, and, if he resists you, then you have got the right to oppose sufficient force to overcome his resistance.*" Farmer was killed while forcing his way into defendant's house. On that point there was no dispute. The practical question before the jury then was not whether the defendant took the proper means to get Farmer out, but whether he was justified in shooting him while he was forcing his way in, in order to prevent the entry or to prevent defendant's own death or serious bodily injury. On this issue the instruction was clearly given in other portions of the charge that, if Farmer was entering without authority of law, the defendant had a right to oppose him by force to the extent of taking his life if necessary. There is no ground for the assignments of error set out

in the twelfth and fifteenth exceptions, for the substance of the requests of the defendant referred to in these exceptions was plainly given to the jury in the general charge.

[12] Defendant's counsel earnestly insist that there was error in refusing the following request: "If the deceased had threatened the life of defendant, and the defendant honestly believed that the deceased intended to carry out the threat by taking his life or doing some serious bodily harm, and the jury, viewing the circumstances from the standpoint of the defendant at the time of the fatal encounter, conclude as a reasonable man of ordinary reason and firmness that he was justified in the belief, then the defendant was entitled to be more watchful and to interpret the acts of the deceased more harshly than he otherwise would have been justified in doing." The Constitution forbids a trial judge to charge a jury with respect to matters of fact. Therefore, to tell the jury what force they should give to evidence of threats, or to any other evidence on a contested issue of fact, was beyond the province of the judge. The consideration of what inferences the defendant might properly draw and what action he might properly take in view of threats made against him was for the jury alone.

[13] Besides, the proposition submitted by the defendant is so perfectly obvious to all that to state it or to omit to state it to the jury could not possibly have affected the verdict. There was no error therefore in refusing the request.

It is the judgment of this court that the judgment of the circuit court be affirmed.

(89 S. C. 511)

IRVINE v. TOWN OF GREENWOOD et al.

(Supreme Court of South Carolina. Oct. 2, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§ 724\*)—TORTS—GROUNDS OF LIABILITY.

A city is not liable for its torts unless made so by statute, irrespective of the nature of the matter in connection with which the injury occurs, all its functions being considered of a governmental and public character, though carried on for profit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1545, 1568; Dec. Dig. § 724.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 733\*)—TORTS—LIABILITY—NATURE OF FUNCTION—STREET LIGHTING.

Even were the distinction recognized between governmental functions and others, the lighting of streets is a governmental function; and no liability is imposed from that standpoint on the city for shock by contact with a wire hanging from a street arc light pole, though the city light plant also supplied private parties.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 766\*)—TORTS—DEFECTIVE STREETS.

Act 1892 (21 St. at Large, p. 91; Civ. Code 1902, § 2023), permitting one injured through a defect in a street to recover damages therefor, requires the city to keep the street in such repair that it is reasonably safe for travel, so that it would be bound to keep an electric lighting pole placed in the street, together with the wires attached thereto, in a safe condition.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1621, 1622; Dec. Dig. § 766.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 821\*)—STREETS—USE BY CHILDREN.

The court cannot say, as a matter of law, that the playing of children in the street is an illegitimate use thereof, which the city is not required to anticipate in maintaining the street in a safe condition; the question being ordinarily for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 821.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 821\*)—STREETS—INJURIES.

It cannot be said, as a matter of law, that a 17 year old boy is so old as to exclude him from the benefit of the rule requiring cities to keep streets safe for children playing therein.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 821.\*]

#### 6. MUNICIPAL CORPORATIONS (§ 821\*)—TORTS—INJURIES IN STREETS—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

Whether the danger to a child playing in the street, in coming in contact with a wire hanging from an electric lighting pole, was so apparent as to make it guilty of contributory negligence held a question for the jury, in an action against the city for resulting injuries.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 821.\*]

Appeal from Common Pleas Circuit Court of Greenwood County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by H. E. Irvine, as administrator of the estate of W. Claude Irvine, deceased, against the Town of Greenwood and others, Commissioners of Public Works of said town. From a judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

Tillman & Watson and Cothran, Dean & Cothran, for appellant. E. L. Richardson and Grier & Park, for respondents.

WOODS, J. The town of Greenwood owns and operates a municipal lighting plant, for the purpose of lighting its streets and furnishing electric current to its citizens for domestic purposes. This plant is controlled and managed by a board of public works, composed of three commissioners, elected by the qualified electors of the town, who are vested, by section 2010 of the Civil Code (volume 1), with full power and authority to build, maintain, operate, and manage the plant. This action was brought against the town of Greenwood and the board of public works by H. E. Irvine, as administrator, to recover damages for the



alleged unlawful and wrongful killing of his son, Claude Irvine.

The facts, as alleged in the complaint, and established by the plaintiff's evidence, are these: On August 23, 1908, the deceased, a boy of 17 years of age, was engaged with two companions in playing a game known as "peg," on Jordan street, in the town of Greenwood, not far from its intersection with Parker street. On the side of Jordan street, a few feet from the point of intersection, and on the edge of the drain between the sidewalk and the street, was an electric light pole, from which an arc light was suspended. A metallic chain, used for the purpose of raising and lowering the light, hung down the side of the pole next to the street, and formed a loop about five or six feet above the ground. As Irvine, in the course of the game, was running from the street to the sidewalk near this post, he slipped on the edge of the drain, caught hold of the loop in an effort to save himself from falling, and was killed by a strong electric current transmitted to his body through the chain.

The complaint alleged, in substance, three acts of negligence and wantonness on the part of the defendants: First, that they had allowed the chain to come in contact with the wires overhead, and to hang a short distance above the street, so that any traveler might touch it; second, that the defendants had removed, or allowed to be removed, the insulation from the wires at the point of contact with the chain; third, that they had failed to equip the light with proper safety appliances. The defendants demurred to the complaint, on the ground that it failed to state facts sufficient to constitute a cause of action, in that no action would lie against a municipality or its agent for negligence in carrying on its corporate functions, unless such action were authorized by statute, and that no liability had been created by statute under the facts stated.

The circuit court sustained the demurrer as to the defendant the board of public works, but overruled it as to the defendant the town of Greenwood, holding that the acts of negligence specified in the complaint might be considered as a defect in the street, and that, under section 2023 of the Civil Code (volume 1), an action would lie against a municipality for injuries resulting therefrom. At the close of the plaintiff's testimony, the defendant moved for a nonsuit, which was granted by the court, on the ground that the plaintiff had failed to prove that the deceased had not been guilty of contributory negligence when he received the injury. From this order of nonsuit, the plaintiff appeals.

[1] Whenever the question has arisen, it has been held in this state that a municipality is not liable in damages for a tort committed by any of its officers or agents, unless made so by statute. *White v. City*

*Council of Charleston*, 2 Hill, 572; *Coleman v. Chester*, 14 S. C. 290; *Black v. City of Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Gibbes v. Beaufort*, 20 S. C. 213; *Parks v. Greenville*, 44 S. C. 168, 21 S. E. 540; *Matheney v. Aiken*, 68 S. C. 163, 47 S. E. 56. Counsel for plaintiff, while acknowledging the authority of these cases, insist that they should be limited in application to such torts as are committed by a municipality in the exercise of its public and governmental functions, and should be held to have no application to torts committed by a municipality in the conduct of a business authorized by law for the advantage of the municipality, but distinct from the public or governmental functions of the corporation. The distinction contended for has the sanction of very high authority, including the Supreme Court of the United States. *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; 1 Dillon on Mun. Corp. § 66. The numerous other authorities on the subject are collated in 28 Cyc. 1237, 1258, 20 Am. & Eng. Ency. 1191, 1 L. R. A. (N. S.) 664, 30 Am. St. Rep. 376.

Notwithstanding this weight of authority, we think there are cogent reasons for rejecting the distinction. The question was not decided in *Mauldin v. Greenville*, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291. There the court held that, in the absence of express bestowal by the Legislature on the city of Greenville of the power to construct and maintain a plant to furnish electric lights in private residences and business houses, such a power was not implied in the general grant of authority "to make and establish all such rules, by-laws, and ordinances respecting the roads, streets, market and police department of said city, and the government thereof, as shall appear to them necessary and requisite for the security, welfare and convenience of said city, for preserving health, life, and property therein, and securing the peace and good government of the same." Here the question is whether the exercise of a particular power expressly conferred on a municipal corporation—a governmental agency—by the General Assembly shall be held to be a governmental function, or on the same legal footing as an ordinary business enterprise of a private corporation. The distinction was referred to in *Childs v. City of Columbia*, 87 S. C. 566, 70 S. E. 296, but no opinion as to its soundness was expressed; the case having been decided on other grounds.

In *Hopkins v. Clemson College*, 77 S. C. 12, 57 S. E. 551, the question was whether Clemson College, a corporation created for a public purpose, was liable for overflowing plaintiff's land in constructing a dike to protect the crops on the college lands from the floods in the Seneca river. This court held that the case fell within the rule laid down in *Gibbes v. Beaufort*, 20 S. C. 213,

*Dunn v. Barnwell*, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843, and the other cases decided in this state, cited above, and that therefore the plaintiff could not recover. On appeal the Supreme Court of the United States reversed the judgment of this court, holding that the flooding of plaintiff's land was the taking of private property without due process of law, and that the taking was by the corporation itself, for corporate purposes, and not by its officers or agents. As we understand, it was on these grounds that the case was distinguished from *Gibbes v. Beaufort*, supra, and other like cases decided in this state. The doctrine of the decision, however, is not applicable to this case, for the reason that here there is no taking of private property by the corporation, but an injury, resulting in death, from the alleged failure of an employee of the municipality to perform the duties imposed on him by the municipality.

In endeavoring to put into practical effect the supposed distinction between public function and private business or enterprise of municipal corporations, it will hardly be doubted that the courts will find themselves involved in a maze of shadowy distinctions. Where is the line of demarcation to be drawn? If it could be satisfactorily laid out now, it could not long continue to receive general recognition; for the functions of government, especially municipal government, are being extended almost every day. That which to-day might clearly appear to be a private business of the corporation, authorized by law, in a short time might appear to be a plain public obligation and a governmental function. Take, for example, the water supply of a city. A short time ago it was held that, while a city exercised a public function in providing water for its fire engines, although used almost exclusively for the protection of private property, yet when it ran pipes to private houses, and there supplied water to its inhabitants for drinking and other domestic purposes, it was acting outside of true governmental functions, and engaging in private business. *Judson v. Borough of Winsted*, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91. At this time it will hardly be doubted that when a city, under legislative sanction, undertakes to furnish water to its inhabitants it performs a public and governmental function; for nothing can be more important to the municipal public than the prevention of disease, and nothing so promotes the public health as a supply to all citizens of pure water. This is but an illustration of the truth that, with advancing civilization, not only do the duties of individuals increase, but the public and governmental duties and functions of the state and of municipalities embrace more subjects.

Expressing the inclination of the court to reject the distinction contended for, Mr. Jus-

tice McGowan says, in *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785: "With all due respect, it seems to us that if the powers granted to a municipal corporation are susceptible of such division and separation it would be exceedingly difficult to carry the doctrine into anything like uniform practice. Opinions must certainly differ, both as to the proper classification of the powers and the character of the duty imposed by them. The necessity of determining in each case whether a particular power should be ranked in the class of corporate, as distinguished from civil, powers, and if the former, whether its exercise imposes a duty, discretionary or merely ministerial, must be the source of constantly recurring difficulties, and tend to great confusion and uncertainty in the administration of the law." The confusion which has resulted from the refinements and distinctions attempted by other courts with respect to the liability of municipal corporations for torts committed by officers or employees is so great that it would be difficult, if not impossible, to deduce from them a rule which could be applied with confidence by the public or the bar. This is made apparent by the study of any well-considered text or opinion on the subject, such as the opinion of Chief Justice Gray, in *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, and the note to *Goddard v. Harpswell (Me.)* 30 Am. St. Rep. 376.

After much consideration of the authorities in this state and elsewhere, it seems to us the more logical conclusion that the courts should not undertake to say that any functions of a municipal corporation are private and not governmental, but, on the contrary, should hold that municipal corporations are created solely for public and governmental purposes, and that all powers granted to them by the General Assembly, under the sanction of the Constitution, are to be exercised as public and governmental functions, for the benefit of the municipal community. Indeed, this view of powers granted is required by the definition of a municipality, for an essential part of the definition is that the charter be granted for the purpose of subordinate self-government. Certain it is that sections 3, 4, and 5 of article 8 of the Constitution of this state contemplate that the construction and operation of water and electric plants, not only for the purposes of the corporation, strictly speaking, but for supplying citizens of the municipality with light and water, shall be a public purpose, for which the municipality may incur debts and levy taxes.

There is another strong reason for the rejection of the distinction contended for, which applies with special force in this state. Municipalities are brought into existence by the legislative branch of the government, and it is peculiarly the province of the General Assembly, not only to confer the powers, but

to determine the extent of the liability of such corporations. Having in view the doctrine long ago laid down by the courts of this state, that municipal corporations are liable for torts only when made so by legislative enactment, the General Assembly has by law expressed its will as to the extent of the liability of such corporations for torts. The courts are therefore bound to restrict the liability to the terms of the statute; and the statute authorizes no distinction between governmental and public duties and supposed private municipal enterprises.

[2] But, even if the distinction contended for were recognized, we do not think this case could fall under it. The death of plaintiff's intestate was due to contact with a wire suspended from a pole supporting one of the arc lights, put up for the purpose of illuminating the streets of the town of Greenwood. The lighting of the streets of a city is universally recognized as a public and governmental function. It cannot alter the case that the same plant which supplied electricity for the street light also supplied the electricity for the lights in private dwellings and business houses.

[3] The next question is whether the alleged tort of the municipal authorities fell within the terms of the act of 1892 (21 Stat. 91), now incorporated in the Civil Code as section 2023, which reads as follows: "Any person who shall receive bodily injury, or damages in his person or property through a defect in any street, causeway, bridge, or public way, or by reason of defect or mismanagement of anything under the control of the corporation within the limits of any town or city, may recover, in an action against the same, the amount of actual damages sustained by him by reason thereof. If any such defect in a street, causeway or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured if his load exceed the ordinary weight: Provided, the said corporation shall not be liable unless such defect was occasioned by its neglect or mismanagement; provided, further, such person has not in any way brought about such injury or damage by his or her own negligent act or negligently contributed thereto." In the case of *Dunn v. Barnwell*, 43 S. C. 398, 21 S. E. 315, 49 Am. St. Rep. 843, the court, construing the statute in the light of its title, held that the liability created by it was limited to misfeasance or nonfeasance connected with the keeping of "any street, causeway, bridge, or public way" in proper repair. This construction has been followed in cases arising since the statute was incorporated in the Civil Code. *Hutchinson v. Summerville*, 66 S. C. 448, 45 S. E. 8; *Bryant v. Orangeburg*, 70 S. C. 142, 49 S. E. 229. But we are unable to give the duty of keeping streets in repair the narrow meaning contended for by respondents. To keep a street in repair means to keep it in such

physical condition that it will be reasonably safe for street purposes. It is not enough that its surface should be safe; a street is not in repair when poles or wires or other structures are so placed in or over it as to be dangerous to those making a proper use of the street. In *Duncan v. Greenville*, 71 S. C. 170, 50 S. E. 776, it was held that a wagon left on the public road, so as to put travelers in peril, must be regarded under the statute as a failure to keep the road in repair. In this case the pole was placed in the street as a fixture, and became a part of the street, which it became the duty of the municipal authorities to keep safe.

Forceful argument was presented in support of the position that no cause of action arose because the street was safe for the ordinary purposes of travel, and plaintiff's intestate, who was 17 years of age, would not have been killed if he had not been using the street for the purpose of playing a ball game, a purpose for which it was not intended; and that the nonsuit must be sustained on that ground. The court has given much consideration to this question, important not only to the parties in this case, but to the general public.

There can be no doubt that the main purpose of streets and roads is for travel. They serve this purpose, not only as avenues of traffic and of social communication, but as a means for the people to obtain at will the pleasurable sensation of locomotion and change of scene and environment. In furtherance of these purposes, streets and roads are now burdened with street railways and trolley lines. The necessity of having the streets lighted, in order that they may serve these purposes, makes any reasonable means to that end, such as the placing of electric light wires, a proper burden on the streets of a town or city. But while those mentioned above are the main and dominant purposes of a street, to which, when the occasion arises, others must yield, still there are other purposes for which streets and roads have always been used, and which become more and more urgent as population becomes more and more dense. One who wishes to build on a city lot must often of necessity be allowed temporary use of a portion of the street for placing his material. Streets and roads are often used for public meetings held for the enlightenment or amusement of the people. So, likewise, children and youths have always used streets for their sports, subject to the regulation of municipal ordinance, and subject to the use of the streets for the other purposes above set out. The necessity for reasonable use of this kind becomes constantly more pressing with the increase in the size of towns and cities, and the decrease of home space. To vast numbers of boys and girls the street affords the only place of sport and the only outlook from a pent-up home. The interest of the state is no less vital that these

boys and girls should have a place for development of body and spirit by out of door sport, than its interest that they should have the public school as a place for mental training. Indeed, it is not to be doubted that arrested and abnormal development of men and women, which results in the great burden of crime borne by society, is due largely to the lack of parks and playgrounds, where the joy of activity in the fresh air may be found.

[4] It is no doubt true that the primary duty of the municipal authorities is to keep the streets safe and in good condition for travel, and if in doing that it becomes necessary to make them unfit and dangerous for the play of boys and girls no responsibility falls on the municipality; and it is also true that the police power extends to forbidding play in streets dangerous or unfit for that purpose from any cause; nevertheless, municipal authorities are bound to take notice of and have a reasonable regard for the fact that many streets are used for the play of boys and girls, and that they may be properly so used, without material interference with the main uses above set out. Viewing the general use of the street by boys and girls for play, and the long acquiescence by the public in such use, when it has not interfered with the other uses mentioned, and considering the growing scope of the duties of the state, and especially of municipal corporations, to the individual, it seems clear that the court should not lay it down, as a proposition of law applicable to all cases, that playing by boys and girls while they are still of the age of youthful sportiveness is an illegitimate use of a street, not to be anticipated by the authorities whose duty it is to keep highways in a reasonably safe condition.

The earlier and later authorities on the subject are in direct conflict. The doctrine first held in this country is thus forcibly stated by Chief Justice Bigelow, in *Blodgett v. Boston*, 8 Allen (Mass.) 237, which was an action for damages received by a boy 11 years old, while engaged in play on a street: "The highway is to be kept safe and convenient for all persons having occasion to pass over it, while engaged in any of the pursuits or duties of life. If this be not the limit beyond which the duty and corresponding liability of cities and towns in relation to the subject-matter do not extend, we are unable to see where the line can be drawn. And yet it is plain that there must be some limit. A town cannot be held responsible for every case of damage to person or property which may happen by reason of a defect in a highway, without regard to the use to which it was appropriated at the time of the accident by the person injured. Suppose, for example, a juggler or gymnast should occupy a portion of a street or road to exhibit his feats of skill or agility or strength. He certainly could not be regard-

ed in the light of a traveler while so using the highway; nor could he claim damages of a city or town for injuries sustained by him in his person or property during the performance, although they might have been occasioned in whole or in part by a defect in the highway. Take another example of a different character. A boy, while using a portion of a highway solely for the purpose of enjoying the amusement of sliding over the snow in a sled, meets with an injury attributable to some defect arising from the accumulation of snow or ice. It would hardly be contended that the city or town in which such an accident happened could be held liable for the damages thereby occasioned."

The same doctrine was stated and applied in *Tighe v. Lowell*, 119 Mass. 472, and *Hunt v. Salem*, 121 Mass. 294. These cases were decided, it is true, under a statute which gave a right of action to "travelers," for injuries received from defects in the highway, while our statute provides for the recovery of damages by "any person who shall receive bodily injury. \* \* \*" But there are other cases laying down the same rule in states where no limitation of the right of action to travelers was expressed in the statute. *Reed v. Madison*, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733; *Chicago v. Starr*, 42 Ill. 177, 89 Am. Dec. 422. The cases cited held, however, that the rule of nonliability extended only to children who were using the street exclusively for play, and not to children who, in going from one place to another, stopped to gratify their curiosity, or to indulge their natural tendency to sportiveness; the diversion or play in such cases being regarded as a mere incident of the travel, to be expected of children in their use of streets for travel.

The matter has not been before any court of last resort in this state, but the conclusion we have stated is in accord with all the later decisions. Modern judicial opinion and the reason for it is thus expressed in *Gibson v. Huntington*, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853: "Poor parents are unable to provide a place of healthful exercise and play for their children, for it requires all their earnings to clothe, feed, and shelter them. The law prohibits them, under the penalty of being trespassers, from entering on the lands of others; and now to forbid them to use the road to its utmost boundary for the purpose of play, when not interfering in any manner with the traveling public, would savor too much of the Dark Ages of barbarism, when children were subject to inhuman, diabolical punishments, and their lives were at the mercy of those having charge over them. The roads are the only commons children now have, and to confine them in the narrow limits of their tenement houses would be cruel, unjust, and oppressive,

blight their young lives, and render their bodies weak, sickly, scrofulous, and vile."

The same principle has been applied in the following cases: *Owensboro v. York*, 117 Ky. 294, 77 S. W. 1130, 25 Ky. Law Rep. 1439; *Covington v. Drexilius*, 120 Ky. 493, 87 S. W. 266, 27 Ky. Law Rep. 903, 117 Am. St. Rep. 593; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Chicago v. Keefe*, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860; *Busse v. Rogers*, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183; *Straub v. St. Louis*, 175 Mo. 413, 75 S. W. 100; *Stodd v. Philadelphia (C. C.)* 183 Fed. 659; *Augusta v. Tharpe*, 113 Ga. 152, 38 S. E. 389; *Rome v. Suddeth*, 116 Ga. 649, 42 S. E. 1032; *Omaha v. Richards*, 49 Neb. 244, 68 N. W. 528; *Indianapolis v. Emmelman*, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65; *Kunz v. Troy*, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508; *Vicksburg v. McLain*, 67 Miss. 4, 6 South. 774; *Beaudin v. Bay City*, 136 Mich. 333, 99 N. W. 285, 4 Am. & Eng. Ann. Cas. 248, and note; note, 20 L. R. A. (N. S.) 753.

[5] It is true that in the decisions cited the ages of the children injured ranged from 3 to 14 years; but we do not think this court can say, as a matter of law, that a boy of 17 has passed the age of youthful sportiveness, and reached such a mature age that play in the street is not to be expected of him, nor allowed to him. We express no opinion as to the correctness of the rulings of the Supreme Court of Mississippi, in *Jackson v. Greenville*, 72 Miss. 220, 16 South. 382, 27 L. R. A. 527, 48 Am. St. Rep. 553, and of the Supreme Court of Massachusetts, in *Vosburgh v. Moak*, 1 Cush. 453, 48 Am. Dec. 613, that grown men playing with a dog, or playing ball on a street, are not making a legitimate or permissible use of the street, and cannot recover for injuries due to a defect in the street, for this case is different.

[6] Under some circumstances and in some localities, it would no doubt be held an improper use of the street, and contributory negligence, as a matter of law, for boys of 17 to incur the risk of playing on the street. But there are no circumstances here to take the case out of the general rule that it is for the jury to determine, under all the circumstances, whether the use of the street by the boys was a legitimate use, and whether the danger was so apparent that they were guilty of contributory negligence.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remanded to that court for a new trial.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(136 Ga. 804)

# JOHNSON v. STATE.

(Supreme Court of Georgia. Sept. 22, 1911.)

(Syllabus by the Court.)

## 1. CRIMINAL LAW (§§ 762, 863\*)—TRIAL—INSTRUCTION—OPINION OF COURT.

The court instructed the jury as follows: "If you believe from the evidence, beyond a reasonable doubt, that the defendant, Will Johnson, was the aggressor, and that he, actuated by malice aforethought, either express or implied, with a pistol shot the deceased, Will Solomon, at the time and place in the manner charged in the indictment, then the defendant would be guilty of the offense of murder, and you would be authorized in convicting him." This charge was not without evidence to support it, nor did it contain an expression of opinion by the court that the accused was the aggressor. Nor was the substantial repetition of the same instruction to the jury, in a recharge at their request, erroneous, on the ground that it was given at the conclusion of such recharge, or on the ground that it inflamed the minds of the jury, and was prejudicial to the accused, as focusing the minds of the jury upon the theory that the accused was the aggressor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1750-1759, 2065-2067; Dec. Dig. §§ 762, 863; \* Homicide, Cent. Dig. §§ 581, 656.]

## 2. HOMICIDE (§ 200\*)—EVIDENCE—DYING DECLARATION.

The court did not err in admitting the statement of the decedent as to the cause of his death and the person who killed him. There was evidence that the decedent, at the time he made the declaration, was in a dying condition, and was conscious of the fact. Penal Code 1910, § 1026.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 425-427; Dec. Dig. § 200.\*]

## 3. CRIMINAL LAW (§§ 419, 420, 448, 696\*)—HOMICIDE (§ 338\*)—EVIDENCE—HEARSAY—OPINION—WRIT OF ERROR—HARMLESS ERROR.

The evidence of a witness that he heard another person say, upon hearing the report of the pistol that killed the decedent, "He has shot that boy," was objectionable as hearsay evidence and the expression of an opinion (Carr v. State, 76 Ga. 592 [3]), and, not being strictly responsive to any question propounded by counsel for the accused, should have been excluded upon his motion; but, as the remark was so indefinite that it could apply as well to the decedent as to the accused, as the party doing the shooting, and as there was only one shot fired, and the accused in his statement admitted firing the shot that killed the deceased, the refusal of the court to rule out the remark as hearsay was manifestly not hurtful to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420, 448, 696; \* Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

## 4. HOMICIDE (§ 300\*)—INSTRUCTION—SELF-DEFENSE.

The court stated a correct legal principle in instructing the jury that "One would not be justified, under the law of self-defense, in killing another to prevent the commission of an injury upon him which would amount to nothing more than a misdemeanor." This charge was not erroneous for either of the following reasons: (a) That "it was confusing and misleading, in that it failed to instruct the jury of what offense the defendant might be guilty;" (b) that "it deprived the defendant of the right to defend himself against an apparent danger, and virtually instructed the jury that, before the defendant

would be authorized to act in self-defense, he must first wait and ascertain whether his adversary only intended to inflict some misdemeanor on him, or whether he intended to commit a felony, before the defendant would be justified in acting at all;" and (c) that "a seeming necessity, if acted upon in good faith, would be equivalent to a real necessity; and for the court to instruct the jury as he did in this case it deprived him of this right." There is no assignment of error that the court did not elsewhere instruct the jury as to the doctrine of a seeming necessity, acted upon in good faith, being equivalent to an actual necessity. Moreover, it appears from the charge in the record that the court fully and clearly instructed the jury on the subject.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

#### 5. HOMICIDE (§ 309\*)—INSTRUCTION—VOLUNTARY MANSLAUGHTER.

The court further charged the jury as follows: "If you believe from the evidence that Will Solomon [the decedent] was the aggressor and committed on the defendant an ordinary battery by striking the defendant with some instrument, or that he was attempting to commit on the defendant ordinary battery, an injury less than a felony, and that by reason of being attacked by the deceased, or by reason of such attempted injury upon him, that violent impulse of passion supposed to be irresistible was excited in the defendant, and the defendant, acting under such impulse of passion, shot and killed the deceased, Will Solomon, he would not be guilty of the offense of murder, but you would be authorized in finding him guilty of the offense of voluntary manslaughter." This charge was not erroneous on the ground that "it confused the law of justification with the law of voluntary manslaughter, and excluded entirely from the jury's consideration other equivalent circumstances which might be sufficient, under the law, to mitigate the offense."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

#### 6. SUFFICIENCY OF EVIDENCE—OVERRULING MOTION FOR NEW TRIAL.

The evidence in the record does not disclose a strong case for murder against the plaintiff in error; but this court cannot say that the verdict for that offense was wholly unauthorized by the evidence, nor that the trial judge abused his discretion in overruling the motion for a new trial.

Error from Superior Court, Early County; W. C. Worrill, Judge.

Will Johnson was convicted of homicide, and brings error. Affirmed.

Byron R. Collins and W. I. Geer, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, T. S. Felder, Atty. Gen., and Hawes & Pattle, for the State.

FISH, C. J. Judgment affirmed.

BECK, J., absent. The other Justices concurred.

(138 Ga. 901)

#### ROBERTS v. TIFT.

(Supreme Court of Georgia. Sept. 30, 1911.)

(Syllabus by the Court.)

#### 1. EJECTMENT (§ 76\*)—PLEADING—AMENDMENT.

An amendment laying a new demise and preserving the action can be made in the ficti-

tious form of ejectment, although the original declaration contained only a demise of a person dead at the time of the commencement of the suit.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 76.\*]

#### 2. WITNESSES (§ 159\*)—TRANSACTIONS WITH PERSONS SINCE DECEASED—SURVIVING PARTY TO CONTRACT—COMPETENCY.

On the trial of an action of ejectment, a lessor was competent to testify that another lessor, in whose name a prior demise was laid, at a given time executed and delivered to the witness as grantee a deed to certain described land for which the action was brought; that the witness saw the grantor sign the instrument in the presence of two named witnesses, neither of whom was an officer; that both of the witnesses and the grantor had since died; that the instrument was lost and could not be found; and that it had never been recorded, the personal representatives or transferee of such grantor not being a party to the suit.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 159.\*]

#### 3. MOTION FOR NEW TRIAL—STATEMENT OF DEFENDANT'S CONTENTIONS.

There was no merit in the grounds of the motion for a new trial based upon the alleged failure of the judge to properly state the contentions of the defendant below upon the trial of the case.

#### 4. EJECTMENT (§ 9\*)—RIGHT OF ACTION—TITLE OF PLAINTIFF—OUTSTANDING TITLE.

The court charged the jury as follows: "Now, the defendant insists that he purchased some portion of the land in dispute, and that he has a right to hold the land as his. The court charges you that the defendant has a right to set up any paramount title to this property, set up any title that is the best title to this property; and, if you believe from the evidence that he holds the true title and that it has descended from the true owners, and that Capt. Tift [the plaintiff] has not complied with the law, and has not come up to the requirements of the law, which gives prescriptive title, why the defendant would be entitled to recover, and your verdict would be in favor of the defendant." This instruction was calculated to impress the jury with the idea that, before they would be authorized to find in favor of the defendant, the evidence had to be sufficient to show that the defendant held under a paramount outstanding title; that is, if it appeared from the evidence that there was an outstanding title superior to that of the plaintiff, he could nevertheless recover if the defendant was not connected with such outstanding superior title. The law is that the plaintiff must recover on the strength of his own title; and therefore, if at the trial an outstanding title be shown superior to that of the plaintiff, he cannot recover, although it be not shown that the defendant had title. As there was evidence tending to show an outstanding paramount title with which the defendant was not connected, the instruction was hurtful error to the defendant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.\*]

#### 5. ADVERSE POSSESSION (§ 116\*)—EFFECT—PRESCRIPTIONS.

It was not error to charge the jury, in effect, that a prescriptive title, when fully shown by the evidence, is good as against the true owner of the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116.\*]

Error from Superior Court, Tift County; R. G. Mitchell, Judge.

Action by H. H. Tift against Gillis Roberts.

Judgment for plaintiff, and defendant brings error. Reversed.

J. B. Murrow, Ellis, Webb & Ellis, and Ellis & Ellis, for plaintiff in error. Fulwood & Murray, J. M. Terrell, and Hal Lawson, for defendant in error.

FISH, C. J. [1] One of the assignments of error raises the question whether the declaration in the fictitious form of ejectment, as used in this state, can be amended by laying a new demise, when the only demise laid in the original declaration was in the name of a lessor who was dead at the time the suit was brought. No ruling of a controlling nature has been made by this court on the question. In *Neal v. Robertson*, 18 Ga. 399, Starnes, J., used in an obiter dictum language strongly persuasive as to the right to make such amendment. While deciding that an amendment to a statutory action for land brought under the act of 1847, which proposed to insert other plaintiffs, was not allowable, he said: "The right to make the amendment moved in this case has been put upon the ground of the practice which prevails in actions of ejectment at common law of laying several demises in several lessors. If this were such a proceeding, there can be no doubt that, under our laws as they now stand with respect to amendments, at any stage of the cause an amendment might be made, inserting a new demise and new lessors. But this would be permitted upon the principle which lies at the foundation of that proceeding, viz., that John Doe is the real plaintiff, that he is the lessee or tenant of those in whom the demises are laid, and, by reason of the fiction upon which the frame of the action rests, these lessors, instead of being different parties, are all in union of interest with the plaintiff. When, therefore, a recovery is had by and through the title of either of these lessors, that recovery is held to inure to the benefit of the plaintiff, John Doe, and through him it is supposed to operate for the benefit of that lessor who is the actual party in interest. So that, when the writ of habere facias issues (though at the point of time when it becomes necessary to execute it the operation of the fiction ceases, and the sheriff is required to put the lessor, whose title is successful, in possession), it issues for the benefit of the plaintiff, John Doe, or, rather, through him for the benefit of that lessor who is the real person in interest. Some courts have required that the consent of all the lessors should be obtained before their names are used. In which event this mutuality of interest is supposed to be rendered certain." As a matter of practice there seems heretofore to have been no question as to the right to lay a new demise by amendment to a declaration in ejectment proper, where the sole lessor in the original declaration was dead when the action was

brought. This practice was recognized in the following cases: *Roe v. Doe*, 30 Ga. 873; *Pollard v. Tait*, 38 Ga. 439; *Head v. Driver*, 79 Ga. 179, 3 S. E. 621; *Jones v. Johnson*, 81 Ga. 293, 6 S. E. 181. In each of the cases just cited the justice writing the opinion noted the fact that the sole lessor in the original declaration was not in life when the action was begun; but there was no intimation that this fact would prevent the laying of a new demise in the name of another lessor. In *Head v. Driver*, supra, in which Chief Justice Bleckley wrote the opinion, all the demises were laid in the name of a person dead at the commencement of the suit. The plaintiff offered an amendment not laying a new demise or alleging a new lessor, but setting up an additional fact as to the merits of the case. In the concluding portion of the opinion the Chief Justice dealt with this proposed amendment, not by showing that the amendment laying a new demise was not permissible, but that the amendment offered would not have helped the plaintiff, or prevented a nonsuit, if it had been allowed. This court has frequently decided that a suit can be maintained only by or in behalf of a natural or artificial person, and that, where an action is instituted by one not having capacity to sue, the proceeding is a mere nullity, and contains nothing to amend by. *Mutual Life Ins. Co. v. Inman Park Presbyterian Church*, 111 Ga. 677, 36 S. E. 880, and cases cited; *Wynn v. Richard Allen Lodge*, 115 Ga. 796, 42 S. E. 29; *Western & Atlantic R. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978. And see *Clark Bros. v. Wyche*, 128 Ga. 24, 26, 54 S. E. 909. It has also been ruled in several cases by this court that there can be no recovery in ejectment proper where the sole lessor of the plaintiff was dead when the suit was brought. *Head v. Driver*, supra, citing *Jones v. Tarver*, 19 Ga. 280 (6); *Goodtitle v. Roe*, 20 Ga. 135; *Watson v. Tindal*, 24 Ga. 494 (5), 503, 71 Am. Dec. 142; *Doe v. Roe*, 29 Ga. 45 (2). It is also the rule that, if the lessor of the plaintiff in ejectment had no title at the commencement of the action, the plaintiff cannot recover on that demise. *Hobby v. Bunch*, 83 Ga. 1 (3), 10 S. E. 113, 20 Am. St. Rep. 301; *Suwannee Turpentine Co. v. Baxter*, 109 Ga. 597, 35 S. E. 142. And the same is true if the plaintiff's lessor had no title at the date of the demise. *Scisson v. McLaws*, 12 Ga. 166; *Foster v. Stapler*, 64 Ga. 766. Moreover, the rule is that "no amendment adding a new and distinct cause of action or new and distinct parties shall be allowed, unless expressly provided for by law." Civ. Code 1910, § 5683. This, so far as we know, has ever been the rule of practice in this state, at least since the adoption of the Code of 1863. See section 3411 of that Code. Notwithstanding the doctrines that no action can be maintained except in the name of a

natural or artificial person, that there can be no recovery in ejectment where the sole lessor of the plaintiff was dead when the suit was brought, or at the date of the demise, or had no title at the date of the demise or at the commencement of the action, and that no amendment is allowable at law which adds a new party or a new cause of action, it has ever been the practice in this state to allow by amendment at any time before the trial the introduction of a new lessor of the plaintiff in the action of ejectment proper (*Pollard v. Tait*, 38 Ga. 439; *Jones v. Johnson*, supra), although every demise of this character introduces a new party to the suit, as well as a new cause of action (*Id.*; *Burbage v. Fitzgerald*, 98 Ga. 582, 25 S. E. 554). It has been held, moreover, that where the sole lessor of the plaintiff in the action of ejectment dies pending the suit the case may proceed to trial for the recovery of costs. *Watson v. Tindal*; *Doe v. Roe*, supra. Furthermore, this court has subscribed to the doctrine "that, if the plaintiff is entitled to the possession of the premises at the time the demise is laid, it will be sufficient, although his right of possession be divested before the trial; for the action of ejectment is intended to give the party compensation for the trespass as well as to enable him to recover possession of the land, and he has the right to proceed for such trespass, although his right to the possession should cease." *Harris v. Cannon*, 6 Ga. 382, 389, citing *Adams on Ejectment*, 33. If the nominal plaintiff in the action of ejectment proper is a sufficient legal entity to authorize the continuance of the action in his name for the recovery of costs where his sole lessor dies pending the suit, and if the action may proceed in his name for the trespass, where his sole lessor was entitled to the possession of the premises at the time the demise was laid, although his right of possession be divested before trial, it would certainly seem to be true that the fictitious plaintiff is a sufficient legal entity to authorize a new demise to be laid by amendment, where the sole lessor in the original declaration was dead at the commencement of the suit. Moreover, if a suit in ejectment proper can be well brought in the name of a fictitious plaintiff upon the demise of a living lessor who had no title at the time the demise was laid, or who had parted with the title prior to the commencement of the suit, and an amendment can be made upon the trial by laying a new demise from a lessor who had title at the time of the new demise, and at the time the suit was brought, which under our practice is certainly allowable, no good reason occurs to us why a new demise may not be laid by amendment in the name of a lessor having title and the right of possession at the time of the laying of such new demise and at the time of the

commencement of the action, although the sole lessor in the original declaration was dead at the time the suit was brought. Our conclusion is that such an amendment as is last referred to is allowable. *Powell on Actions for Land*, § 118, note 5.

Two grounds of the motion for a new trial complain of error in the exclusion of certain evidence offered by the defendant below. An examination of the brief of evidence sent up in the record shows that the evidence alleged to have been excluded was admitted. The other grounds of the motion for a new trial are sufficiently dealt with in the headnotes relating thereto. The judgment refusing a new trial is reversed, upon the error in the instruction set forth in the fourth headnote.

BECK and ATKINSON, JJ., absent. The other Justices concur.

(136 Ga. 791)

#### TATUM v. LEIGH.

(Supreme Court of Georgia. Sept. 22, 1911.)

#### (Syllabus by the Court.)

#### 1. CORPORATIONS (§ 537\*)—OFFICERS—LIABILITY FOR CORPORATE DEBTS.

Where a private corporation, owing a debt on which a suit is pending, ceases to carry on the corporate business and sells all of its property, and its officers, being its only stockholders, appropriate all of the proceeds of sale to their individual use, thus leaving no other assets from which to pay the corporate debt, in an equitable suit by the creditor against the corporation and officers, for the purpose of charging the latter as trustees and as liable for the debt, the corporation, upon facts as just stated, is to be regarded as in a state of insolvency.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 537.\*]

#### 2. CORPORATIONS (§ 545\*)—OFFICERS—DUTIES AND LIABILITIES—APPLICATION OF FUNDS.

Under facts as above enumerated, the officers of the corporation would be under duty to apply the proceeds of sale primarily to the payment of the debts of the corporation, and could not, for their personal benefit, lawfully apply such proceeds to the payment of existing debts owing to them individually, or give preference to existing debts which the corporation owed to other persons, and for which such officers were primarily liable; such payments or preferences not having been made in the performance of any agreement or understanding entered into at or prior to the time when the liabilities were incurred, or before the insolvency of the corporation. *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624-630, 17 S. E. 968 et seq., and citations; *Atlas Tack Co. v. Macon Hardware Co.*, 101 Ga. 391, 29 S. E. 27; *Crawford v. Roney*, 130 Ga. 515, 61 S. E. 117; 2 *Cook on Stock and Stockholders* (3d Ed.) § 661; *Olney v. Conanicut Land Co.*, 16 R. I. 597, 18 Atl. 181, 5 L. R. A. 361, 27 Am. St. Rep. 767; *Rouse v. Merchants' Natl. Bank*, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644; *Jones on Insolvent and Failing Corporations*, §§ 126, 248.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2170-2175; Dec. Dig. § 545.\*]



### 3. CORPORATIONS (§ 548\*)—OFFICERS—LIABILITY FOR CORPORATE DEBTS.

After judgment in such a pending suit as mentioned in the first headnote, followed by due issuance of execution and entry of nulla bona thereon, a petition against the corporation and its officers in a court of equity, alleging the procurement of such a judgment and return of nulla bona on the execution, and other facts as specified in the first headnote, and, further, that the defendant officers had actual notice of the debt and pending suit at the time of sale, but nevertheless, upon demand, refused to pay the amount specified in the execution, and praying to charge the officers as trustees, and for a judgment against them individually for the amount of the debt, was not subject to general demurrer. In this connection, see *Lamar v. Allison*, 101 Ga. 270, 28 S. E. 686.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2182-2186; Dec. Dig. § 548.\*]

### 4. CORPORATIONS (§ 605\*)—TERMINATION OF EXISTENCE—NONUSER OF FRANCHISE.

A corporation, by merely ceasing to exercise its franchise and selling all of its property, does not cease to exist. *Lamar v. Allison*, 101 Ga. 270-274, 28 S. E. 686; 1 Cook on Stock and Stockholders (3d Ed.) § 631.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2389; Dec. Dig. § 605.\*]

### 5. VENUE (§ 22\*)—RESIDENCE OF PARTIES—CODEFENDANTS.

The venue of a suit of the character mentioned in the third headnote may be laid in the county of the residence of any one of the defendants against whom substantial relief is prayed; and the petition in the present case was not subject to the separate demurrer of one of the officers of the corporation, alleged to reside in a different county from that in which the suit was brought, which complained that the facts alleged showed that the court was without jurisdiction as to him.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 35-37; Dec. Dig. § 22.\*]

### 6. BANKRUPTCY (§ 426\*)—DISCHARGE OF BANKRUPT—DEBTS DISCHARGED.

An indebtedness of an officer of a private corporation, created by his misappropriation of the funds of such corporation, is not dischargeable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 426.\*]

(Additional Syllabus by Editorial Staff.)

### 7. BANKRUPTCY (§ 426\*)—DEBTS DISCHARGED—"OFFICER."

The word "officer" as used in Bankruptcy Act July 1, 1898, c. 541, § 17a (4), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), excepting from the operation of a discharge in bankruptcy debts created by the bankrupt's fraud, embezzlement, misappropriation, or defalcation while acting as an officer, includes an officer of a private corporation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 426.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 4933-4951; vol. 8, p. 7737.]

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by F. B. Leigh against J. W. Tatum and others. Judgment for plaintiff, and defendant Tatum brings error. Affirmed.

Perry, Foy & Monk, for plaintiff in error. R. D. Meader, for defendant in error.

ATKINSON, J. [1-5] 1-5. It is unnecessary to elaborate the ruling announced in headnotes 1 to 5, inclusive.

[6] 6. J. W. Tatum, who was president of the corporation and one of the directors, filed a separate plea, admitting that half of the proceeds derived from the sale of all of the corporate property had been applied to the payment of notes due to the National Bank of Brunswick, which he and his codefendant Abrams, who was a director and also the secretary and treasurer of the corporation, had made individually, and that the other half was applied to his own use, but setting up that the notes so held by the bank had been given for money borrowed on account, and expended for the use, of the corporation, and were entitled to be paid out of the funds of the corporation, and the other half of the funds which was so applied to his own use went in part payment of valid and existing debts which the corporation owed to him individually. At the trial, which was held at the June term, 1910, of the court, the defendant offered an amendment to his original plea, setting up that, on the 21st day of May, 1910, he had been duly adjudged a voluntary bankrupt in the District Court of the United States for the Eastern Division of the Northern District of Alabama, and having been so adjudged he is now a bankrupt; that the time of making his application for discharge has not expired, and he intends in good faith, within the time provided by law, to make application for a discharge from all provable debts against him; that the debt sued upon in this case was contracted and became due before the filing of the petition and adjudication in bankruptcy; that the plaintiff was duly scheduled in bankruptcy as one of the unsecured creditors, and was given notice and had actual knowledge of the proceeding in bankruptcy; that his contemplated discharge, when granted, will release the defendant from all liability upon the indebtedness sued upon in this case; and thereupon he prayed that the suit be suspended and stayed until after adjudication or dismissal of his petition in bankruptcy, and until the question of the final discharge is determined, etc. Error is assigned upon the ruling of the judge disallowing this amendment. The question whether an indebtedness of an officer of a private corporation, created by his misappropriation of the funds of such corporation, is dischargeable in bankruptcy is presented by an exception to the disallowance of an amendment to the plea of the defendant, Tatum. An indebtedness created by a misappropriation of the funds of a private corporation by a director, while acting in the capacity of president of such corporation, falls within the meaning of the bankruptcy act of July 1, 1898, c. 541, § 17a (4), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), declaring

that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as \* \* \* (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

[7] It was held in *Re Harper* (D. C.) 133 Fed. 970, that the word "officer," as used in section 17, cl. 4, included officers of a private corporation. It was accordingly decided that an indebtedness created by the embezzlement and misappropriation of the funds of the bank by the debtor, while acting in the capacity of vice president of the bank, and having full control of its affairs, was one created by his fraud, embezzlement, and misappropriation while acting as an officer, and therefore was not dischargeable in bankruptcy. While the point as to whether he was acting in a fiduciary capacity, within the meaning of clause 4 of the seventeenth section of the bankruptcy act, was discussed by the District Judge, it was not adjudicated. On a review of this case by the Circuit Court of Appeals for the Fourth Circuit (*Harper v. Rankin*, 141 Fed. 626, 72 C. C. A. 320), the judgment rendered in the District Court was affirmed upon the ground that the vice president of the bank, in creating the indebtedness by his embezzlement and misappropriation of the funds of the bank, was acting in a fiduciary capacity, within the meaning of section 17a, cl. 4, of the bankruptcy act; the court stating that it did not deem it necessary to pass upon the point whether an officer of a private corporation came within the scope of the section and clause of the act referred to. A petition in the case to the Supreme Court of the United States, for a writ of certiorari to be directed to the Circuit Court of Appeals, was denied. *Harper v. Rankin*, 200 U. S. 621, 26 Sup. Ct. 758, 50 L. Ed. 624. Therefore the judgment of the Circuit Court of Appeals was allowed to stand affirmed by the Supreme Court, but whether upon the point that the vice president of the bank was an officer, as held by the District Court, or whether he was acting in a fiduciary capacity, as held by the Circuit Court of Appeals, or whether upon both points, we are unable to ascertain. It is enough, however, for us to say that the denial by the Supreme Court of a writ of certiorari in the case, in view of the ruling sought to be reviewed, is decisive of the point involved in the case we have under consideration, that an indebtedness created by the president of a private corporation, by his misappropriation of the funds of an insolvent private corporation in the payment of a debt due him by the corporation, made pending a suit by a creditor of the corporation against it, is not dischargeable in bankruptcy. It was held in *Re Gulick*, 183 Fed. 350, by the District Court of the United States for the Southern District of New York, that officers of a private cor-

poration, where they get control, with an attendant fiduciary obligation, of the property of the corporation, are "officers," within the meaning of section 17a (4) of the bankruptcy act of July 1, 1898, exempting from discharge debts created by his misappropriation or defalcation while acting as an "officer." The ruling was based on the reasoning of Judge McDowell in *Re Harper* (D. C.) 133 Fed. 970. Under the admissions contained in the defendant's answer, and in view of the principles announced in the authorities cited to the second headnote, the defendant, by applying the proceeds of sale to the payment of debts in the interest of himself, to the exclusion of the plaintiff, misappropriated the funds which were in his hands and held for the benefit of creditors.

Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 795)

### WESTBERRY v. CLANTON.

(Supreme Court of Georgia. Sept. 22, 1911.)

(Syllabus by the Court.)

#### 1. ARREST (§ 63\*)—WARRANT—NECESSITY—COMMON-LAW RULE.

At common law a public officer could not lawfully arrest without a warrant for an offense not a felony, when not committed in his presence, except as provided by St. Winchester, c. 4, an arrest of any suspicious nightwalker might be made by watchmen; or a justice of the peace, by word of mouth, might authorize the arrest of one engaged in a riot not in the presence of the justice. 4 Bl. Com. \*292; 2 Hawk. P. C. 127 et seq.; 2 Hale's P. C. 85, 86, 98; 2 Addison on Torts, § 802. See *Porter v. State*, 124 Ga. 297, 301, 52 S. E. 283, 2 L. R. A. (N. S.) 730.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 145-156; Dec. Dig. § 63.\*]

#### 2. EVIDENCE (§ 80\*)—PRESUMPTIONS—LAWS OF OTHER STATES—COMMON LAW.

The contrary not appearing, it will be presumed that the common law exists in the state of Alabama (*Wells v. Gress*, 118 Ga. 566 (2), 557, 45 S. E. 418), and therefore that a public officer in that state is not authorized to make an arrest without a warrant for a misdemeanor not committed in his presence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80; \* Common Law, Cent. Dig. §§ 14-16.]

#### 3. FALSE IMPRISONMENT (§ 2\*)—ELEMENTS—COMMON LAW—STATUTORY PROVISIONS.

False imprisonment at common law and elsewhere consists in the unlawful detention of the person of another for any length of time, whereby he is deprived of his personal liberty (3 Bl. Com. \*127; 12 Am. & Eng. Enc. Law, 721; 19 Cyc. 319; Civ. Code 1910, § 4447, which is a codification of the common law), and furnishes a right of action for damages to the person so detained. The only essential elements of the action being the detention and its unlawfulness (3 Bl. Com. \*127), malice and the want of probable cause need not be shown (*Chivers v. Savage*, 85 Eng. Com. Law R. 696; *Brandt v. Craddock*, 27 L. J. (N. S.) 314; 12 Am. & Eng. Enc. Law, 726, citing, among other cases, *Rich*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

v. McInerney, 103 Ala. 345, 15 South. 663, 49 Am. St. Rep. 32).

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 1; Dec. Dig. § 2.\*]

**4. TRIAL (§§ 251, 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.**

Accordingly, where, upon the trial of an action brought in this state, embracing several counts, one of which was for false imprisonment, it appeared that the plaintiff was arrested and imprisoned in the state of Alabama by a police officer of a city of that state, by virtue of a telegram sent to him, at the instance of the defendant, by a sheriff of this state, the defendant writing the telegram and by authority of the sheriff signing the latter's name thereto, the defendant having previously had a warrant issued in this state, charging the plaintiff with having committed in this state "the offense of a misdemeanor," it was error for the court to give the jury the following instructions: (a) "If the imprisonment is by virtue of a warrant, the party bona fide suing it out is not guilty of a false imprisonment." (b) And, in general terms, without confining the instruction to the counts other than that for false imprisonment, that the plaintiff must show by a preponderance of the evidence "that the defendant acted in the matters complained of with malice and without probable cause. Those two ingredients must occur before he can recover." There was no evidence to authorize instruction "a." The imprisonment was by virtue of the telegram, the police officer having no warrant, and the warrant in the hands of the sheriff in this state had no force in Alabama. *Scott v. Eldridge*, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; *Simmons v. Vandyke*, 138 Ind. 380, 37 N. E. 973, 26 L. R. A. 33, 46 Am. St. Rep. 411; *Cunningham v. Baker*, 104 Ala. 180, 16 South. 68, 53 Am. St. Rep. 27; *State v. Shelton*, 79 N. C. 605; *Malcomson v. Scott*, 56 Mich. 459, 23 N. W. 166; *Harris v. Louisville, etc. (C. C.)* 35 Fed. 116; 2 Am. & Eng. Enc. L. (2d Ed.) 882; 5 Enc. L. & P. 477 et seq. Instruction "b" was error, because, to sustain the count for false imprisonment, as above shown, it was not necessary to prove malice and want of probable cause.

[Ed. Note.—For other cases, see Trial, Dec. Dig. §§ 251, 252.\*]

**5. TRIAL (§ 196\*)—INSTRUCTIONS—POLICY OF LAW.**

The court should not have instructed the jury " \* \* \* that it is the policy of the law, as well as the policy of the courts, that these actions should be strictly guarded. Circumstances under which they are maintained must be accurately stated, and are never encouraged, except in plain cases." While similar language has been used by justices in delivering opinions of this court (*Ventress v. Rosser*, 73 Ga. 534, 541; *Joiner v. Ocean Steamship Co.*, 86 Ga. 238, 245, 12 S. E. 361), trial judges should not employ it in instructing juries as to the law of the case.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 196.\*]

**6. OTHER GROUNDS NOT REVIEWED.**

In view of the rulings above stated, and the fact that a new trial must be had, it is not necessary to pass on the other grounds of the motion for a new trial.

Error from Superior Court, Tattnall County; P. E. Seabrook, Judge.

Action by J. W. Westberry against D. S. Clanton. Judgment for defendant, and plaintiff brings error. Reversed.

Twiggs & Gazan and Hines & Jordan, for plaintiff in error. Warnell & Anderson, for defendant in error.

FISH, C. J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 790)

**ROBERTS v. MOORE**

(Supreme Court of Georgia. Sept. 22, 1911.)

(Syllabus by the Court.)

**1. FRAUDS, STATUTE OF (§ 139\*)—EVIDENCE—ADMISSIBILITY.**

In an action for the recovery of land, it was not error to permit a witness to testify to the effect that two persons under whom the plaintiff and the defendant respectively claimed bought a certain lot of land, one half of which was the subject of the action, and that each of such persons paid for his respective half of the lot which they divided between them, one taking the east half and the other the west, over the objection that the transaction about which the witness testified was one involving the sale of land or an interest therein, and was therefore required to be in writing, and that the writing would be the highest evidence; it also appearing that each purchaser took possession of the land respectively assigned to him in the parol division.

[Ed. Note.—For other cases, see Frauds, Statute of, Dec. Dig. § 139.\*]

**2. APPEAL AND ERROR (§ 1051\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In such an action it was not harmful error to permit a witness to testify to whom a deed was made, where the deed itself was put in evidence and showed that it was made to the person to whom the witness testified it was executed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

**3. REFORMATION OF INSTRUMENTS (§ 33\*)—PARTIES—ADMISSIBILITY OF EVIDENCE—INSTRUCTIONS.**

In an action to which the grantor in a deed is not a party, parol evidence was not admissible to show that the instrument, while purporting to convey an entire lot of land, was intended by the parties thereto to convey only the west half of the lot, and that by mistake of the scrivener the entire lot was inserted. This is true, although the defendant in the action set up such mistake in his plea, and asked that the deed be accordingly reformed. The grantor not being a party to the action, such plea was not good in law. *Wyche v. Green*, 32 Ga. 341; *Brown v. Brown*, 97 Ga. 531, 25 S. E. 353, 33 L. R. A. 816; *Hamilton v. Cargile*, 127 Ga. 762, 56 S. E. 1022; *Halliday v. Bank of Stewart County*, 128 Ga. 639, 58 S. E. 169; 34 Cyc. 987; 18 Enc. P. & P. 795.

(a) The grantor named in the deed which was sought to be reformed not being a party to the suit, it was error to charge on the law of mutual mistake and reformation of deeds.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 122-139; Dec. Dig. § 33.\*]

**4. EVIDENCE (§ 472\*)—OPINION—STATEMENT OF FACTS.**

The bare statement of a witness that he used no fraud or deception to induce the gran-

tors to sign a designated deed was not admissible in evidence, as it amounted to a mere conclusion of the witness. The facts and circumstances attending the signing should have been stated, so that the jury could reach their own conclusion as to whether or not any fraud or deception was used by the witness to induce the grantors to sign the instrument. See, in this connection, *Mayor, etc., of Milledgeville v. Wood*, 114 Ga. 370, 40 S. E. 239.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.\*]

#### 5. TRIAL (§ 193\*) — INSTRUCTIONS — OPINION OF JUDGE.

This being an action of complaint for land, where the plaintiff alleged that the defendant was in possession of the land in dispute, and the defendant filed his plea setting up title by prescription by adverse possession under color of title, the judge did not express an unauthorized opinion as to the facts of the case, when in beginning his instructions to the jury he stated that the case was brought by the plaintiff against the defendant "in the possession of the east half"; nor, while setting forth the contentions of the defendant, in stating that "the defendant sets up a title by prescription and color of title."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.\*]

#### 6. CHARGE OF COURT—PRESCRIPTION.

There was not sufficient evidence of possession by defendant, or those under whom he claimed, to authorize a charge on the subject of prescription.

#### 7. ARGUMENTATIVE CHARGE.

An assignment of error that the whole charge was argumentative was without merit.

Error from Superior Court, Baker County; Frank Park, Judge.

Action by M. D. Roberts, administrator, against E. A. Moore. Judgment for defendant, and plaintiff brings error. Reversed.

W. I. Geer, for plaintiff in error. P. D. Rich & Nelson, for defendant in error.

ATKINSON, J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 812)

#### WALKER v. WALKER.

(Supreme Court of Georgia. Sept. 22, 1911.)

(Syllabus by the Court.)

#### REFUSAL OF NEW TRIAL.

The judge did not abuse his discretion in refusing to grant a new trial.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between C. R. Walker and K. M. Walker. From the judgment, C. R. Walker brings error. Affirmed.

W. R. Hammond, for plaintiff in error. E. H. Frazer, for defendant in error.

EVANS, P. J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(137 Ga. 34)

#### O. O. BANKS BROS. et al. v. LESTER. (Supreme Court of Georgia. Oct. 12, 1911.)

(Syllabus by the Court.)

#### WILLS (§ 718\*) — ACCEPTANCE OF BENEFITS — PROBATE OF WILL—ESTOPPEL.

Where a writing purporting to be the last will and testament of a testator is probated and admitted to record, notwithstanding its defective execution as a will, and an heir of the decedent accepts from the executor possession of land therein devised to him treating the same as his own, such devisee, after the lapse of a great length of time, and without offering to restore the property to the estate, will be estopped from denying the validity of the paper as a will, or questioning the jurisdiction of the court admitting it to probate.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 718.\*]

Error from Superior Court, Baldwin County; Jas. B. Park, Judge.

Action by W. T. Lester against O. O. Banks Bros. and another. Judgment for plaintiff, and defendants bring error. Reversed.

Hines & Vinson, for plaintiffs in error. Allen & Pottle, for defendant in error.

EVANS, P. J. This is an action of complaint for land by W. T. Lester against O. O. Banks Bros. and L. A. Collette. The plaintiff claimed a one-fifth undivided interest in the premises sued for. He attached to his declaration the following abstract of title: "(1) Death of W. W. Lester, grandfather of petitioner, in possession of said premises in 1872. (2) Setting apart of the tract of land described in the within petition as a homestead of Sarah A. Lester, widow of W. W. Lester, and her three minor children, to wit, William T. Lester, John Dennis Lester, and Emma Lester. (3) Death of William T. Lester, leaving as his sole heir at law W. T. Lester, the petitioner. (4) Death of John Dennis Lester and Emma Lester, leaving no heirs at law. (5) At the date of the death of Sarah A. Lester and the maturity of Wm. T. Lester, John Dennis Lester, and Emma Lester, being the date at which the homestead estate was determined, there remained surviving of all the children of W. W. Lester and Sarah A. Lester, Wm. T. Lester, John Dennis Lester, Emma Lester, L. L. Lester, Kit Lester, Virginia Lester, Mrs. Tobe Thompson, and Mrs. Tom Butts." The defendant filed a plea admitting his possession, but denying that the plaintiff had any title to the land. He offered to amend by alleging that in 1869 the common grantor, William Lester, executed a writing purporting to be a will, which writing devised to Sarah A. Lester, his wife, for life, with remainder over to Virginia, Emma and John D. Lester, the land described in the petition; that the will was attested by two witnesses, and was probated in common form and admitted to record as the last will and testament of Wil-

liam W. Lester, and that letters testamentary were issued to denominated executors; that the widow and all of the heirs at law of William W. Lester treated the writing herein described as the true, legal, and valid will of William W. Lester, and all their acts and conduct affecting the property therein devised have been performed with reference to, and in conformity with, the writing; that W. T. Lester (father of the plaintiff) accepted the devise to him of certain lands located in Early (now Miller) county, and entered into possession of the same. Wherefore, defendants say that this conduct on the part of W. T. Lester operates to estop him from disputing the validity of the will, and, further, that the writing proved as a will is good color of title. This amendment was disallowed by the court. The case proceeded to trial, and resulted in a verdict for the plaintiff for a one-seventh undivided interest in the premises and certain mesne profits. A motion for new trial was denied, and the defendants excepted.

The paper admitted to record as the will of W. W. Lester was attested by only two witnesses. A will attested by only two witnesses is void, and can derive no aid from probate and being admitted to record. *Cureton v. Taylor*, 89 Ga. 490, 15 S. E. 643. The defense set up in the amendment is, not that the defendants obtained title under the will, but that their grantors and the plaintiff's father were devisees under this instrument which was probated as the last will and testament of W. W. Lester, and that the plaintiff's father could not enter into possession and appropriate to his own use the land devised to him and repudiate the devise made to the defendants' grantors. In the language of the old Scotch law, one cannot both approbate and reprobate. The plaintiff's father received the Miller county land as a devise under the will of his father; and he will not be permitted to assert that the will was legally executed to the extent of conveying his title, but not so as to the other devisees. The invalidity of the will because of defective attestation does not forbid the application of the doctrine of estoppel. It is the conduct of a party taking a benefit which he could not otherwise have but for the invalid will which will estop him from setting up the invalidity of the will to defeat the other devisees. If a will defectively executed has been probated by agreement of the heirs, who are sui juris, and the property distributed by virtue of the will, an heir will not be heard in disaffirmance of the title to the property therein devised. *Gay v. Sanders*, 101 Ga. 601, 28 S. E. 1019. In *Branson v. Watkins*, 96 Ga. 54, 23 S. E. 204, a will attested by two witnesses was probated to record. One of the devisees accepted a devise of land thereunder;

and the court said: "The conduct of [this devisee] amounted to an election to take under the will; and after remaining for more than 80 years in possession of the land received from the executors, accepting and acquiescing in the validity of the probate proceedings whereby the paper had been adjudged to be the true last will of the alleged testator, and claiming thereunder a life estate only, she would have been estopped from denying the validity of the paper as a will or questioning the jurisdiction of the court admitting it to probate or the regularity of the probate proceedings." We think the principle ruled in the case last cited controls the legal proposition presented in the amendment. As neither the original plea nor the amendment averred any adverse possession in the defendants or their predecessors in title for the prescriptive period, we forbear ruling on the purely academic question of whether a defectively attested will, when probated and admitted to record, may suffice for color of title.

All of the assignments of error in the amended motion are expressly abandoned, except the last, which is so insufficiently stated that no precise legal question is presented.

For the reason that the court deprived the defendants of a substantial defense by disallowing their amendment, a new trial is granted.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 830)

RUCKER v. RUCKER et al.

(Supreme Court of Georgia. Sept. 23, 1911.)

(Syllabus by the Court.)

1. EVIDENCE (§ 273\*)—DECLARATIONS—TITLE TO PROPERTY.

Declarations of a person in possession of property, in favor of his own title, are admissible to prove his adverse possession, but for no other purpose. Civil Code 1910, § 5767; *Dawson v. Callaway*, 18 Ga. 573; *Hansell v. Bryan*, 19 Ga. 167; *Harrison v. Hatcher*, 44 Ga. 638 (4); *Bowman v. Owens*, 133 Ga. 49, 65 S. E. 156.

Accordingly, the declarations of such person that the property had been given to him by another are not admissible for the purpose of proving the gift.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273; \*Adverse Possession, Cent. Dig. § 670.]

2. TRIAL (§ 252\*)—ADVERSE POSSESSION (§ 60\*)—HOSTILE CHARACTER OF POSSESSION—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Permissive possession cannot be the foundation of a prescription until an adverse claim and actual notice to the other party. Civil Code 1910, § 4164. Where possession is inceptively permissive, title by prescription under 20 years' possession will not ripen until the expiration of 20 years after actual notice to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

party under whom possession originated of the adverse claim of the one setting up prescription. Therefore, where the defendant relied on adverse possession for a period of 20 years for the establishment of a prescriptive title to a part of the land in controversy, and introduced evidence tending to show possession for the requisite time, but the evidence disclosed that the possession originated by permission of the plaintiff, and there was no evidence tending to show 20 years' possession after actual notice to the plaintiff of the defendant's adverse claim, a charge on the subject of title by prescription under 20 years' adverse possession was not authorized by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252; Adverse Possession, Dec. Dig. § 60.\*]

### 3. ADVERSE POSSESSION (§ 60\*) — HOSTILE CHARACTER OF POSSESSION—INSTRUCTION.

The evidence set out in the sixth ground of the motion for a new trial, relating to the adverse possession of the defendant to part of the land in controversy, was admissible; but, in the absence of any evidence tending to show that the plaintiff had actual notice of the adverse character of such possession for 20 years prior to the bringing of the action, the evidence was not sufficient to show title by prescription in the defendant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-314; Dec. Dig. § 60.\*]

### 4. CHARGE OF COURT—NO ERROR.

Other portions of the charge to which exceptions were made were not erroneous for any reason assigned.

### 5. REFUSAL OF NEW TRIAL—ERROR.

The court erred in refusing to grant a new trial.

Error from Superior Court, Elbert County; D. W. Meadow, Judge.

Action by Mrs. S. F. Rucker against Adle Rucker and others. Judgment for defendants, and plaintiff brings error. Reversed.

Z. B. Rogers and J. N. Worley, for plaintiff in error. C. P. Harris, for defendants in error.

FISH, C. J. Judgment reversed.

BECK, J., absent. The other Justices concur.

[136 Ga. 787]

### PROPPER v. OWENS et al.

(Supreme Court of Georgia. Aug. 21, 1911. Rehearing Denied Sept. 22, 1911.)

(Syllabus by the Court.)

### 1. ATTORNEY AND CLIENT (§ 40\*) — DISBARMENT—GROUNDS—CONCEALMENT OF PREVIOUS DISBARMENT.

Where a person applied for and obtained admission to the bar of this state as an attorney in good standing in another state, under Civil Code 1895, § 4411 (Civil Code 1910, § 4949), without disclosing the fact that shortly theretofore he had been disbarred for professional misconduct and acts involving moral turpitude by a court of competent jurisdiction in another state where he was located before going to that whence he came to Georgia, this was such a fraud and imposition upon the court of this state as authorized the disbarment of such

attorney upon its discovery. On the general subject, see *In re Pritchett*, 122 App. Div. 8, 106 N. Y. Supp. 847; *In re Marx*, 115 App. Div. 448, 101 N. Y. Supp. 680; *People v. Gilmore*, 214 Ill. 569, 73 N. E. 737, 69 L. R. A. 701; *In re Olmstead*, 11 N. D. 305, 91 N. W. 943; *Lowenthal's Case*, 61 Cal. 122; *State v. Laughlin*, 10 Mo. App. 1; *State Board of Law Examiners v. Williams*, 116 Tenn. 51, 92 S. W. 521; *In re Mills*, 1 Mich. 392; *Jackson v. State*, 21 Tex. 149; *In re Bowman*, 7 Mo. App. 569; *Ex parte Tillinghast*, 4 Pet. 108, 7 L. Ed. 798; *Weeks on Attorneys at Law*, § 80, p. 153.

(a) Accordingly, on the trial of a disbarment proceeding against an attorney at law in this state, in the court which admitted him and in the county of his residence, before the judge who by consent passed upon the law and facts without the intervention of a jury, where the pleadings and evidence were of such character as to authorize a finding that on the 21st day of February, 1906, the respondent, being then an attorney at law in the state of Illinois, by judgment of the Supreme Court of that state, having jurisdiction in such matters, based on charges involving professional misconduct and moral turpitude, was disbarred from pleading and practicing law in any of the courts of that state, and thereafter became a resident of Tennessee, and in January, 1907, after examination under the laws of Tennessee, obtained a license to plead and practice law in that state, without informing the court so admitting him of his previous disbarment in Illinois, and in July, 1907, became a resident of Georgia, and on the 5th day of October, 1907, upon his application representing that he was an attorney at law in good standing in the state of Tennessee, obtained admission to the bar in Georgia, under the provisions of the statute mentioned in the first headnote, without informing the court of the fact of his previous disbarment in the state of Illinois, the judge was authorized to enter a judgment disbarring the respondent and revoking his license as an attorney at law.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 58; Dec. Dig. § 40.\*]

### 2. ATTORNEY AND CLIENT (§ 53\*)—DISBARMENT PROCEEDINGS—ADMISSIBILITY OF EVIDENCE.

In such a proceeding, the respondent in his answer having set up that before the grant of the license to him in Tennessee he informed the officers of court admitting him of his previous disbarment in Illinois, it was not error to admit their testimony tending to disprove that part of the plea over the objections: (a) That it was irrelevant; and (b) that it sought to impeach the judgment of the court of Tennessee which admitted him to plead and practice in that state.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 53.\*]

### 3. JUDGMENT (§ 822\*) — CONCLUSIVENESS — MATTERS CONCLUDED.

It is undisputed that the respondent participated in the trial which resulted in his disbarment in Illinois, and that the trial was had in the court having jurisdiction of such matters in that state, and that the judgment has never been set aside. The judgment so rendered was conclusive upon the respondent, and there was no error in rejecting evidence tending to disprove the charges upon which the judgment was based.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 822.\*]

### 4. APPEAL AND ERROR (§ 728\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

A complaint in the bill of exceptions that "the respondent offered to testify that the judg-

ment of the Supreme Court of Illinois disbaring him was obtained by fraud, by a conspiracy upon the part of" certain named persons, and that the judge "rejected the testimony, \* \* \* to which said judgment of the court the respondent then and there excepted and now excepts and assigns error upon the same," is not a sufficient assignment of error. [Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 728.\*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Disbarment proceedings on the relation of Geo. W. Owens and others against A. H. Propper. Judgment of disbarment, and respondent brings error. Affirmed.

A. A. Lawrence, for plaintiff in error. W. C. Hartridge, Sol. Gen., T. M. Cunningham, Jr., Geo. W. Owens, and Jas. M. Rogers, for defendants in error.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 849)

McGARRY et al. v. SEIZ et al.

(Supreme Court of Georgia. Sept. 26, 1911.)

(Syllabus by the Court.)

**LIMITATION OF ACTIONS (§ 180\*)—DELAY IN BRINGING SUIT—AGREEMENT AS TO TIME—DEMURRER.**

This case is controlled by the decision in McGarry v. Seiz, 129 Ga. 296, 58 S. E. 856. The court did not err in sustaining a general demurrer to the petition.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 180.\*]

Evans, P. J., dissenting.

Error from Superior Court, Fulton County; J. L. Pendleton, Judge.

Action by Mary McGarry and others against E. C. Seiz and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Thos. F. Corrigan and R. B. Blackburn, for plaintiffs in error. Dodd & Dodd, for defendants in error.

BECK, J. The plaintiffs in error filed, in the court below, suit against E. C. Seiz, as principal, and Aetna Indemnity Company, as surety, on a bond given for the faithful performance of a contract for the erection of a dwelling. The suit was instituted to recover from the defendants the amount of a judgment in favor of certain materialmen, obtained by them in a lien foreclosure proceeding against the property of the plaintiffs above referred to, growing out of the erection of the building by the defendant Seiz, and his failure to pay said materialmen's claims. It was alleged that this judgment had been paid off and satisfied by the petitioners. The indemnity company demurred

generally to the petition, which demurrer was sustained, and the plaintiffs excepted.

It is contended by the defendants in error that the demurrer was properly sustained, on the ground that the suit was not brought within the time required by the following provision contained in the bond: "If any suits at law or proceedings in equity are brought against said surety to recover any claim hereunder, the same must be instituted within six months after the completion of the work specified in said contract." It is evident from the allegations of the petition that this suit was not instituted within the time stipulated in the foregoing clause of the bond.

On the other hand, it is contended by the plaintiffs in error that, since materialmen have 12 months from the time their claim becomes due in which to commence a proceeding to foreclose the same, the foregoing clause of the bond is at variance and irreconcilable with the following clause contained therein, to wit: "The surety shall not be liable under this bond to any except the obligee, but it is agreed that the obligee, in estimating his damage, may include the claims of mechanics and materialmen, arising out of the performance of the contract, and paid by him, only when the same, by the statutes of the state where the contract is to be performed, are valid liens against the property."

A former suit, instituted by the same plaintiffs against these defendants to recover the amount claimed by the same materialmen whose judgment is referred to in the present suit, and who were then proceeding to foreclose the same, was dismissed by this court, on the ground that the same was prematurely brought; it appearing from the petition in that case that the liens so set up had not been paid by the plaintiffs; and it not being alleged that the same were valid liens. The decision in that case is reported in 129 Ga. 296, 58 S. E. 856. It was then contended by counsel for Mrs. McGarry that she must have the right to bring her suit within the six months, notwithstanding no payment had been made to the materialmen. On this question Justice Cobb, speaking for the court said: "She has entered into a contract by which she agrees that the surety will not be liable to her, unless her claim for damages is asserted by suit within six months from the time the work is completed. She has also entered into a contract that the surety will not be liable on account of the claims of materialmen, unless such claims are valid liens under the laws of the state. She must be held to the terms of her contract; there being nothing in the undertakings therein which would be contrary to public policy. The surety had a right to contract with her that its liability should be subject to reasonable conditions, and the conditions above referred to are not, in any sense, unreasonable

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as to the character of the claim for which the surety should be liable, or the time in which the suit should be brought. See, in this connection, *Massachusetts Life Ass'n v. Robinson*, 104 Ga. 272, 30 S. E. 918, 42 L. R. A. 261, and citations. In order to hold the surety liable, she must determine, at her peril, whether the claim of the materialmen, asserted against her, constituted a valid lien under the laws of this state. If it does, she may pay the same, and bring suit for indemnity within six months from the time the work is completed. If it does not, she may decline to pay the same and defend against such claim. There is nothing in the terms of the contract which, either expressly or impliedly, provides that the validity of the lien shall be first determined by a judgment of the courts. If she paid the claim, and it thereafter developed that the same was not a valid lien under the laws of the state, there is no liability under the bond. If she paid the claim, and it was a valid lien under the laws of the state, the surety would be liable, provided the other conditions of the bond are complied with, and suit to recover the amount so paid is filed within six months from the time that the work is completed."

This case is controlled by the ruling above quoted; and under that ruling the petition now before us was properly dismissed on demurrer, because the same was not filed within the time required by the terms of the bond.

Judgment affirmed. All the Justices concur, except EVANS, P. J., dissenting.

(136 Ga. 805)

# MARSHALL v. WHATLEY et al.

(Supreme Court of Georgia. Sept. 22, 1911.)

## (Syllabus by the Court.)

### 1. LIS PENDENS (§ 25\*)—ACTION RELATING TO LAND—PERSONS BOUND BY JUDGMENT—"NOTICE."

A suit for specific performance of a contract for the sale of land is "notice" of the claim that the plaintiff sets up therein from the time it is commenced and docketed; and, if duly prosecuted and not collusive, one purchasing the land pending the suit is affected by the final decree rendered therein, though the suit is in a county other than the one in which the land is located.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 47-57; Dec. Dig. § 25.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4839-4844; vol. 8, p. 7733.]

## (Additional Syllabus by Editorial Staff.)

### 2. VENUE (§ 5\*)—"RESPECTING TITLES TO LAND."

A suit for specific performance is not a suit "respecting titles to land," within Const. art. 6, § 16, par. 2, requiring cases of that nature to be tried in the county where the land lies.

[Ed. Note.—For other cases, see *Venue*, Dec. Dig. § 5.\*]

Error from Superior Court, Upson County; E. J. Reagan, Judge.

Action by G. P. Marshall against H. T. Whatley and others. Judgment for defendants, and plaintiff brings error. Reversed.

Claude Worrill and E. C. Armistead, for plaintiff in error. J. Y. Allen, W. Y. Allen, and E. F. Dupree, for defendants in error.

HOLDEN, J. G. P. Marshall, plaintiff in error (hereinafter called the plaintiff), brought suit in April, 1907, to recover a described tract of land, against H. P. Whatley and others. All the defendants in the suit, except H. T. Whatley (hereinafter called the defendant), disclaimed title and any right of possession. Upon the conclusion of the plaintiff's evidence, the court granted a nonsuit, and he excepted. The plaintiff claimed to have entered into possession of the land and made valuable improvements thereon, under a written contract for its purchase from J. A. Carmichael, Jr., to whom he paid all of the purchase-money, but who would not make him a deed. He filed a petition, in Pike superior court, for specific performance of the contract and an injunction against the sale of the land by Carmichael. Upon this petition, on the day it was filed, a restraining order was granted, which seems never to have been revoked or modified. Upon the trial a verdict and decree were rendered in favor of the plaintiff, requiring Carmichael to make the plaintiff a deed to the land, which was located in Upson county. Counsel for the defendant contends that the record shows that the defendant bought the land from C. S. Barrett, and that Barrett bought from Carmichael, and that if the plaintiff had any title to or interest in the land when he purchased, neither of them, when they respectively purchased the land, had any notice of such title or interest. The plaintiff contends that the record shows that Barrett bought from Carmichael, and defendant bought from Barrett after plaintiff made his written contract with Carmichael for the purchase of the land, and that each, when they respectively purchased, had equal notice of the fact that the plaintiff had such written contract. The plaintiff further contends that the purchases by Barrett and the defendant were made pending the suit of the plaintiff against Carmichael for specific performance; and though this suit was in the superior court of Pike county, and the land was located in Upson county, it was notice to any one buying from Carmichael, pending the suit, of the plaintiff's claim therein, and of the verdict and decree rendered therein.

[1] 1. We think the record sufficient to authorize a finding that when Barrett bought the land from Carmichael, and when the defendant bought it from Barrett, the suit by the plaintiff against Carmichael for specific



performance was pending. The plaintiff testified, among other things, to substantially the following: He made a contract with Carmichael for the purchase of the land in 1899, and went into possession in the spring of 1899. He built a house and made other improvements. He locked the house, in which were some sawmill tools, and left the land in the spring of 1902. The defendant states, in the amendment to his plea, that "it was after plaintiff had declared he had given it up and moved off that Barrett purchased." According to the evidence, the plaintiff "moved off" in the spring of 1902, and the suit for specific performance was filed March 15, 1902. The defendant does not expressly state that either of the purchases, the one by him from Barrett, or the one by Barrett from Carmichael, was not made pending the suit for specific performance, but alleges that this suit in the superior court of Pike county was not notice to one buying, pending the suit from the defendant in that suit, the land located in Upson county. The suit for specific performance, which was filed March 15, 1902, pending until April 3, 1906, when a verdict and decree were rendered. The plaintiff did not leave the land until the spring of 1902. After that some one broke open the house. The plea alleges that Carmichael was in possession when Barrett bought from him. We think the evidence sufficient to authorize a finding that Barrett bought pending the suit. The plaintiff testified that the defendant bought the land in 1903, which was pending the suit for specific performance. He further testified that "suit was pending in Pike superior court at the time the defendants bought the land here in dispute from J. A. Carmichael, under which they went into possession of it." The Civil Code 1910, § 4533, provides: "Decrees ordinarily bind only parties and their privies; but a pending suit is a general notice of an equity or claim to all the world from the time the petition is filed and docketed; and if the same is duly prosecuted and is not collusive, one who purchases pending the suit is affected by the decree rendered therein." No exception is made with respect to a suit which is pending in a county other than the one wherein the land involved is located. We think that the suit for specific performance by the plaintiff against Carmichael in the superior court of Pike county, which terminated in a verdict and decree in favor of the plaintiff, was notice of the right and claim of the plaintiff to the land, though the land was situated in Upson county. Civil Code 1910, § 5425, provides: "A decree for specific performance shall operate as a deed to convey land or other property without any conveyance being executed by the vendor. Such decree, certified by the clerk, shall be recorded in the registry of deeds in the county where the land lies, and shall stand in the place of a deed." There is no statute in this state (as in some states) providing that in order for suits

of this character to be notice there must be filed in the county where the land lies a notice that suit is pending in another county. In the absence of such a statute, a suit for specific performance of a contract for the sale of land against the owner, in a county different from that in which the land lies, is notice of the rights of the plaintiff in that suit, under the section of the Civil Code of 1910, above quoted.

[2] It is true that a suit for specific performance is not a suit "respecting titles to land," within the meaning of the provision of our Constitution (Const. art. 6, § 16, par. 2), requiring a suit of that nature to be brought in the county where the land lies; and that it must be brought in the county of the residence of the defendant, though it be in a county different from that in which the land is located. Yet a suit of this kind is of such a nature, and so far involves the right to the title, use, and enjoyment of the land as to make it notice under the section above quoted. See *Faulkner v. Vickers*, 94 Ga. 531, 21 S. E. 233. This is true, though the suit is brought in a county other than that in which the land is located. The provision in the Civil Code 1910, § 5425, quoted, supra, that "such decree, certified by the clerk, shall be recorded in the registry of deeds where the land lies, and shall stand in the place of a deed," is a requirement as to what shall be done after the determination of the suit; but we have no statute providing that anything must be done by the plaintiff in a suit for specific performance, in a county other than that in which the land lies, pending such suit, in order to give notice to any one who buys the land involved in the suit from the defendant therein. In 2 Black on Judgments, in the text in section 550, he quotes language appearing in the decision in the case of *Brightman v. Brightman*, 1 R. I. 112, as follows: "We apprehend it is well settled that he who purchases property pending a suit in which the title to it is involved takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases. That he purchased it bona fide and paid a full consideration for it will not avail against such judgment or decree. Nor will he be permitted to prove that he had no notice of the suit. The law infers that all persons have notice of the proceedings of courts of record." See, in this connection, *Wickliffe v. Breckinridge*, 1 Bush (Ky.) 427.

In the suit for specific performance, the land was described as follows: "Two hundred acres, more or less, being all of lot No. ——— in ——— district of Upson county, Ga., being bounded on the north by the county line and on the east by the lands of Will Daniel, and on the south and west by the lands of Richard Fallens." This description was not so indefinite as to prevent the pendency of the suit from operating as a *lis pendens*, so as to give notice of the plaintiff's claim made

in that suit to the land in controversy. See *Johnson v. McKay*, 121 Ga. 763, 49 S. E. 757. Judgment reversed.

BECK, J., absent. The other Justices concurred.

(126 Ga. 799)

### HELMS v. STATE.

(Supreme Court of Georgia. Sept. 22, 1911.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 649\*)—REFUSAL OF CONTINUANCE—GROUNDS.

Where, in the course of a trial, a party desires to impeach a witness by stenographic notes taken on a former trial, which notes are in an adjoining county, it is not an abuse of discretion to refuse to suspend the case until the next day to allow an effort to be made to procure the absent notes; and especially is this so where the court allows the movant to introduce witnesses who deliver testimony in accord with the alleged absent memoranda.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1512-1515; Dec. Dig. § 649.\*]

#### 2. CRIMINAL LAW (§ 681\*)—EVIDENCE—ADMISSIBILITY—PRELIMINARY PROOF.

Relevant evidence dependent for its admissibility upon preliminary proof, which has been allowed without requiring such preliminary proof, should be considered by the jury, and an instruction which in effect withdraws such evidence from the jury is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1611, 1612; Dec. Dig. § 681.\*]

#### 3. CRIMINAL LAW (§§ 814, 1172\*)—INSTRUCTIONS—APPLICABILITY TO CASE—IMPEACHMENT OF WITNESS—HARMLESS ERROR.

Where on the trial of a criminal case the accused sought to impeach a witness for the state by proof of a contradictory statement, and the state replied with proof denying that the witness made the statement, and the judge, in charging as to how witnesses may be impeached, read Pen. Code 1910, § 1052, upon the subject, there being no evidence of the good character of any of the witnesses, the last clause of that section, to the effect that a witness, when impeached, may be sustained by proof of general good character, was inapplicable and improperly given in charge; but, under the facts of the case, this was a harmless error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1890; Dec. Dig. §§ 814, 1172.\*]

#### 4. CRIMINAL LAW (§ 825\*)—IMPEACHMENT—INSTRUCTIONS.

Where the court instructs the jury as to the different methods of impeaching a witness and the effect of a successful impeachment, and a party desires an elaboration of the law of impeachment or a concrete application of it, he should make a pertinent and timely written request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

#### 5. CRIMINAL LAW (§ 782\*)—INSTRUCTIONS—NEGATIVE AND POSITIVE TESTIMONY.

It is erroneous to charge Pen. Code 1910, § 1011, that "the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist because many witnesses who had the same opportunity of observation swear that they did not see or know

of its having transpired," without an instruction, in connection therewith, touching the credibility of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.\*]

#### 6. CRIMINAL LAW (§ 828\*)—INSTRUCTIONS—REQUESTS—MANSLAUGHTER.

The evidence did not authorize an instruction on the law of voluntary manslaughter. The criticism that the evidence did not authorize certain charges is not well founded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.\*]

Error from Superior Court, Jasper County; J. B. Park, Judge.

Lloyd Helms was convicted of murder, and brings error. Reversed.

A. S. Thurman, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. Lloyd Helms was convicted of the murder of Joe Greer, alias Good Greer, and recommended to the mercy of the court. The state submitted evidence tending to show that Laura Greer, the sister of the deceased, lived in a state of concubinage with the defendant. Between 7 and 8 o'clock at night the defendant came to the house where Laura Greer lived. She was sick, and attended by a small girl, named Lidell Sanders. He demanded, with an oath, that the door be opened, and Laura told Lidell to open the door. The defendant came into the house with his shoes under his arm, and with a knife, and asked if his supper was ready. Upon Laura's giving him an affirmative answer, he said he was going to the spring to get some water, and was going to kill her upon his return. As soon as he left the house, Laura ran to her mother's about a mile or a mile and a half distant. When she reached her mother's house, she cried out for some one to open the door. Her brother, the deceased, replied, "The door is open. Come on in the house. Nobody ain't going to bother you." The mother of Laura asked her if the defendant was pursuing her, and she said yes, that he was going to kill her. When the defendant arrived at the house of the mother of the deceased, he said "he had to have nigger out of there." The mother replied, "There is no need of you carrying on this way. You better go home." And the defendant said, "If she don't come out, I will kill her." The deceased started out of the house, when his mother told him not to go. The deceased replied that he was going out to show the road to the defendant. Neither the mother nor daughter saw the deceased approach the defendant, nor did they see any blow. The deceased was stabbed with a knife. The mother of the deceased called him, and the defendant, who had ran off a short distance, replied, "God damn him, he won't answer you any more,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for I have killed him." The homicide occurred in a road about 10 steps from the door of the house. A few hours afterwards a razor, identified as belonging to the deceased, was picked up at the place where the body of the deceased was found.

[1] 1. The case had been tried on a former occasion, and was stenographically reported. The stenographer's notes, which had not been transcribed, were at his home in an adjoining county. When two of the witnesses for the state had testified, counsel for the defendant moved to suspend the trial of the case until he could send to the home of the stenographer for his notes, to be used for the purpose of impeachment. The court refused to suspend the trial, and the defendant introduced witnesses who testified that the two witnesses for the state had testified differently on the former trial. The court is not bound to suspend the trial of a cause to enable the defendant to procure additional evidence. *Zipperer v. Mayor & Aldermen of Savannah*, 128 Ga. 135, 57 S. E. 311. The defendant knew that the case had been tried on a former occasion, and, if he desired the stenographic report of the case, proper diligence would have demanded that he procure it before the trial.

2. It appeared in evidence that shortly before the homicide the deceased had threatened to kill the defendant, but this threat was not communicated to the defendant prior to the homicide. The court charged the jury that any threat made by the deceased against the defendant should not be considered by the jury unless they believed that the deceased attacked the defendant, or did some overt act showing an intention to carry the threat into execution. Among other criticisms on this charge it is contended that inasmuch as the defendant in his statement declared that the deceased attacked him, and that he inflicted the mortal blow in defense of this attack, and as the evidence of the state was somewhat equivocal as to the motive of the deceased in leaving the house and as to his conduct just before he was stricken, the charge withdrew from the jury any consideration of the uncommunicated threat in determining whether the deceased was actually attacking the defendant when he received his mortal wound.

[2] It is a rule of law that as a preliminary to the admissibility of an uncommunicated threat by the defendant against the deceased it must be shown that the deceased was the assailant in the fatal encounter, or did some overt act showing an intention to carry that threat into execution, and that this preliminary foundation must be made by proof; the defendant's statement being insufficient of itself to supply the foundation. *Rouse v. State*, 135 Ga. 227, 69 S. E. 180; *Pride v. State*, 133 Ga. 439, 66 S. E. 259. It would have been sufficient ground for the rejection of evidence of the decedent's uncommunicated threat that the proper founda-

tion had not been laid; yet, where the evidence has been received, the defendant is entitled to have it considered by the jury in all its aspects. Evidence which has no probative value—like hearsay evidence—may be disregarded by the court in his charge; but relevant evidence, the admissibility of which is dependent upon a preliminary showing, is not to be withdrawn from the jury by the court in its charge simply because the proper foundation may not have been laid. *Goodwyn v. Goodwyn*, 20 Ga. 600; *Patton v. Bank of Lafayette*, 124 Ga. 974, 53 S. E. 664, 5 L. R. A. (N. S.) 592. The charge was harmful to the defendant, because of the uncertainty of the decedent's intent and purpose in leaving the house to meet the defendant, as disclosed by the evidence. His mother testified that after Laura Greer had reached her house, and the defendant came up, announcing his purpose "that he had come to kill or get killed or have his negro out of there," she advised the decedent, as he started out of the door, to remain in the house. To this admonition the decedent replied that he was going out to show the road to the defendant. No one observed what actually transpired in the road after the decedent left the house. The evidence makes it apparent that the defendant was familiar with the road; that the house sat within a few feet of the road, with no inclosure. The prior threat of the decedent under these circumstances tended to illustrate the state of mind of the deceased, and whether his declaration that he intended to show the defendant the road meant something other than an expression of an intended friendly courtesy. *Vaughn v. State*, 88 Ga. 731, 16 S. E. 64.

[3] 3. The accused offered evidence tending to show that two of the state's witnesses have testified differently on a former trial. The state offered evidence tending to show that their testimony on the present trial was in harmony with that delivered by them on the former trial. In his charge the court read Pen. Code 1910, § 1062, which provides how a witness may be impeached by contradictory statements previously made, where the proper foundation has been laid. He read the entire section of the Code, the last sentence of which is as follows: "When thus impeached he may be sustained by proof of general good character, the effect of the evidence to be determined by the jury." Error is assigned upon the reading of this Code section in its entirety, because there was no attempt to sustain the witness by proof of general good character. We do not think this is sufficient ground for a new trial. The state did not attempt to establish the credibility of the witnesses by proof of good character, and the reading of the entire Code section under the facts of this case is not reversible error. *Kelly v. State*, 118 Ga. 329, 45 S. E. 413.

[4] 4. The court charged the jury concern-

ing the different methods of impeaching a witness and the effect of a successful impeachment. Complaint is made that the court failed to further elaborate the law of impeachment, and apply its principles in the concrete to the case. The court's failure in this respect, in the absence of a pertinent and timely written request, is not ground for a new trial. *Perdue v. State*, 135 Ga. 277, 69 S. E. 184.

[5] 5. The court read several sections of the Penal Code respecting the character and degree of strength of the evidence required for a conviction in criminal cases. He also read section 1011 (quoted in the 5th head-note). Error is assigned upon the reading of this section without further stating in connection therewith that the rule applies only where the witnesses are of equal credibility. Whenever the judge deems it proper to give this section of the Code in charge, he should accompany it by an additional charge touching the credibility of witnesses. *Warwick v. State*, 125 Ga. 133, 53 S. E. 1027. And, where he fails so to do, a new trial will ordinarily be granted, unless it appears that the failure in this respect was not calculated to harm the complaining party. While, under the facts of this case, the error may not have been so harmful to the defendant as to require a new trial, yet attention is called to it that it may be avoided on the next trial.

[6] 6. There is nothing in the evidence authorizing a charge on the law of voluntary manslaughter. If that grade of homicide was involved, it was founded solely on the statement of the accused; and, there being no timely written request to charge upon the subject of manslaughter, there was no error in the failure to do so. *Cook v. State*, 134 Ga. 348, 67 S. E. 812. The criticism that the evidence did not authorize an instruction upon certain propositions is not well founded.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 831)

#### BARBER v. STATE

(Supreme Court of Georgia. Sept. 23, 1911.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 954\*)—MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS.

A ground of a motion for new trial should be complete in itself; and nothing is presented for decision by a ground which complains that the court erred in refusing to permit a named witness to be questioned by the defendant's attorney as to what the witness swore on the commitment trial, and also that the court refused to permit the attorney to ask the witness if she did not swear "certain things" on such trial which were contradictory to what "she now swears," such examination of the witness being

relied on to show that defendant's counsel had been entrapped by said witness "in having sworn differently at the said commitment trial to what she now swears; the attorney having stated that he had been entrapped by said witness."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2363-2367; Dec. Dig. § 954.\*]

#### 2. INSTRUCTIONS—THREATS.

The charge on the subject of threats was not error on the ground that "it is not law, and also gives undue stress to threats, and is calculated to affect the minds of the jury against the defendant."

#### 3. CRIMINAL LAW (§ 1129\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

The court did not instruct the jury upon the law of circumstantial evidence; and an assignment of error upon an extract from the charge which complained that it was an instruction upon the subject of circumstantial evidence, and that there was no evidence to authorize it, was without merit.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1129.\*]

#### 4. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict, and there was no error in refusing to grant a new trial.

Error from Superior Court, Butts County; R. T. Daniel, Judge.

Dallas Barber was convicted of crime, and brings error. Affirmed.

H. M. Fletcher and O. M. Duke, for plaintiff in error. J. W. Wise, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 846)

#### GEORGIA RY. & ELECTRIC CO. v. WHITE.

(Supreme Court of Georgia. Sept. 26, 1911.)

(Syllabus by the Court.)

#### 1. MASTER AND SERVANT (§ 281\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The verdict was contrary to the evidence and without evidence to support it, and a new trial should have been granted on that ground.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 281.\*]

#### 2. DEMURRER TO PETITION.

There was no error in overruling the general demurrer to the petition.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by R. W. White against the Georgia Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

Colquitt & Conyers, for plaintiff in error. Jas. L. Key, Reuben R. Arnold, and Lamar Hill, for defendant in error.

BECK, J. R. W. White brought suit against the plaintiff in error to recover dam-

ages for personal injuries alleged to have been sustained by him on October 4, 1906. The plaintiff alleged that on the date named he was in the employment of the defendant company as conductor; that he had never practiced as motorman, and was not skilled in the operation of a motor or well acquainted with the method of operating the same; that a car was due to leave Atlanta at 1:45 in the morning, which went out Decatur street and out to the Soldiers' Home junction; that there was no motorman to run the car, and the plaintiff was ordered by one of defendant's agents, acting with authority of superintendent, to run said car both as motorman and conductor; that plaintiff had never been warned of the perils of running a car as motorman, nor been given sufficient opportunity or practice to run a car with skill as motorman, or to know or understand the speed of a car; that while proceeding out Decatur street, at the rate of five or six miles an hour, plaintiff reached a switch or turnout from the Decatur street track at the intersection of Piedmont avenue; that this Piedmont avenue track is not a track used by regularly scheduled cars, but used at irregular intervals, and by construction cars mostly, going to defendant's power house to load or unload equipment, and the like; that, under the defendant's practice and custom, the switch at the intersecting turnout at Piedmont avenue was not one which motormen running on the Decatur street main line were required to stop and turn before proceeding, but was one which, being required to remain turned to the main line, motormen could run over upon the assumption that the same was always turned to the main line; that upon the occasion and night in question a car of the defendant in charge of defendant's employes had used said switch in going into said turnout, but had negligently failed to turn the same back to the main line, and, when the same was left open, it was a dangerous obstruction to cars coming down Decatur street; that the defendant was negligent in the construction and maintenance of said switch, in that the same should have been equipped with a block of rubber or other substance, which would keep the switch automatically turned to the main line when not in use, it being alleged that rubber blocks and electrical automatic contrivances were in common use in keeping switches turned, and that ordinary care required the use of same, which, after said switch is turned or used, would automatically throw it back to the main line. It was alleged that while the plaintiff was so proceeding with the car out Decatur street the car struck said open switch, this condition being unknown and invisible to plaintiff in the exercise of ordinary care, and that the car was suddenly turned from the main line track into the Piedmont avenue track, throwing him off the platform of the car

upon the ground, seriously and permanently injuring him.

The defendant filed a general demurrer, which was overruled, and defendant excepted. Upon a trial of the case a verdict was rendered against the defendant; the court having overruled a motion for a nonsuit, made at the conclusion of the plaintiff's evidence. A motion for a new trial was overruled, and the defendant excepted.

[1] 1. A new trial must be granted in this case, on the ground that the verdict is contrary to the evidence and without evidence to support it. The testimony of the plaintiff himself shows that he voluntarily undertook in the capacity of motorman to run the car from which he was thrown out Decatur street to the point to which it was destined on that particular run. He was at that time in the employment of the defendant company as a conductor, but he had had sufficient experience as a motorman to enable him in that capacity to operate the car. The plaintiff himself testified: "I went the regular schedule for the crew. Yes, sir; I took that car to run it as motorman that night. Yes, sir; they waited until he could see if he was going to come, and he didn't come—that is, waited for the motorman to come. I reckon we waited 15 or 20 minutes. \* \* \* He asked me, and I told him I didn't see nothing of him. After waiting about 15 minutes, I went and told him that the motorman hadn't come. He asked me could I run the car, and I told him I thought I could run it. No; I didn't ask him to let me go and run it. He just said to go ahead and take the car. What I told him was, 'I think I can run the car,' wasn't nothing much said about it, just told him that he hadn't come, and the boys wanted to go home, and he asked me if I had a motorman to carry it out. Yes, sir; I told him I thought I could run a car, and he told me all right, to go ahead and run it. That's just about all that was said. \* \* \* I told the man down there that I could run the car all right." It also appeared from the plaintiff's testimony that he was familiar with the route over the Decatur street line and over the switch at which he was hurled from the car. He had passed over that switch many times. He knew the character of the switch and its exact location. It is true that during the week or so when he ran over the line passing the particular switch in question he had not seen motormen stop the car for the purpose of adjusting the switch; but that fact does not negative the other fact—of his knowledge as to the location and character of the switch. The switch was not unusual in its character. It was of a kind with the other switches on the lines upon which the plaintiff had run as a conductor for a year or more, being one that was adjusted by a switch stick. On the lines with which the plaintiff was familiar there were but few, if any, automatic switches or

switches fitted with a rubber block. The plaintiff further testified: "I did not know any rule with reference to whether any switch at Decatur and Piedmont [the point at which the switch in question was located] was to be open or shut. I didn't know any of the motorman's rules. I know nothing about whether that switch was to be open or closed, and nothing about the switch at the corner of Piedmont avenue and Decatur street [the switch last above referred to]. I don't know whether that was to be open or closed, nor how that switch was to be left, or how it was. I knew there was a switch there. I knew there was a track down there. I started my car a block back from that thing. I just started up there, and, without decreasing my speed any, ran it on down as far as the switch, and then ran it into the switch, and it throwed me out. I knew no rule with reference to that switch." It was also in the testimony given by a witness for plaintiff that "those switches like that one down there on Piedmont avenue could be used with the application of very little force and exchanged from one line to the other with the switch stick. They were moved frequently by other force than the switch stick. They were moved by wagons. A wagon comes down the rail and the wheel strikes the switch tongue, and throws it over. If a wagon does that running down there, down the curve of the switch, and turns it the wrong way, and a motorman approaches it, he stops and throws it the right way, the same as if another car had used it and left it in that condition. That is not an extremely rare thing where wagons do that. That is pretty often. \* \* \* If there had been a rubber in it, the wagon couldn't have turned it."

When it is remembered that the plaintiff himself was in sole and complete control of the car, that he was running it over a track with which he was familiar, over a switch of which he knew the character and location, that he ran his car, without decreasing his speed, into this switch, there can be but one conclusion reached, and that is that the plaintiff himself by a failure to exercise due care and caution brought upon himself the injury of which he now complains, but of which he has no ground of complaint as against the defendant company. There are other facts in the record strongly tending to show that the plaintiff himself was grossly negligent in running into the open switch, but we have stated only those facts which are uncontroverted and came from the plaintiff or his own witnesses; and under them the plaintiff is not entitled to recover, and the court erred in not granting a new trial upon that ground. Having so held, it is unnecessary to deal with the special assignments of error contained in the motion for a new trial.

2. There was no error in overruling the general demurrer to the petition.

Judgment reversed. All the Justices concur.

(136 Ga. 832)

DUKE v. KELLY.

(Supreme Court of Georgia. Sept. 23, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 613\*)—DISMISSAL—DELAY IN CERTIFYING BILL OF EXCEPTIONS.

Where a bill of exceptions on October 19, 1909, was presented to the judge, who held the same for examination until December 14, 1910, before certifying it, and counsel for the plaintiff in error in the meantime made no effort to obtain a mandamus to compel the judge sooner to certify the bill of exceptions, the writ of error will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2702-2707; Dec. Dig. § 613.\*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action between Mrs. M. L. Duke and W. P. Kelly. From the judgment, Duke brings error. Dismissed.

J. S. James, for plaintiff in error. Anderson, Felder, Rountree & Wilson and Geo. P. Whitman, for defendant in error.

HOLDEN, J. In this case the bill of exceptions was presented to the presiding judge on October 19, 1909, and the certificate thereto was signed December 14, 1910. The certificate recites that the bill of exceptions was presented in time and was "held for consideration." Below the certificate is a statement signed by the judge as follows: "Rec'd Oct. 19th, 1909, and held for examination." No application was made to this court to require the judge to certify the bill of exceptions. Civ. Code 1910, § 6158, provides: "If the judge shall determine that the bill of exceptions is not true, or does not contain all the necessary facts, he shall return the same, within ten days, to the party or his attorney, with his objections to the same in writing. If those objections are met and removed, the judge may then certify, specifying in his certificate the cause of the delay. If the judge sees proper, he may order notice to the opposite party of the fact and time of tendering the exceptions, and may hear evidence as to the truth thereof." When the bill of exceptions was presented to the judge, he kept it for "examination" and "consideration." It was not returned to counsel for the plaintiff in error because it was not true, or did not contain "all the necessary facts." When the bill of exceptions was presented to the judge, within 10 days thereafter he should have certified it or returned it to counsel for the plaintiff in error under the provisions of the section above quoted. The failure of the

judge, however, to certify the bill of exceptions within 10 days from the time it was presented to him would not work a dismissal of the writ of error, unless the failure to certify the bill of exceptions within the 10 days "was caused by some act of the plaintiff in error or his counsel." Under the act of 1896, embodied in Civ. Code 1910, § 6187, it is provided: "No bill of exceptions shall be dismissed upon the ground that the same was not certified by the judge in the time required by law for tendering and signing bills of exceptions; but if it shall appear from the bill of exceptions that the same was tendered to the judge within the time required by law, a mere failure on his part to sign the same within the time prescribed shall be no cause for dismissal, unless it should appear that the failure to sign and certify the same by the presiding judge within the time prescribed by law was caused by some act of the plaintiff in error or his counsel." This section only provides that a bill of exceptions shall not be dismissed for failure of the judge to certify it within 10 days from the time it is presented, unless such failure "was caused by some act of the plaintiff in error or his counsel." We think the bill of exceptions will have to be dismissed—not because of the failure of the judge to certify it within 10 days, but for other reasons hereinafter stated.

Civ. Code 1910, § 6159, provides: "If from any cause the bill of exceptions is not certified by the judge, without fault of the party tendering, such party or his attorney shall apply at the next term of the Supreme Court, and, on petition, obtain from said court a mandamus nisi directed to such judge." We do not think section 6187, hereinbefore quoted, prohibits a dismissal when the bill of exceptions is held by the judge, with the express or tacit acquiescence of the plaintiff in error, for a long period after the expiration of the 10 days without being certified. This section should be construed in connection with other sections of the Code. So construed, it was not the legislative intent that a plaintiff in error or his counsel upon tendering a bill of exceptions should remain inactive for an indefinite length of time, and permit the judge to hold the bill of exceptions without any action upon it. If the act of 1896 should be so construed, the judge might overlook the bill of exceptions or lay it aside, and let years pass before taking action upon it. In the meantime the defendant in error would remain in a state of uncertainty, and his rights and rights of property might have a cloud cast upon them by reason of the tendering and retention of an inchoate bill of exceptions. While the act of 1896 prohibited the dismissal of a bill of exceptions because the judge after receiving it in due time did not certify it within the time prescribed by law,

yet it did not entirely relieve the plaintiff in error or his counsel from any diligence in regard to the matter, or permit them to sit by indefinitely in a state of quiescence, or acquiescence, in the delay of the judge and allow many months, including an entire term of this court, to pass without any effort to compel the judge to act upon the bill of exceptions and thus advance the prosecution of the writ of error. The bill of exceptions in this case was held by the judge for nearly 14 months after being presented to him and then certified. If the judge did not thus hold it without certifying it with the express consent of counsel for the plaintiff in error, it was certainly with their tacit acquiescence. The retention by the judge of the bill of exceptions without certifying it for nearly 14 months after it was presented to him was certainly done with the knowledge of counsel for the plaintiff in error. He had his remedy under the sections above quoted to compel the judge by mandamus from this court to certify the bill of exceptions, which appears to be true and to contain all the necessary facts. His failure to use this remedy to compel the judge to certify the bill of exceptions during the long time the latter held it shows acquiescence by such counsel in the judge thus holding the bill of exceptions without certifying it, and is such neglect on the part of such counsel as makes it necessary to dismiss the writ of error. The bill of exceptions was presented to the judge on October 19, 1909, and should have reached the March term, 1910, of this court. The bill of exceptions was presented to the judge in less than three weeks after the October term, 1909, of this court began, and the plaintiff in error allowed the remainder of that term and the whole of the March term, 1910, to pass without any effort to obtain a mandamus from this court to compel the judge to certify the bill of exceptions, and the bill of exceptions was not certified until several months after the October term, 1910, of this court began.

Writ of error dismissed.

BECK, J., absent. The other Justices concur.

(126 Ga. 812)

CLARK, County Treasurer, v. BLACK.  
(Supreme Court of Georgia. Sept. 22, 1911.)

(Syllabus by the Court.)

1. STATUTES (§ 124\*)—SUBJECT AND TITLE—ESTABLISHMENT OF COURTS.

Where the title of an act provides for the establishment of a court, the appointment of a judge and a solicitor, and the definition of their powers and duties, a provision in the body of the act fixing the fees of the solicitor and the mode of their payment is germane to the general object of the act, and does not offend the constitutional inhibition against the enactment of a

law containing matter different from what is expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 184-186; Dec. Dig. § 124.\*]

## 2. COURTS (§ 160\*)—ESTABLISHMENT—STATUTORY PROVISIONS.

The General Assembly is expressly empowered to establish such courts as in its wisdom it may deem proper. In the establishment of a city court, uniformity in procedure, jurisdiction, or powers is not required. The constitutional provision respecting writs of error to the Court of Appeals from the city courts of Atlanta and Savannah and other like courts concerns only the right of review by direct bill of exceptions, and contains no restriction upon the Legislature in fixing the compensation of the officers of other city courts in a manner different from that prescribed for the officers of the city courts of Atlanta and Savannah.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 160.\*]

## 3. COUNTIES (§ 139\*)—COUNTY EXPENSES—ADMINISTRATION OF JUSTICE.

The fees of the solicitor of the city court of Richmond county are an expense of that court and lawfully payable from the funds raised to defray the expenses of that court.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 139.\*]

## 4. COUNTIES (§ 139\*)—COUNTY EXPENSES—FEES OF OFFICERS.

The provision in the act establishing the city court of Richmond county for the payment of the fees of the solicitor "out of any funds which may be in the treasury," considered in connection with the act of 1894, is to be construed harmoniously with the general law that taxes are to be levied for specific uses and applied only to such uses; and, when thus construed, the fees of the solicitor are to be paid from funds legally available for that purpose. The pleadings admit that there is in the treasury a legally available fund more than sufficient to pay the solicitor's demands.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 139.\*]

## 5. COUNTIES (§ 139\*)—OFFICERS—FEES—PAYMENT.

When a case is terminated in the city court of Richmond county by a judgment of nolle prosequi, the solicitor is entitled to his fee for drawing the accusation and entering the nolle prosequi, and the judgment of the court allowing the entry of nolle prosequi cannot be collaterally attacked by the treasurer of the county, upon whom the law devolves the duty of paying the solicitor's costs when duly audited and presented.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 139.\*]

## 6. COSTS (§ 308\*)—FEES OF SOLICITOR.

The offenses of stabbing, larceny from the person, and larceny from the house are reduced felonies under the act of March 20, 1866, and the solicitor may charge felony costs in such cases.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 308.\*]

## 7. WRIT OF MANDAMUS—ADMITTED FACTS.

Under the admitted facts, the applicant was entitled to the writ of mandamus.

Error from Superior Court, Richmond County; B. T. Walker, Judge.

Application by J. C. C. Black, Jr., for writ of mandamus to W. A. Clark, County Treasurer. To a judgment making absolute the

mandamus nisi, the defendant brings error. Affirmed.

Salem Dutcher and W. K. Miller, for plaintiff in error. Wm. H. Barrett, E. H. Callaway, and Boykin Wright, for defendant in error.

EVANS, P. J. The solicitor of the city court of Richmond county applied for a writ of mandamus to compel the treasurer of that county to pay his fees, which had been audited and approved by the judge of the city court. The treasurer resisted the issuance of the writ, attacking the constitutionality of the act creating the court, and denying the liability of the county for any of the items of cost. The case was heard upon an agreed statement of facts, and the mandamus nisi was made absolute. The treasurer excepted.

[1] 1. The city court of Richmond county was established by the act of September 22, 1881 (Acts 1880-81, p. 574); the title of the act being, "An act to establish a city court in the county of Richmond, to provide for the appointment of a judge and solicitor thereof, and to define their powers and duties." The fourth section of the act was as follows: "There shall be a solicitor of the said city court, who shall be appointed by the Governor, by and with the advice and consent of the Senate, and shall hold his office for the term of four years; vacancies in the office of the solicitor of the said city court shall be filled in the same manner as is herein prescribed for the filling of vacancies in the office of the judge of the said court; it shall be the duty of the said solicitor to represent the state of Georgia in all cases in the said city court in which the state shall be a party, and in the Supreme Court in such cases upon writs of error from said city court. He shall, for his services in such cases, receive the same fees as are allowed the Solicitor General for similar services before the superior courts and Supreme Court. His fees in the city court shall be paid out of fines and forfeitures when there is a sufficiency of money arising from those sources for that purpose. But all bills for insolvent costs that may become due to said solicitor, when examined and approved by the judge of the said court, shall, upon presentation, be paid by the treasurer of the county out of any funds which may be in the treasury. The fees of said solicitor, for services rendered in the Supreme Court, shall be paid by the state, on the warrant of the Governor, in all cases where the said solicitor shall present the certificate of the clerk of the Supreme Court as to services, and the clerk of said city court to the effect that the defendant was acquitted or was unable to pay cost." By the act approved December 15, 1894 (Acts 1894, p. 215), it was enacted that "the treas-



urer of Richmond county shall pay to the solicitor of the city court of Richmond county his bills of insolvent costs for services rendered in criminal cases in the city court of Richmond county, upon presentation of itemized bills, audited and approved by the presiding judge; provided the sum paid shall not exceed in any one year the sum of two thousand dollars. It is contended that the provision fixing the compensation of the solicitor and the mode of payment violates the constitutional inhibition against the enactment of any law containing matter different from what is expressed in the title. We do not think this criticism is well founded. It was never intended that the title of the act should embody every detail of the law, but should embrace a description of the general object of the proposed legislation. Details of the general object of the legislation, which are of a subsidiary nature and germane to the subject-matter expressed in the title, may properly be elaborated in the body of the act without being obnoxious to the criticism of plurality of subject-matters. The practical question in every case is the correspondence of the subject-matter in the title and in the body of the act, and is to be determined in view of the subject-matter to which the legislation relates as expressed in the title. The subject-matter of the legislation in the instant case is the establishment of a court, the appointment of the officers, and the definition of their powers and duties. It is not to be expected that the officers are to serve without compensation, and the fixing of that compensation and the mode of payment is germane to the general object of the legislation as expressed in the title. *Carroll v. Wright*, 131 Ga. 745, 63 S. E. 260; *Nolan v. Central Georgia Power Co.*, 134 Ga. 205, 67 S. E. 656; *Smith v. Bohler*, 72 Ga. 546.

[2] 2. It is urged that the act creating the city court of Richmond county is unconstitutional, because that court is not like the city courts of Atlanta and Savannah, as in the acts creating those courts neither of the counties in which those cities are located is made liable for the insolvent costs of the solicitor. We fail to perceive the force of this attack on the act. The Constitution declares that "the judicial powers of this state shall be vested in a Supreme Court, a Court of Appeals, superior courts, courts of ordinary, justices of the peace, commissioned notaries public, and such other courts as have been or may be established by law." Article 6, § 1, par. 1 (Civil Code 1910, § 6497). The General Assembly is here given express authority to establish such courts as in the legislative wisdom may be deemed proper. If the court to be established be classed as a city court, it is not required by the Constitution that its jurisdiction, powers, proceedings, and practice shall be uniform with those of other city courts. Const. art. 6, § 9, par. 1 (Civil Code 1910, § 6527). But, before a judgment of a

city court can be reviewed by the Court of Appeals by direct writ of error, such city court must be a "like court" to the city courts of Atlanta and Savannah as constituted at the time of the ratification of the Constitution. Const. art. 6, § 2, par. 9 (Civil Code 1910, § 6506). This constitutional provision concerns only the right of review of a judgment of a city court by direct bill of exceptions, and has no application to the power of the General Assembly to provide for the compensation of the officers of a city court in a manner different from that prescribed for the payment of the officers of the city courts of Atlanta and Savannah.

[3] 3. It was within the power of the Legislature to provide that the salary of the solicitor, in whole or in part, should be paid from the county treasury. His salary was an expense of court, to pay which a tax could be constitutionally levied. *Clark v. Eve*, 134 Ga. 788 (4), 68 S. E. 598.

[4] 4. Another attack on the validity of the act establishing the city court of Richmond county is that the act is repugnant to the constitutional mandate that no special law shall be enacted in any case for which provision has been made by an existing general law. The repugnancy is said to result from the provision that the insolvent costs of the solicitor "shall, upon presentation, be paid by the treasurer of the county out of any funds which may be in the treasury," which, it is contended, conflicts with the general law requiring taxes to be levied for specific purposes and to be used for such purposes respectively as levied, and for none other. Civ. Code 1910, §§ 516, 518. Even if the act establishing the city court of Richmond county be held to be a special law within the purview of this constitutional provision, and conceding that the alleged repugnancy does exist, the effect would be not to nullify all of the fourth section, but only that part which authorizes payment "out of any funds which may be in the treasury." That is to say, the insolvent costs would be payable out of the treasury, and the funds applicable to their payment would be those appropriated by the general law. But this objection is completely answered and dissipated by the act of 1894, which makes it the duty of the treasurer of Richmond county to pay to the solicitor insolvent costs to the extent of \$2,000, when duly audited and approved by the presiding judge, without specifying out of which the same are to be paid. By this act manifestly the Legislature intended the payment of the solicitor's fees from legally available funds, viz., funds arising from taxes levied to defray court expenses. It is admitted that the county treasurer had in his possession funds raised by taxation for payment of expenses of the city court more than sufficient to pay the applicant's demand.

[5] 5. The fees claimed by the solicitor included charges for costs of \$5.25 in each case

wherein a judgment of nolle prosequi was entered. The act declared that the solicitor for his services was to receive the same fees as are allowed the Solicitor General for similar services. The law allows the Solicitor General a fee of \$5 for each person indicted and 25 cents for the entering of a nolle prosequi. Pen. Code 1910, § 1126. Where a case was terminated by the entry of a nolle prosequi, the solicitor was entitled to the fee charged, and the judgment of the court allowing the entry of nolle prosequi has the same force of conclusiveness ordinarily incidental to judgments, and cannot be collaterally attacked. *Peebles v. Walker*, 12 Ga. 353; Penal Code 1910, § 382.

6. The solicitor's cost bill also embraced charges for felony costs in cases of stabbing, larceny from the person, and larceny from the house. The contention is that only misdemeanor costs were legally chargeable in such cases. Under Code 1863, § 4268, the offense of stabbing was punishable by fine or imprisonment in jail, or both, or imprisonment in the penitentiary for a term of not less than one or more than two years. Larceny from the person was punishable by confinement in the penitentiary for a term of years. Code 1863, § 4309. Larceny from the house, whether committed by breaking any house with intent to steal, or by entering any house with intent to steal, or by stealing from a house after having broken into the same, or by stealing from any house after having entered it, as defined in Pen. Code 1910, §§ 175, 176, 177, 178, 179, was punishable, under the Code of 1863, by confinement in the penitentiary for a term of years. Code 1863, §§ 4312, 4313, 4314, 4315. See *Heard v. State*, 120 Ga. 843, 48 S. E. 311. The act approved March 20, 1866 (Acts 1865-66, p. 233), declared that "the crimes defined in the following sections of the Penal Code [Code of 1863] as felonies, and punishable by imprisonment in the penitentiary, shall henceforth be reduced below felonies, and punished in the manner hereinafter set forth, viz.: Sections . . . 4268, when not within the proviso to said section;" sections 4309, 4312, 4313, 4314, 4315; and the next section provided for a misdemeanor punishment. By the act approved December 15, 1866 (Acts 1866, p. 153), it was provided that the fees of the Solicitor General for prosecuting in the superior court the felonies which were reduced to misdemeanors by the act of March 20, 1866, shall remain the same as they were before the passage of the act. Pen. Code 1910, § 1126. These specific offenses were thus declared to be felonies by the act of the Legislature mitigating their punishment, and, though reduced to misdemeanors by the act of 1866, the Solicitor General's fees were to be charged as if they were still felonies.

7. Applying the foregoing rulings to the

pleadings and admitted facts, there was no error in granting the mandamus absolute. Judgment affirmed.

BECK, J., absent. The other Justices concur.

(136 Ga. 817)

CLARK, County Treasurer, v. REYNOLDS.  
(Supreme Court of Georgia. Sept. 22, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 854\*)—REVIEW—REASON FOR DECISION.

Where a Solicitor General applied for a mandamus against a county treasurer to command the payment of certain insolvent costs which he claimed the right to have paid under several local acts on the subject, and the presiding judge granted the mandamus, but, in connection with his judgment, filed a written opinion in which he stated that he thought the earlier acts were repealed by the later ones, and that he had doubts as to the constitutionality of the latter, but would resolve them in favor of the acts, and the respondent excepted to the grant of the mandamus, if the judgment was correct, it will not be reversed, although the reasoning expressed in the opinion may not have been sound.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403-3430; Dec. Dig. § 854.\*]

2. CONSTITUTIONAL LAW (§ 225\*)—EQUAL PROTECTION OF LAWS—INSOLVENT COSTS.

The act of 1873 (Acts 1873, p. 225) in regard to the payment of insolvent costs to the Solicitor General of the Augusta circuit from the county treasury, upon recommendation of the grand jury, was not invalid as being in conflict with the clause of the Constitution of 1868 (article 1, § 1, par. 1), which declared that "protection of person and property is the paramount duty of government, and shall be impartial and complete," nor did it conflict with the fourteenth amendment to the Constitution of the United States, which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 225.\*]

3. CONSTITUTIONAL LAW (§§ 66, 70\*)—DISTRIBUTION OF GOVERNMENTAL POWER—LOCAL LAWS—INSOLVENT COSTS OF SOLICITOR GENERAL.

Such a local law, enacted prior to the adoption of the Constitution of 1877, was not unconstitutional because it made the operation of its provisions dependent upon the recommendation of a majority of the grand jury; nor on the ground that it conferred on the judicial department of the government a power properly belonging to the legislative department.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 115-122, 129-132; Dec. Dig. §§ 66, 70.\*]

4. STATUTES (§ 169\*)—REPEAL—REPEAL OF REPEALING ACT.

Where an act of the Legislature provided for the repeal of an earlier act, to take effect at a certain time, and before the arrival of such time the repealing act was itself repealed, the original act stood as if no repealing legislation had been passed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 246-250; Dec. Dig. § 169.\*]

**5. STATUTES (§ 168\*)—REPEAL—INVALIDITY OF REPEALING ACT.**

If an act which contains a general clause repealing all other acts inconsistent with it is itself unconstitutional and void, it does not operate to repeal any other act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 244; Dec. Dig. § 168.\*]

**6. CONSTITUTIONAL LAW (§ 24\*)—CONSTRUCTION AND OPERATION OF CONSTITUTION—REPEAL OF PRIOR LEGISLATION.**

The act of 1873, referred to in the second headnote above, was not repealed by the Constitution of 1877, but was preserved by the clause of that instrument which declared that "local and private acts passed for the benefit of counties, cities, towns, corporations, and private persons, not inconsistent with the supreme law, nor with this Constitution, and which have not expired nor been repealed, shall have the force of statute law, subject to judicial decision as to their validity when passed, and to any limitations imposed by their own terms." Article 12, § 1, par. 4.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21-29; Dec. Dig. § 24.\*]

**7. CONSTITUTIONAL LAW (§ 24\*)—CONSTRUCTION AND OPERATION OF CONSTITUTION—REPEAL OF PRIOR LEGISLATION.**

Nor was such act repealed because the Constitution of 1877 limited the purposes for which counties might levy taxes, one of such purposes being for "expenses of court" and the act mentioned having, before the adoption of the Constitution (as could then be done), made the insolvent costs of the Solicitor General a part of the expenses of court in the Augusta circuit, when properly recommended.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21-29; Dec. Dig. § 24.\*]

**8. STATUTES (§ 76\*)—LOCAL OR SPECIAL LAWS—INSOLVENT COSTS OF SOLICITOR GENERAL.**

The local act of 1893 (Acts 1893, p. 485), and the act amending it in 1894 (Acts 1894, p. 93), making provision for the payment of the insolvent costs of the Solicitor General of the Augusta circuit semiannually upon recommendation by the grand jury, and upon approval of the presiding judge of an itemized bill thereof, were in conflict with the provision of the Constitution of 1877, which declares that "no special law shall be enacted in any case for which provision has been made by an existing general law." Article 1, § 4, par. 1.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-79½; Dec. Dig. § 76.\*]

**9. COUNTIES (§ 139\*)—EXPENSES—RECOMMENDATION OF GRAND JURY.**

Under the act of 1873 a recommendation by the grand jury that the insolvent costs of the Solicitor General accruing at a certain term should be paid, followed by an auditing and approval of the itemized account of such costs by the presiding judge and an order for their payment, was sufficient to require the county treasurer to pay such accounts upon proper presentation thereof, although the grand jury may not have examined and audited the itemized account.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 139.\*]

**10. COUNTIES (§ 139\*)—EXPENSES—RECOMMENDATION OF GRAND JURY.**

Under the act of 1873, after the grand jury had failed to include in their presentments a recommendation as to insolvent costs, the signing of a paper by the individuals who had been members of that body recommending payment of the insolvent costs of the term did not constitute an official recommendation by the grand jury. But where the grand jury omitted to include in their presentments a recommendation

of payment of insolvent costs of the Solicitor General, but all the members signed a paper so recommending, and at the next term of court the grand jury at that term recommended that the insolvent costs of the preceding term be paid, as well as those of the current term, this was sufficient to authorize such payment.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 139.\*]

**11. COUNTIES (§ 139\*)—EXPENSES—RECOMMENDATION OF GRAND JURY.**

Where affirmative action by a grand jury was required by a statute as a condition of payment of certain costs from a county treasury, its absence cannot be waived by county commissioners, so as to make such account thus payable.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 139.\*]

Error from Superior Court, Richmond County; B. F. Walker, Judge.

Application by J. S. Reynolds for mandamus to W. A. Clark, County Treasurer. To a judgment granting a mandamus absolute, the treasurer excepts. Affirmed.

On February 15, 1873, an act was approved which read as follows: "Be it enacted by the General Assembly of the state of Georgia, that whenever at any term of the superior court of any county of the Augusta judicial circuit a majority of the grand jury shall so recommend, the judge of the superior court shall grant to the Solicitor General an order upon the county treasurer for the payment of any account for insolvent criminal costs, so recommended to be paid; and it shall be the duty of the county treasurer of said county to pay the same out of any money in the treasury thereof; provided, nothing in this act shall be deemed or considered mandatory to the grand jury; but they shall have full discretion to recommend or not, as they see proper, the payment of said criminal and insolvent costs." Then follows the repealing clause. Acts 1873, p. 225. In 1879 an act was passed which declared that so much of the act of 1873 as applied to the county of Richmond "be and the same is hereby repealed: Provided, said repeal shall not take effect until the expiration of the term of office of the present incumbent." It contained also the usual clause repealing all laws and parts of laws in conflict with the act. Acts 1878-79, p. 405. On December 6, 1880, before the expiration of the term of the then incumbent in the office of Solicitor General, another act was approved which repealed the act of 1879. Acts 1880-81, p. 650. In 1893 an act was passed which was approved December 20th, the title of which was as follows: "An act to limit and regulate the payment of insolvent costs of the Solicitor General of the Augusta circuit, for services in Richmond superior court, out of the treasury of Richmond county, and for other purposes." Acts 1893, p. 485. It made no reference to the preceding acts, but declared generally that the treasurer of Richmond county should

pay to the Solicitor General of the Augusta circuit semiannually his bill of insolvent costs for services in Richmond superior court upon presentation of an itemized bill thereof audited and approved by the presiding judge, "provided, the same shall not exceed, in any one year, the sum of two thousand dollars." It also declared that all laws and parts of laws "in conflict with this act be and the same are hereby repealed." In 1894 an act was passed, approved December 15th, amending the act of 1893 by adding to the first section thereof the words "provided further that the grand jury at each term of the superior court of Richmond county shall authorize and recommend the payment of the same in their presentments." It also contained a general repealing clause. Acts 1894, p. 93. The Solicitor General demanded of the treasurer payment of certain bills for insolvent costs aggregating \$5,197.50, and accruing at several terms of the superior court as follows: September term 1909, \$1,110.25; November term, 1909, \$1,041; January term, 1910, \$350.50; March term, 1910, \$839.25; May term, 1910, \$471.25; September term, 1910, \$1,225.25; November term, 1910, \$160. The county treasurer refused to pay these amounts, and the Solicitor General applied for a writ of mandamus to compel him to do so. In his petition he set out all of the acts above mentioned. The respondent attacked the validity of the act of 1873, and also contended that it had been repealed. He attacked the acts of 1893 and 1894 as unconstitutional. He further set up that, if such acts were valid, there had not been a compliance with them so as to entitle the applicant to the writ of mandamus. By consent the case was submitted to the presiding judge upon the pleadings and an agreed statement of facts, of which only the following portion need be set out: At no term of the court did the Solicitor General present to the grand jury of that term itemized bills of costs for services rendered, and upon which he claimed a right to collect insolvent costs. The method adopted by him, and which has always been that practiced in the circuit, so far as known, was that at each term of the court the grand jury included in its presentments a recommendation to the effect that the insolvent costs of the Solicitor General and the other officers should be paid, when audited and approved by the presiding judge. Thereupon the bills of costs were made up and presented to the judge, and by him there was entered an order upon such bills stating, "audited, approved and ordered paid." Such an itemized bill, in accordance with the recommendation of the grand jury, and approved as stated for the September term, 1909, amounting to an aggregate of \$1,110.25, was presented to the treasurer for payment, which was demanded and refused. The treasurer notified the Solicitor General

at the time that he had been instructed by the board of commissioners of roads and revenues not to pay that or any other like bills until further notice. This position was confirmed by a letter from the chairman of the board of commissioners to the Solicitor General, to the effect that no further bills for insolvent costs would be paid until there had been a final determination in the matter. Negotiations continued, looking to the settlement of the question of insolvent costs of the Solicitor General for each succeeding term. The itemized bills were audited and approved by the judge of the court, but were not actually presented for payment, otherwise than by a written demand covering each of the aggregate amounts for the respective terms, and the demand was refused. For the September term, 1909, the grand jury omitted to include in its presentments the recommendation of the payment of such insolvent costs, but all of the members of the grand jury signed a writing recommending that such costs be paid. At the November term, 1909, of the court the grand jury recommended that the costs for the September term, 1909, and the November term, 1909, be paid. At the May term, 1910, there was no grand jury to make a recommendation, "but by agreement between the Solicitor General and the board of commissioners of roads and revenues of Richmond county, such recommendation was waived by the said board." The presiding judge granted a mandamus absolute, commanding the county treasurer, on presentation of the bills set out in the petition, to pay them out of any money he might have in the treasury subject to expenses of court. The treasurer excepted.

Salem Dutcher and W. K. Miller, for plaintiff in error. W. H. Barrett, E. H. Calaway, and N. M. Reynolds, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The answer of the respondent raised many points. They may be grouped under a few general heads: (1) Was the act of 1873 violative of the Constitution of 1868, which was in force at the time of its passage, or of the fourteenth amendment to the Constitution of the United States? (2) Was it repealed by subsequent legislative acts? (3) Was it repealed by the Constitution of 1877? (4) Were the acts of 1893 and 1894 unconstitutional? (5) If the acts mentioned or any of them were valid and of force, was there such a compliance with their terms as to authorize the grant of a mandamus, requiring the county treasurer to pay the insolvent costs involved?

[1] 1. In granting the mandamus absolute the presiding judge filed a brief opinion, in which he said that he thought the acts of 1873, 1879, and 1880 were, by implication, repealed by the acts of 1893 and 1894; that

he had doubt as to the constitutionality of those acts, but resolved the doubt in their favor, and granted the writ. It was argued on behalf of the plaintiff in error that this was an adjudication that the acts preceding that of 1893 had been repealed, and that the only questions which should be considered arose under that act and the act of 1894. We do not think this contention is sound. If we should determine that the acts of 1893 and 1894 were invalid, of course, they could not repeal by implication preceding acts. The judgment which was rendered was that a mandamus absolute be granted. The views and doubts expressed by the judge would not require a reversal, if the writ was properly granted.

[2] 2. Was the act of 1873 in conflict with the provision of the state Constitution of 1868 (which was in force when the act was passed), which declared that "protection of person and property is the paramount duty of government and shall be impartial and complete" (Code 1873, § 4993), or with the fourteenth amendment to the Constitution of the United States which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws?" The contention on this subject was based on the ground that the Solicitor General was a state official, and should be paid by the state; that the general legislative plan for compensating the Solicitor General for his services was by the payment of a small salary from the state treasury (about enough it was said, to pay his expenses), and the balance from state funds arising from fines and forfeitures; that the act of 1873, which made special provision in regard to the Augusta judicial circuit, imposed the burden of paying the insolvent costs of the Solicitor General upon the counties in such circuit, and necessitated the levying of a tax in Richmond county for the purpose of replenishing the county treasury with funds wherewith to pay such costs; and that this denied to such persons the equal protection of the laws. This contention is without merit. The Constitution of 1868 did not prevent the passage of local laws because of the existence of general laws on a particular subject. The fact that there were and had been general laws as to the payment of insolvent costs from funds arising from fines and forfeitures did not prevent the Legislature from adopting an act supplementing such fund in a particular county. In this there was no denial of the equal protection of the law. Certainly there was none as against the county treasurer. *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479.

[3] 3. It was urged that, under the Constitution of 1868, taxation for state purposes was imposed by the General Assembly, and for county purposes by county authorities, and that this act created a necessity for taxation and a liability dependent upon recommendation of the grand jury. It was also

urged that the act conferred upon the judicial department of the government a power properly belonging to the legislative department. Neither of these objections to the act is well taken. Where the Legislature had power to enact the local law, making it take effect or become operative upon such a condition, did not violate the provisions of the Constitution of 1868, to which reference has been made. Moreover, the present proceeding is not one to compel the levy of a tax. The money is already in the hands of the treasurer; but he declines to pay the insolvent cost bills of the Solicitor General on the ground that they are not lawful demands.

[4] 4. Was the act of 1873 repealed by the act of 1879? The act of 1879 provided for its repeal, but not to take effect until the end of the term of the then incumbent in office. Before that time arrived, the act of 1880 repealed the act of 1879. It was therefore held by this court that the act of 1873 was not repealed by the act of 1879, but remained of force. *Adam v. Wright*, 84 Ga. 720, 11 S. E. 893. These acts and counteracts do not present a case of legal execution and resuscitation, but of intercepted death.

[5] 5. Was the act of 1873 repealed by the acts of 1893 and 1894? Those acts each contained a general clause repealing "all laws and parts of laws in conflict with this act." If they were themselves valid, they so covered the same subject-matter as that dealt with in the act of 1873 as to repeal it. If they were themselves unconstitutional and void, they did not repeal it. Nothing can properly be said to conflict with a nullity; and a repeal of what conflicts with a nullity is no repeal at all. We shall presently show that the two later acts were unconstitutional. Hence they did not repeal the former act. *Barker v. State*, 118 Ga. 35 (1), 44 S. E. 874.

[6] The contention that the act of 1873 was repealed by the Constitution of 1877, because not in accord with it, cannot stand. It was expressly provided by that Constitution (article 12, § 1, par. 4) that "local and private acts passed for the benefit of counties, cities, towns, corporations, and private persons, not inconsistent with the supreme law, nor with this Constitution, and which have not expired nor been repealed, shall have the force of statute law, subject to judicial decision as to their validity when passed, and to any limitations imposed by their own terms." Civ. Code 1910, § 6605. No such inconsistency between that act and the Constitution has been pointed out as under the adjudications of this court works a repeal of the former. If all prior local acts thus preserved became at once inconsistent with the Constitution because they were not altogether like the general laws existing or those passed under such Constitution, the preservation would be nugatory. There may

be such an inconsistency or such an exhibition of constitutional or legislative intent that the prior local law will be repealed. But such is not the case here. The enforcement of the law in Richmond county and the services of the Solicitor General for that purpose are beneficial. That the local law of 1873 made provision in regard to the compensation of that officer, and that the treasury of the county would have to be supplied with funds from taxation, did not exclude that act from the constitutional classification of local acts "passed for the benefit of counties." The distinction between local acts passed prior to the Constitution of 1877, and by it preserved unless inconsistent with that instrument, and local or private acts passed since the adoption of that Constitution in cases covered by general laws must be borne in mind.

[7] 7. By article 7, § 6, par. 2, Const. (Civ. Code 1910, § 6562), it is declared that the Legislature shall not have power to delegate to any county the right to levy a tax except for certain purposes. One of these is for "expenses of courts." In 1889 an act was passed (Acts 1889, p. 1153) requiring the commissioners of roads and revenues of Fulton county to levy a tax to pay a certain proportion of the insolvent costs not collected by the two plaintiffs, while solicitors of the city court of Atlanta, from fines and forfeitures. In *Adair v. Ellis*, 83 Ga. 464, 10 S. E. 117, it was held that this claim was not for "expenses of court" within the meaning of the constitutional provision mentioned, and the act was void. Justice Simmons in the opinion said: "It may be argued, however, that the Legislature has the power to determine and define, under this paragraph, what are expenses of courts, and that the courts would be bound by its definition. This may or may not be true. It is unnecessary for us to determine in this case whether the Legislature can enlarge the common and usual meaning of these words or not. It is sufficient for us to say that in this case the Legislature did not say that the claims of the defendants in error were expenses of court." In *Adam v. Wright*, 84 Ga. 720, 11 S. E. 893, it was held that the act of 1873, now under consideration, was not so modified by the constitutional provision just mentioned as to forbid payment of insolvent costs out of any funds in the county treasury raised by taxation, such costs having, before the adoption of the Constitution of 1877, been made part of the expenses of court in the Augusta circuit, when properly recommended, as could then be done. See, also, *Massey v. Bowles*, 99 Ga. 216, 25 S. E. 270; *Moore v. Houston County*, 128 Ga. 187, 57 S. E. 236; *Duer v. Thweatt*, 39 Ga. 578; *Adam v. Cohen*, 84 Ga. 725, 11 S. E. 895. In *Houston County v. Kersh & Wynne*, 82 Ga. 252, 10 S. E. 199, it was held that, in the absence of a statute providing for the publication of the general present-

ments of the grand jury as a part of the proceedings of the court, there was no authority of law for paying out of the public funds for such a publication. Subsequently an act was passed providing for such publication and the payment thereof as a part of the expenses of court. See *Howard v. Early County*, 104 Ga. 672, 30 S. E. 880. It has not been held that the Legislature can exercise the judicial function of construing a clause of the Constitution, but it seems to have been recognized that they may require certain things to be done and certain legitimate expenses to be incurred. In those cases, however, the question arose in regard to the taxing power of counties.

[8] 8. The act of 1893 provided that "the treasurer of Richmond county shall pay to the Solicitor General of the Augusta circuit, semiannually, his bill of insolvent costs for services in Richmond superior court, upon presentation of itemized bill for same, audited and approved by the presiding judge; provided, the sum paid shall not exceed, in any one year, the sum of two thousand dollars." Acts 1893, p. 485. This was amended by the act of 1894 by adding: "Provided further, that the grand jury, at each term of the superior court of Richmond county, shall authorize and recommend the payment of the same in their presentments." Acts 1894, p. 93. Both of these acts were attacked on the ground, among others, that they were in conflict with the provision of the Constitution which declares that "no special law shall be enacted in any case for which provision has been made by an existing general law." Article 1, § 4, par. 1 (Civ. Code 1910, § 6391). This ground of attack is well taken. In *Moore v. Houston County*, supra, it was said (referring to a local act fixing the compensation of the treasurer of Houston county, passed prior to the Constitution of 1877): "While special legislation of the character of the act of 1875 [Acts 1875, p. 286] is no longer permissible since the Constitution of 1877 went into effect, still a previous valid special law was not repealed by the adoption of that Constitution." The act of 1873 was not repealed, as already stated. It was subject to repeal; but new and additional local legislation could not be enacted after the passage of the Constitution of 1877, where provision had been made on the subject by an existing general law. *Houston County v. Killen*, 76 Ga. 826. When the two later acts mentioned were passed, there was a general law in existence on the subject of the salary and fees of the Solicitor General, and their payment from the fine and forfeiture funds. Pen. Code 1910, §§ 1112, 1130. The Legislature could not then provide by local act for the payment of insolvent costs to the Solicitor General of the Augusta circuit from the county treasury of Richmond county.

It was argued in the brief of counsel for defendant in error that the Constitution pro-

hibited "special" legislation; that this differed from local legislation; that the difference had not been regarded by this court in former decisions; and that it should now be held that the Constitution of 1877 did not prevent local legislation from being enacted, although there might be in existence a general law covering the subject. To give the Constitution such a construction would be to permit the evil at which this provision was largely aimed, the passing of a law to govern the whole state, and then allowing every militia district, county, judicial circuit or other division of the state, or the officers thereof, to obtain special legislative dispensation on the same subject, so that, while the law purported to operate throughout the state, a great part of the state's territory might be exempt from the mandate, and a state law might practically cease to be a state law. The Constitution not only prohibits a special law in any case for which a provision has been made by an existing general law, but in the same connection declares that "laws of a general nature shall have uniform operation throughout the state," and also provides for the preservation of local laws already passed and not inconsistent with that instrument; thus showing that the word "special" was not used in the restricted sense contended for by counsel for defendant in error. In *Mathis v. Jones*, 84 Ga. 804, 11 S. E. 1018, the subject was fully considered. It was there said: "You cannot make a general statute cease to be general otherwise than by another statute repealing it. That is, under the Constitution of 1877, you cannot repeal a general law in part by a local law; for in the eye of the Constitution every local law is special relatively to a general law. \* \* \* They [general statutes] cannot be deprived of their force in one part of the state without simultaneously depriving them of force in every other part. They can be killed, but not mutilated. The smallest of their territorial members cannot be cut off." Such has been the uniform construction of this court, and it was reaffirmed as late as *Futrell v. George*, 135 Ga. 265, 69 S. E. 182. We think it a correct interpretation of the Constitution, and we decline to depart from it. There is no question here of amending or modifying a general law by another general law or of legitimate classification which may make a law general in character. Nor is an act in regard to a city court involved.

[9] 9. It was contended that, if the act of 1873 remained in force, there had been no sufficient compliance with its terms to authorize the Solicitor General to demand payment of his insolvent cost bills. It was urged that the act required an itemized account of the insolvent costs of the term, of which payment was sought, to be presented to the grand jury and passed upon by that body, before presentation to the judge. The act

declared that, "whenever at any term \* \* \* a majority of the grand jury shall so recommend, the judge shall grant an order for the payment of any account for insolvent criminal costs, so recommended to be paid." It then provided that nothing in the act should be deemed mandatory to the grand jury; but they should have full discretion "to recommend or not, as they see proper, the payment of said criminal and insolvent costs." It is not entirely clear whether it was intended that the grand jury should investigate the items of the cost bill, or whether they could recommend in general terms the payment of the insolvent costs. The discretionary power of recommending or not does not apply merely to an auditing of an itemized account. It seems rather to confer a discretionary authority to determine whether the insolvent costs of the Solicitor General shall be paid from the county treasury. This construction also comports with the opening words of the act, that whenever at any term of the superior court a majority of the grand jury "shall so recommend," etc. The possible uncertainty arises from the repetition of the words "so recommended to be paid," and the question whether those words qualify the words "any account," so as to require an itemized account to be presented and recommended. It is a matter of common knowledge that the most active work of the Solicitor General in prosecuting cases does not begin until after the grand jury have brought in indictments or presentments, and that a large part of his services on account of which insolvent costs may arise is rendered after the grand jury have acted. By the act organizing the Augusta circuit in 1870 (Acts 1870, p. 38), it was provided that the regular terms of Richmond superior court should continue for four weeks, though an adjourned term should be called, if necessary. If the grand jury should finish their labors during the first week, and the criminal docket be called during the second or third week, under the construction of the act contended for they could not be discharged, but would be compelled to return at the close of the term to pass upon the itemized accounts of the Solicitor General, or else they could take no action in the matter. The fees allowed that officer are fixed by statute. Under the general law then in force, the presiding judge examined the accounts of officers claiming insolvent costs, and ordered them to be entered on the minutes, to be paid in the manner prescribed by law. Pen. Code 1910, § 1118. The act of 1873 provided for the payment of the insolvent costs of the Solicitor General from the county treasury when "so recommended" by the grand jury at any term. We think the more reasonable construction of the act is that the grand jury could approve the policy, and the judge could approve the items. According to the agreed statement of facts, this has been the uniform practice in the Augusta circuit ever since the adoption

of the act of 1873. For about 36 years the grand juries, Solicitors General, judges, and county officials acted upon such construction before any controversy arose. It is true that long practice cannot make legal that which is illegal. But it can hardly be assumed that all of the officers during this long time intentionally violated the law; and we cannot say that they actually violated it in this respect.

[10, 11] 10, 11. The facts contained in the agreed statement show a sufficient compliance with the act of 1873 to authorize the payment of each of the bills of insolvent costs of the Solicitor General, except in one instance. It appears that at the May term, 1910, there was no grand jury to make a recommendation, "but by agreement between the solicitor general and the board of commissioners of roads and revenues of Richmond county, such recommendation was waived by the said board." The law required affirmative action on the part of the grand jury, in order to authorize the payment of those costs. The board of commissioners of roads and revenues could not waive what the law required as a *sine qua non*. Their waiver could not make that due which under the law was not due. It was accordingly erroneous to grant the mandamus absolute as to the bill of insolvent costs of the Solicitor General for the term mentioned. Direction is given that the judgment be amended accordingly.

What is said above covers the substantial controversy. There were some other contentions, such as that the act of 1873 contained matter in its body which was not covered by its title, that the proviso was inconsistent with the act, etc. It is sufficient to say that, except as above stated, there was no error in granting the writ of mandamus absolute. Nothing herein said conflicts with the decision in *Clark v. Hammond*, 134 Ga. 792, 68 S. E. 600.

Judgment affirmed, with direction.

BECK, J., absent. The other Justices concur.

(137 Ga. 1)

#### STRICKLAND v. STATE.

(Supreme Court of Georgia. Oct. 5, 1911.)

(Syllabus by the Court.)

#### 1. WEAPONS (§ 3\*)—CONSTITUTIONAL LAW—RIGHT TO CARRY WEAPONS.

The act of the General Assembly, approved August 12, 1910 (Georgia Laws 1910, p. 134), entitled "An act to prohibit any person from having or carrying a revolver without first having obtained a license from the ordinary of the county of said state, in which the party resides, and to provide how said license may be obtained and a penalty prescribed for a violation of the same, and for other purposes," is not null and void because in violation of article 1, § 1, par. 22, of the Constitution of the state, which provides: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall

have power to prescribe the manner in which arms shall be borne."

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 3; Dec. Dig. § 3.\*]

#### 2. WEAPONS (§ 3\*)—CONSTITUTIONAL LAW—CARRYING REVOLVER.

The act described in the preceding head-note is not violative of the right of the citizen, under article 8, § 2, of the Constitution of the United States, which declares: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 3; Dec. Dig. § 3.\*]

Atkinson, J., dissenting.

Certified Questions from Court of Appeals.

J. L. Strickland was convicted of carrying a pistol without a license, and brought error to the Court of Appeals, which certified certain questions to the Supreme Court. Questions answered in the negative.

See, also, 72 S. E. 436.

The Court of Appeals certified to the Supreme Court the following questions: "Is the act of the General Assembly of the state of Georgia, approved August 12, 1910 (Georgia Laws 1910, p. 134), entitled 'An act to prohibit any person from having or carrying about his person, in any county in the state of Georgia, any pistol or revolver without first having obtained a license from the ordinary of the county of said state, in which the party resides, and to provide how said license may be obtained and a penalty prescribed for a violation of the same, and for other purposes,' null and void, because in violation of article 1, § 1, par. 22, of the Constitution of the state of Georgia, which provides: 'The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne'? Is this act in violation of the right of the citizen, under article 8, § 2, of the Constitution of the United States (Civil Code 1910, § 6685), which provides: 'A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed'?"

R. W. Adamson and Napier & Maynard, for plaintiff in error. C. E. Roop, Sol., for the State.

LUMPKIN, J. The first question propounded by the Court of Appeals is whether the act of August 12, 1910 (Acts 1910, p. 134), entitled "An act to prohibit any person from having or carrying about his person, in any county in the state of Georgia, any pistol or revolver without first having obtained a license from the ordinary of the county of said state, in which the party resides, and to provide how said license may be obtained and a penalty prescribed for a violation of the same, and for other purposes," is violative of article 1, § 1, par. 22,



of the Constitution of this state, which provides that "the right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne."

[1] 1. First let us glance hastily at some of the English laws which antedated the introduction into the federal Constitution, and into the Constitutions of many of the states, of provisions in reference to bearing arms. As early as A. D. 1328, the statute of 2 Ed. III was passed, prohibiting persons "to go or ride armed by night or by day." And it has been declared that at common law riding or going about armed with dangerous or unusual weapons, to the terror of the people, was always indictable. Bish. Stat. Cr. (3d Ed.) §§ 783, 784; 4 Bl. Com. 149. By the act of 22 and 23 Car. II, c. 25, § 3, it was provided that no person who had not lands of the yearly value of £100, except certain specified persons, should be allowed to keep a gun, etc. James II arbitrarily disarmed the Protestant population, and quartered Catholic soldiers among the people. After the revolution which forced his abdication, in the first year of the reign of William and Mary, an act of Parliament was passed which recited certain abuses which had existed, and asserted certain rights and privileges. Among the grounds of complaint recited were the keeping of a standing army within the kingdom in time of peace, without the consent of Parliament, and quartering soldiers contrary to law, and "causing several good subjects, being Protestants, to be disarmed, at the time when papists were both armed and employed contrary to law." The Bill of Rights no doubt arose from the conduct of the Stuarts. It followed the Declaration of Rights, to which the Prince of Orange assented. Among other things, it declared that "the subjects which are Protestants may have arms for their defense, suitable to their condition and as allowed by law." This was not an unlimited conference of authority upon the Protestants, but only insured them rights under the law, which allowed persons of a certain rank and condition to have arms.

When the second amendment to the Constitution of the United States was adopted, it declared: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The third amendment also declared that no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, except in the manner to be prescribed by law. Some similar provision has been incorporated in most of the state Constitutions. The language employed has not always been uniform. In some cases the preliminary reference to the importance of an efficient militia is made, and in some it

is omitted, and there are other verbal differences. But the common element is the assurance of the right "to bear arms."

One of the first questions which was raised under the constitutional provisions on this subject was whether they were violated by laws which prohibited the carrying of concealed weapons. In the case of *Bliss v. Commonwealth*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251, decided in 1822, the Supreme Court of Kentucky declared that an act to prevent the carrying of concealed weapons was unconstitutional and void as impairing the constitutional right to bear arms. This ruling has not been followed, but severely criticised. The decisions are practically unanimous to the contrary. *Aymette v. State*, 21 Tenn. (2 Humph.) 154; *State v. Wilforth*, 74 Mo. 528, 41 Am. Rep. 330; *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44; *State v. Speller*, 86 N. C. 697; *State v. Mitchell*, 3 Blackf. (Ind.) 229; *Wright v. Commonwealth*, 77 Pa. 470; *State v. Jumel*, 13 La. Ann. 399; *State v. Buzzard*, 4 Ark. 18; note to case of *In re Brickey*, 1 Am. & Eng. Ann. Cas. 55, 56; *Ex parte Thomas*, 21 Okl. 770, 97 Pac. 260, 20 L. R. A. (N. S.) 1007, 17 Am. & Eng. Ann. Cas. 566, and note.

In several states other statutes, regulatory in their nature, or prohibiting the carrying of certain kinds of weapons, or the carrying of weapons under certain circumstances and at certain places, have been upheld. In *Andrews v. State*, 3 Helsk. (Tenn.) 165, 8 Am. Rep. 8, the Supreme Court of Tennessee held that an act of the Legislature providing that it should not be lawful for any person to publicly or privately carry a dirk, sword-cane, Spanish stiletto, belt or pocket pistol, or revolver, was constitutional, except as to a revolver; that the word "revolver" might include a pistol adapted to the equipment of a militiaman or soldier, or a weapon not so adapted; that if the weapon designated by the statute was of the former character the absolute prohibition against it was too broad. In the opinion, in speaking of the arms in the use of which a soldier should be trained, at one place the word "repeater" was used. But it was evident that reference was made to army and navy repeaters of a character used in modern warfare, and not to every pistol which might repeat its fire. The pocket revolver was not meant, for in *Page v. State*, 3 Helsk. (Tenn.) 198, the court sustained a conviction for carrying such a pistol. In the opinion it was said that "the evidence fully establishes the fact that the pistol carried by Page was not an arm for war purposes, and therefore, under the ruling of this court in the case of *Andrews v. State*, decided at Jackson, it was a weapon, the carrying of which the Legislature could constitutionally prohibit." In *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556, an act was under consideration which provided that "any person who shall bear or carry any pistol of

any kind whatever, or any dirk, butcher or bowie knife, or sword or spear in a cane, brass or metal knucks, or razor, as a weapon, shall be adjudged guilty of a misdemeanor," etc. The court in construing the act said: "From the company in which the pistol is placed, and the known public mischief which the Legislature intended by the act to prevent, it is manifest that the pistol intended to be proscribed is such as is usually carried in the pocket, or of a size to be concealed about the person, and used in private quarrels and brawls, and not such as is in ordinary use, and effective as a weapon of war, and useful and necessary for 'the common defense.'" It was held that the act did not infringe the constitutional privilege of the citizen to bear arms.

In *State v. Wilburn*, 7 Baxt. (Tenn.) 57, 32 Am. Rep. 551, it was held that a law prohibiting the carrying of an army pistol, except in the hand, was not violative of the constitutional provision of that state in regard to the right of citizens to bear arms for the common defense, which also stated that the Legislature should have power, by law, to regulate the wearing of arms, with a view to prevent crime. In *Haile v. State*, 38 Ark. 564, 42 Am. Rep. 3, it was held that a statute prohibiting the carrying of army pistols by nonmilitary persons, except uncovered and in the hand, was not unconstitutional.

In West Virginia an act was passed which made it a misdemeanor to carry about the person any revolver or other pistol, dirk, bowie knife, razor, slungshot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, or to sell or furnish any such weapon to one whom the furnisher knew, or had reason from his appearance or otherwise to believe, to be under the age of 21 years. Certain exceptions were made as to keeping or carrying a pistol about the dwelling of the owner, or from the place where it was purchased to his dwelling house, etc. In *State v. Workman*, 35 W. Va. 367, 14 S. E. 8, 14 L. R. A. 600, it was held that, whenever an act of the Legislature can be so construed as to avoid conflict with the Constitution, such construction will be adopted by the courts, and that the act was not unconstitutional. In *Ex parte Thomas*, 21 Okl. 770, 97 Pac. 260, 20 L. R. A. (N. S.) 1007, 17 Am. & Eng. Ann. Cas. 563, it was held that the word "arms," as used in the Oklahoma Constitution, providing that "the right of a citizen to keep and bear arms \* \* \* shall never be prohibited," has reference to such arms as are recognized in civilized warfare, and not to weapons mentioned in the statute of that state which forbade the carrying about the person of any pistol, revolver, bowie knife, dirk, knife, loaded cane, billy, metal knuckles, or any other offensive or defensive weapon, except as in the act provided.

In *City of Salina v. Blaksley*, 72 Kan. 230, 83 Pac. 619, 3 L. R. A. (N. S.) 168, 115 Am. St. Rep. 196, 7 Am. & Eng. Ann. Cas. 925, the Supreme Court of Kansas went further than any other case which has come to the attention of the writer, and held that the provision of the Constitution of that state that "the people shall have the right to bear arms for their defense and security" was a limitation upon the legislative power to enact laws prohibiting the bearing of arms in the militia, or any other military organization provided for by law, but was not a limitation on legislative power to enact laws prohibiting and punishing the promiscuous carrying of arms or other deadly weapons.

In *Re Brickey*, 8 Idaho, 597, 70 Pac. 609, 101 Am. St. Rep. 215, the Supreme Court of Idaho held that, while it is undoubtedly within the police power of the Legislature to prohibit the carrying of concealed deadly weapons, the Legislature has no power to prohibit absolutely the carrying of deadly weapons in any manner whatsoever, in cities, towns, and villages; such a regulation being repugnant to those provisions of both the state and federal Constitutions which guarantee to the citizens the right to bear arms. In so far as reference was made to the federal Constitution, the decision was the result of oversight, as will presently be seen.

An examination of the various decisions, whether dealing with laws against carrying concealed weapons, or with regulations as to the manner of carrying certain weapons, or the prohibition against carrying weapons of a particular character, will show that two general lines of reasoning have been employed in upholding such statutes: First, that such provisions are to be construed in the light of the origin of the constitutional declarations, of their connection with words declaratory of the necessity for an efficient militia or for the common defense, or the like, where they are used, and in view of the general public purpose which such provisions were intended to subserve; and, second, that the right to bear arms, like other rights of person and property, is to be construed in connection with the general police power of the state, and as subject to legitimate regulation thereunder. Where a state Constitution in terms provides, in connection with the right to bear arms, that the state may regulate this right, or may regulate the manner of bearing arms, these words expressly recognize the police power in direct connection with the constitutional declaration as to the right. But even where such expressions do not occur, it has been held that the different provisions of the Constitution must be construed together, and that the declaration or preservation of certain rights is not to be segregated and treated as arbitrary, but in connection with the general police power of the state, unless the language of the instrument itself should exclude such a construction. Thus, if the right to bear arms includes dead-

ly weapons of every character, and is absolute and arbitrary in its nature, it might well be argued, as it was in earlier days, that the citizen was guaranteed the right to carry weapons or arms, in the broadest meaning of that term, whenever, wherever, and however he pleased, and that any regulation, unless expressly provided for in the Constitution, was an infringement of that right. The ruling that the Legislature may prohibit the carrying of concealed weapons essentially concedes the police power of regulation to some extent. If this be conceded, the question then becomes one as to whether the particular regulation involved is legitimate and reasonably within the police power, or whether it is arbitrary, and, under the name of regulation, amounts in effect, to a deprivation of the constitutional right.

Various other rights are guaranteed by the Constitution, but they are construed in connection with the general police power of the state. The Constitution prohibits the passage of any law curtailing or restraining the liberty of speech or of the press. But it has never been held that this gave the arbitrary right to a person to make public speeches or shout his sentiments, at all times and in all places, regardless of interference with public order; nor has it ever been held that such guarantees interfered with laws making libel and slander punishable. The right of contract has been held to be a part of the liberty of the citizen, and yet various contracts have been subjected to police regulation. The right to go from place to place is subject to police regulation for the public health and safety, as, for instance, in times of epidemics. Other illustrations might readily be given.

Let us now consider more especially the laws and decisions of this state on the subject. The provision in reference to bearing arms appeared in the Constitution of 1861. It was again incorporated in the Constitution of 1865 and that of 1868. In the latter the same language was used as in the Constitution of 1877, except that it contained the preamble: "A well regulated militia being necessary to the security of a free people." In the Constitution of 1877, these words were not employed in that immediate connection, but were used in article 10, § 1, par. 1, treating of the militia; and it was doubtless deemed unnecessary to reiterate them in both connections. While proceedings of a constitutional convention may be looked to, they do not furnish a controlling construction of the meaning of words in the Constitution. Such an instrument derives its vitality and force from its adoption by the people, rather than from the intentions of certain members of the convention, or expressions of individual opinions in speeches.

The first case which arose in this state on the subject under consideration was that of *Nunn v. State* (which was decided in 1846), 1 Ga. 243. At that time it was still a somewhat mooted question whether the second

amendment to the Constitution of the United States was a limitation on the power of Congress only, or also affected that of the state Legislatures, although *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672, had been decided. An examination of the decisions of courts will show that some very reputable authorities had expressed the opinion that the amendment applied to state Legislatures, as well as to Congress. As already noted, the Supreme Court of Idaho, as late as 1902, still treated it as a limitation upon the state governments, and as a guaranty to the individual citizen. In this condition of judicial consideration, the *Nunn Case* was decided. It was said: "A law which merely inhibits the wearing of certain weapons in a concealed manner is valid. But, so far as it cuts off the exercise of the right of the citizen altogether to bear arms, or, under the color of prescribing the mode, renders the right itself useless, it is in conflict with the Constitution, and void." As at that time there was no provision on the subject in the state Constitution, and the only constitutional declaration quoted was from the second amendment to the federal Constitution, it is clear that the court took the view that such amendment was a restriction upon the Legislature of the state, as well as upon Congress, and what was said was in reference to the federal Constitution. The opinion contains some broad language used in discussion; but evidently it was never intended to hold that men, women, and children had some inherent right to keep and carry arms or weapons of every description, which could not be infringed by the Legislature, unless as a result of the constitutional provision under consideration. Since that time the Supreme Court of the United States, whose construction of the federal Constitution is conclusive, has held that the second amendment to that instrument was a restriction upon the power of Congress only. In *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588, it was said: "The second amendment means no more than that it [the right to bear arms] shall not be infringed by Congress, and has no other effect than to restrict the powers of the national government. Sovereignty, for the protection of the rights of life and personal liberty within the respective states, rests alone with the states." *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 590, 29 L. Ed. 615; *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97. In *Stockdale v. State*, 32 Ga. 225, the only point really decided was whether the court erred in refusing a request to give a charge as to what exposure of a weapon would satisfy the act prohibiting the carrying of concealed weapons, and in charging to the effect that, if any part of a pistol was concealed, it was a violation of the law. No constitutional question was involved; and, so far as the ref-

erence to the Nunn Case mentioned such a question, it was obiter dictum.

In *Hill v. State*, 53 Ga. 472, an act which made it penal to carry about the person any dirk, bowie knife, revolver, or any kind of deadly weapon to any court of justice or any election grounds or precinct, or any place of public worship, or any other public gathering in this state, except militia muster grounds, was attacked as violative of the provision of the Constitution of 1868 in regard to the right of the people to keep and bear arms. Speaking of the meaning of this clause of the Constitution, McCay, J., made use of the following vigorous utterance: "It is to secure the existence of a well-regulated militia; that, by the express words of the clause, was the object of it, and I have always been at a loss to follow the line of thought that extends the guaranty to the right to carry pistols, dirks, bowie knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day. It is in my judgment a perversion of the meaning of the word 'arms,' as used in the phrase 'the right to keep and bear arms,' to treat it as including weapons of this character. The preamble of the clause is the key to the meaning of it. The word 'arms' evidently means the arms of a militiaman, the weapons ordinarily used in battle, to wit, guns of every kind, swords, bayonets, horseman's pistols, etc. The very words 'bear arms' had then, and now have, a technical meaning. The 'arms-bearing' part of a people were its men fit for service on the field of battle. That country was 'armed' that had an army ready for fight. The call 'to arms' was a call to put on the habiliments of battle, and I greatly doubt if in any good author of those days a use of the word 'arms,' when applied to a people, can be found, which includes pocket pistols, dirks, sword canes, toothpicks, bowie knives, and a host of other relics of the past barbarism, or inventions of modern savagery of like character. In what manner the right to keep and bear these pests of society can encourage or secure the existence of a militia, and especially of a well-regulated militia, I am not able to divine." He said that if it should be held (following the opinion in the Nunn Case) that the guaranty of our state Constitution was intended to include weapons of the character mentioned, the act was still not unconstitutional; that the power to "prescribe the manner in which arms may be borne" should be given a reasonable interpretation, and that it included the power to prescribe, not only the particular way in which such weapons might be carried, such as openly or secretly, on the shoulder or in the hand, loaded or unloaded, cocked or uncocked, capped or uncapped, but also the time when and the place where they might be borne. He said: "The Constitution is to be construed as a whole. One

part of it is not to be understood in such a sense as will militate against another. It is as well the duty of the General Assembly to pass laws for the protection of the person and property of the citizens, as it is to abstain from any infringement of the right to bear arms. The preservation of the public peace, and the protection of the people against violence, are constitutional duties of the Legislature, and the guaranty of the right to keep and bear arms is to be understood and construed in connection and in harmony with these constitutional duties." Bish. St. Cr. (3d Ed.) § 793. Surely no one will contend that children have a constitutional right to go to school with revolvers strapped around them, or that men and women have a right to go to church, or sit in the courtrooms, or crowd around election precincts, armed like desperadoes, and that this is beyond the power of the Legislature to prevent.

It was argued that the requirement of a license to carry the weapons named in the act, and the fixing of a fee of 50 cents, were obnoxious to the constitutional provision. If this argument be sound, then practically the whole licensing system would be destroyed on the ground that to require a license is not a regulation, but a prohibition. Many persons are required to obtain a license before engaging in certain businesses or performing certain acts; where a legitimate exercise of the police power of the state, it has never been thought that this was a violation of any constitutional right as to person or property. It was contended also that a requirement of a bond of \$100, conditioned upon a proper and legitimate use of the weapons, rendered the act obnoxious to the Constitution. It was said that this might deprive some persons who could not give a bond of the right to carry the weapon. There are many cases in which a person may exercise a certain right by giving a bond. Numerous public officers are required to furnish bond before taking charge of the office, but this has not been thought to be unconstitutional because some citizens might desire to hold the office who could not give the bond. The right to appeal to the courts is guaranteed by the Constitution. In order to obtain a writ of attachment, the plaintiff must give bond. It would hardly be said that, because he could not give the bond required by the statute, he was unconstitutionally excluded from appealing to the court in that manner. Illustrations might be multiplied. We think, upon careful consideration, that the regulatory provisions of the act of 1910 are not so arbitrary or unreasonable as to amount, in effect, to a prohibition of the right to bear arms, or an infringement of that right as protected by the Constitution.

Acts of the Legislature ought to be given a reasonable and sensible construction, and

one which will not conflict with the Constitution, where it is practicable to do so. *County of De Kalb v. City of Atlanta*, 132 Ga. 727 (2), 65 S. E. 72; *Southern Ry. Co. v. Atlanta Sand Co.*, 135 Ga. 36 (5), 68 S. E. 807; *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 561, 69 S. E. 725, 32 L. R. A. (N. S.) 20. The illustrations given by Blackstone, in connection with his rules for construing statutes, are familiar. Among them is a law forbidding a layman to "lay hands" on a priest, which was construed to include hurting him with a weapon; a law forbidding all ecclesiastical persons to purchase "provisions" at Rome, which should be construed as not including "grain or other victuals," but nominations to benefices, which were known as ecclesiastical provisions; a law declaring that those who in a storm forsook a ship should forfeit all property therein, and the ship and lading should belong to those who staid in it, which was construed not to apply in favor of a sick passenger, who, by reason of his disease, was unable to get out and escape; and a law which declared that "whoever draws blood in the streets" should be punished, which was held not to apply to a surgeon, who opened the vein of a person who fell down in the street in a fit. 1 Bl. Com. 60, 61. We are not called upon to determine whether the act of 1910 offends the rules of rhetoric or English grammar, but whether it violates the Constitution. The act should receive a reasonable construction. Suppose that the owner of a pistol should accidentally drop it from the window of his dwelling to the street. A narrow and literal construction of the act might make it penal for him to pick it up and carry it into his house. It is lawful to sell pistols. But a similar construction might make it impossible for the carrier to deliver them to the dealer, or the dealer to deliver them to the customer. But we will not anticipate that any such construction will be given, but one which will carry out the legislative purpose.

[2] 2. The second question propounded by the Court of Appeals is whether the act of 1910 is in violation of the right of a citizen, under article 8, § 2, of the Constitution of the United States, which provides: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." What has been said above answers this question in the negative. It is not contended that anything contained in this act affects, or was intended to affect, any federal law passed in pursuance of the Constitution of the United States in regard to the regulation of militia. All the Justices concur, except BECK, J., absent.

ATKINSON, J. (dissenting). The first question propounded by the Court of Appeals should be answered in the affirmative.

The correctness of the answer depends upon a proper construction of the statute in question, and of the Constitution of this state. In construing the Constitution on the subject, its history is such as to make manifest the intention of the people in adopting it, and the intent, as thus shown, should be given effect. Precedents of other states, consisting of rulings of courts, relative to Constitutions, statutes, and questions which were not identical with those of our own, and which probably had different histories, can have but little, if any, weight in showing the intention of the makers of our Constitution and statutes. Resort to the history of the early English laws on the subject of the right to bear arms is not important, otherwise than as to be suggestive of reasons why it should have been expressly put in our fundamental law that the inherent right of the people to bear arms should never be infringed by the legislative power in the exercise of the right to enact laws.

Section 1 of the act, concerning the constitutionality of which the question is propounded, declares: "That from and after the passage of this act it shall be unlawful for any person to have or carry about his person, in any county in the state of Georgia, any pistol or revolver without first taking out a license from the ordinary of the respective counties in which the party resides, before such person shall be at liberty to carry around with him on his person, or to have in his manual possession outside of his own home or place of business; provided that nothing in this act shall be construed to alter, affect or amend any laws now in force in this state relative to the carrying of concealed weapons on or about one's person; and provided further, that this shall not apply to sheriffs, deputy sheriffs, marshals, or other arresting officers of this state or United States who are now allowed, by law, to carry revolvers; nor to any of the militia of said state while in service or upon duty; nor to any students of military colleges or schools when they are in the discharge of their duty at such colleges." Section 2 declares: "That the ordinary of the respective counties of this state, in which the applicant resides, may grant such license, either in term time or during vacation, upon the application of party or person desiring to apply for such license; provided applicant shall be at least eighteen years old or over, and shall give a bond payable to the Governor of the state in the sum of one hundred dollars, conditioned upon the proper and legitimate use of said weapon, with a surety approved by the ordinary of said county, and the ordinary granting the license shall keep a record of the name of the person taking out such license, the name of the maker of the firearm to be carried, and the caliber and number of the same." Section 3 provides that: "The person making such application,

and to whom such license is granted, shall pay to the ordinary for granting said license the sum of fifty cents, which license shall cover a period of three years from date of granting same." Section 4 makes the violation of the act punishable as for a misdemeanor.

The majority refuse to "anticipate" that this act will be so construed as to render it unlawful for the owner of a pistol, who should accidentally drop it from his dwelling to the street, to afterwards pick it up and carry it into his house; or that, if a pistol should be purchased, it would be unlawful for the dealer to deliver it or the purchaser to receive it. When some such question arises, it cannot be passed over lightly. An existing statute prohibits the carrying of a pistol concealed, and in a prosecution for the violation of this statute it has been held that if a pistol be carried concealed but for a moment it is a violation of the law. *Brinson v. State*, 75 Ga. 882. But the provisions of the act above quoted extend further than to instances such as mentioned by the majority. Under them no person, male or female, under the age of 18 years, other than such as might come within certain classes specifically excepted, could lawfully carry around on his person, or have in his manual possession, any kind of pistol or revolver, for any purpose whatever, in any conceivable manner, elsewhere than in his own home or place of business. Nor could any person over the age of 18 years do so without first having obtained a license so to do from the ordinary of the county, and having given bond and paid the prescribed fee. Relatively to a person under the age of 18 years, it matters not what the conditions or causes might be that would render it necessary for him or her, as the case might be, to go to or from his home or place of business, or what dangers might be encountered on the way, or how great the necessity for a pistol or revolver for the protection of self or property, he would violate the statute if on the way he carried in his hand, or otherwise about his person, a pistol or revolver. The same would apply to all persons over the age of 18 years, not falling within any of the excepted classes, unless they had complied with the prescribed conditions relative to obtaining a license, giving bond, and paying the fee. A nonresident, without a place of business, could not obtain a license. If there were a vacancy in the office of the ordinary, no person could obtain a license. However distasteful or inconvenient it might be to a law-abiding citizen to take out a license and be recorded as the carrier of a pistol, or, in case of remote distance from the ordinary, or inaccessibility to his office, however great the necessity of carrying a pistol or revolver for self-protection, before a license could be obtained, it would be a violation of this statute to carry any kind of a pistol or re-

volver in any manner whatever, and punishable as for a misdemeanor.

Whatever else might be said of this statute, it ought not to be held that it does not infringe the right to carry a pistol or revolver. As the statute is to be construed as infringing the right to carry a pistol or revolver, it only remains to determine whether "pistols or revolvers," as contemplated by this act, are to be classed as "arms," within the meaning of the Constitution of this state, which declares that "the right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne." If they were so contemplated, then the act is obnoxious to this clause of the Constitution. The act contemplates all pistols and revolvers, because it excepts none. If it had not contemplated specially pistols and revolvers, such as belong to the accoutrement of the militia, the militia would not have been included among the classes which were excepted from its operation. By such an exception, the act gave to the militia the right of carrying pistols and revolvers of the kind which it undertook to deny to other people. If it were a proper test and right to hold that the Constitution, by the use of the word "arms," contemplated only such as were borne by the militia, this act, according to the manifest purpose and intent of the Legislature, would antagonize the Constitution; but this dissent is not rested on that proposition. Before our Constitution contained any declaration against the infringement upon the right of the people to bear arms, it was thought by this court that the second amendment to the Constitution of the United States, which is set forth in the second question propounded by the Court of Appeals, prohibited legislation by state Legislatures which infringed the right to bear arms, and that the Constitution last mentioned, which did not refer to "pistols or revolvers," otherwise than as might be comprehended by the word "arms," contemplated pistols. That such was the understanding of this court at that time is shown by the decision rendered in the case of *Nunn v. State*, 1 Ga. 243, which has been referred to by the majority. *Nunn* had been convicted under the act of 1837, which made it a misdemeanor "for any merchant or vender of wares or merchandise in this state, or any person or persons whatever, to sell, or to offer to sell, or to keep or to have about their persons, or elsewhere, any of the hereinafter described weapons, to wit: Bowie or any other kinds of knives, manufactured and sold for the purpose of wearing or carrying the same as arms of offense or defense; pistols, dirks, sword-canes, spears, etc., shall also be contemplated in this act, save such pistols as are known and used as horseman's pistols," *Cobb's Dig.* p. 848. This act was attacked as being unconstitutional, and it was so

held by this court, and the judgment of the lower court refusing a new trial was reversed. The effect of the decision was to hold that a pistol was an "arm," in the meaning of the Constitution. The court, expressing the opinion through Lumpkin, J., said: "We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons secretly that it is valid, inasmuch as it does not deprive the citizen of his natural right of self-defense, or of his constitutional right to keep and bear arms. But that so much of it as contains a prohibition against bearing arms openly is in conflict with the Constitution, and void; and that as the defendant has been indicted and convicted for carrying a pistol, without charging that it was done in a concealed manner, under that portion of the statute which entirely forbids its use, the judgment of the court below must be reversed, and the proceeding quashed."

This decision was rendered in 1846, and was subsequently approved in the case of *Stockdale v. State*, 32 Ga. 225-227, which was decided at the January term, 1861. No constitutional question was raised in this latter case; but it is pertinent to the present discussion for the purpose of showing that this court construed the word "arms" to include "pistols." In the opinion, Lyon, J., after quoting so much of the opinion as is quoted above from the case of *Nunn v. State*, supra, said: "That decision has been constantly adhered to from that time to the present, and must continue to stand as the law of this court on that subject." It was further said: "To enforce the law, as the court construed it to the jury, would be to prohibit the bearing of those arms [pistols] altogether. . . . What the Legislature did intend was to compel persons who carried those weapons to so wear them about their persons that others, who might come in contact with them, might see that they were 'armed.'" Subsequently, in 1874, the decision of this court, in the case of *Hill v. State*, 53 Ga. 472, was rendered. Hill was indicted under a section of the Code which prohibited the carrying of a pistol, etc., to any court of justice, etc. He was convicted, and this court affirmed the judgment of the lower court in refusing to grant a new trial, holding, among other things, that the statute under which he was indicted was not obnoxious to the Constitution of this state, which declared, "a well regulated militia being necessary to the security of a free state, the right of the people to keep and bear shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne." McCay, J., speaking for himself, was of the opinion that if the question were entirely a new one he should not hesitate to hold that the language of the Constitution of this state, as well as that of the United States,

guarantees only "the right to keep and bear the 'arms' necessary for a militiaman," and did not include pistols; and after criticising the reasoning in the case of *Nunn v. State*, supra, said further: "But, assuming that the guaranty of our state Constitution was intended to include weapons of this character (which, considering that it was made a part of the Constitution after the decision of *Nunn v. State*, 1 Ga. 243, is not improbable) we are still of the opinion that the act" under which the indictment was found was not unconstitutional. The decision, however, was placed, not on a holding that pistols were not arms, as contemplated by the Constitution, but upon a construction of that provision of the Constitution which authorizes the Legislature to regulate the manner in which arms might be borne, holding, in effect, that the right to regulate the manner of carrying arms authorized the legislation preventing them from being carried to courts of justices, etc.

The ruling so made was a concession that pistols were "arms," within the meaning of the Constitution, but only saved the statute by construing the power to regulate the manner of carrying such arms into authority to provide that arms should not be carried to courts of justice. There were no other decisions on this subject; but all of these, except the last, were rendered prior to the adoption of the Constitution of 1861, which was the first time the makers of the Constitution of this state saw fit to interpose. When they spoke, they made an affirmative declaration which recognized the existence of the right of the people to bear arms, and placed a limitation on the power of the Legislature with respect thereto, and declared that the right should not be infringed. This was done after "arms" had been construed by this court, in *Nunn v. State*, supra, to include pistols, and after this interpretation had been followed by the decision in *Stockdale v. State*, supra, in 1861, at which time the construction was reaffirmed. Subsequently the question was dealt with in other Constitutions, as follows: The Constitution of 1865, art. 1, § 1, par. 4 (Code 1868, § 4893) declared: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The Constitution of 1868, art. 1, § 1, par. 14 (Code of 1873, § 5006), declared: "A well regulated militia being necessary to the security of a free people, the right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have the power to prescribe by law the manner in which arms may be borne." There was no other provision in the Constitution on the subject until the adoption of the Constitution of 1877, when the question was dealt with as set forth in the excerpt copied in the first question propounded by the Court of Appeals. Without going further, it is manifest that

the framers of the Constitution of 1877, by the use of the word "arms," as in that instrument employed, intended to include pistols. It would be strange to impute to them a different intention, when it is considered that the Legislature had formerly so employed it, and the courts had so interpreted it from the time of the decision in *Nunn v. State*, 1 Ga. 243, up to the time of the decision in *Stockdale v. State*, 32 Ga. 225, in 1861, and still recognized in *Hill v. State*, 53 Ga. 472, in 1874, and especially when in the latter case the interpretation was specially mentioned and criticised by the judge rendering the opinion, before such interpretation was yielded to by the court. After such use and interpretation of the word, if it was intended by the Constitution of 1877 to empower the Legislature to deal with pistols on a different footing from other weapons of offense and defense, some change in expression on the subject would have been made.

But in looking to the real intent of the framers of the Constitution, there is still more light on the subject disclosed by Small's Report of the Constitutional Convention of 1877. "One of the aids in constitutional construction is an examination of the proceedings of the constitutional convention." *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 805, 60 S. E. 149, 151, 15 L. R. A. (N. S.) 567, 121 Am. St. Rep. 244. See, also, *Wellborn v. Estes*, 70 Ga. 390, 401; *Blocker v. Boswell*, 109 Ga. 233, 34 S. E. 289; *State v. Central R. Co.*, 109 Ga. 728, 35 S. E. 37, 48 L. R. A. 351; *Epping v. Columbus*, 117 Ga. 264 (4), 271, 43 S. E. 803; *Park v. Candler*, 114 Ga. 466, 40 S. E. 523. By reference to Small's Report (page 56), it will be seen that section 19 of the Bill of Rights was: "A well regulated militia being necessary for the security of a free people, the right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne." When this section was under consideration, as appears on page 91, it was referred to as section 23, and a motion was made which in effect struck "a well regulated militia being necessary for the security of a free people," for the reason that such a declaration had already been made in the section of the Bill of Rights on militia. After that amendment was carried, Mr. Toombs moved "to strike out all after the word 'infringe,' and strike out 'but the General Assembly shall have the power to prescribe the manner in which arms may be borne,' insisting that 'the Legislature has no power to prescribe how the people shall bear arms; that they shall not carry them in their boots, or anywhere else that they want to. I think the people have the right to keep and bear arms as they choose for their protection.'" On the other hand, Mr. Warren urged: "I hope the gentleman's motion will not prevail. The ex-

perience of all of us is that the General Assembly should have the right to regulate the manner of keeping and bearing arms. There is nothing which provokes bloodshed so much as the indiscriminate bearing of concealed weapons." The motion to amend was lost. Other amendments which were offered, but not adopted, were: (a) By inserting the word "place" after the word "manner," so as to give the Legislature the power to prescribe where a man shall carry arms and where not; (b) "when off their freeholds or away from their homes." Thus it appears from the debates that the members of the convention who framed the provision as it appears in the Constitution of 1877 had in mind that "arms," as referred to in the clause as adopted, contemplated, not merely such arms of warfare as might be used by the militia, but especially small weapons which might be concealed about the person, which was in keeping with the interpretation theretofore placed on the word by the court.

Resort to the general law, relative to the police power of the state, in this discussion, does not aid those who take a contrary view from that above expressed. It is the Constitution which we are construing, being itself the fundamental law; and it regulates and may limit the police power. By the provision of the Constitution in question, it was intended to limit the police power, when it was declared that "the right of the people to bear arms shall not be infringed." This declaration was modified all that it was intended that it should be modified by the other express declaration, "the General Assembly shall have the power to prescribe the manner in which arms may be borne." This was affirmative action upon the part of the people in adopting the Constitution, and shows that the matter of restricting the Legislature in the exercise of the police power of the state, relative to the right of the people to bear arms, received special consideration, and that there was no intent to further qualify the broad declaration which favored the right to bear arms. It was intended to guarantee to the people the right to bear arms, so that the Legislature could do no more than to regulate the manner in which they should be borne. This guaranty was to all the "people," and was never intended to be restricted merely to those of the militia, or those intending to become such.

The majority answer the second question propounded by the Court of Appeals in the negative, on account of the reasoning placed in their discussion relative to the first question. I do not concur in the reasons which they urge; but, in view of the ruling in *Hill v. State*, 53 Ga. 472, *U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588, *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615, *Spies v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80, *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556, and *Ellenbecker*



v. Plymouth County, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801, I concede that the second amendment to the Constitution of the United States relates only to limitations upon the power of Congress, and has no reference to state legislation, and accordingly concur in the judgment that the question should be answered in the negative.

(9 Ga. App. 818)

DAVIS v. STATE. (No. 3,317.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**CARRYING WEAPONS.**

This case is controlled by the decision of the Supreme Court of Georgia, in *Strickland v. State*, 72 S. E. 260, rendered October 5, 1911.

Error from City Court of Floyd County; J. H. Reece, Judge.

Will Davis was convicted of carrying a revolver without a license, and brought error to the Court of Criminal Appeals, which certified the same to the Supreme Court. Questions answered.

Eubanks & Mebane, for plaintiff in error. John W. Bale, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 817)

BROWN v. STATE. (No. 3,342.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**CARRYING WEAPONS.**

This case is controlled by *Strickland v. State* (Sup.) 72 S. E. 260.

Error from City Court of Moultrie; J. D. McKenzie, Judge.

John Brown was convicted of carrying a weapon without a license, and brought error to the Court of Criminal Appeals, which certified the same to the Supreme Court. Questions answered.

James Humphreys and G. C. Edmondson, for plaintiff in error. Alfred R. Kline, Sol., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 817)

RICHARDSON v. STATE. (No. 3,385.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**CARRYING WEAPONS.**

This case is controlled by *Strickland v. State* (Sup.) 72 S. E. 260.

Error from City Court of Tifton; R. Eve, Judge.

James Richardson was convicted of carrying a weapon without a license, and brought error to the Court of Criminal Appeals, which certified the same to the Supreme Court. Questions answered.

R. D. Smith, for plaintiff in error. Jas. H. Price, Sol., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 817)

CAMPBELL v. STATE. (No. 3,381.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**CARRYING WEAPONS.**

This case is controlled by *Strickland v. State* (Sup.) 72 S. E. 260.

Error from City Court of Brunswick; D. W. Krauss, Judge.

Joe Campbell was convicted of carrying a weapon without a license, and brought error to the Court of Criminal Appeals, which certified the same to the Supreme Court. Questions answered.

F. H. Harris, for plaintiff in error. Ernest Dart, Sol., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 817)

CHATMAN v. STATE. (No. 3,388.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**CARRYING WEAPONS.**

This case is controlled by *Strickland v. State* (Sup.) 72 S. E. 260.

Error from Superior Court, Houston County; W. H. Felton, Judge.

Squire Chatman was convicted of carrying a weapon without a license, and brought error to the Court of Criminal Appeals, which certified the same to the Supreme Court. Questions answered.

R. N. Holtzclaw, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 840)

ALEXANDER v. STATE. (No. 3,632.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**CARRYING WEAPONS.**

This case is controlled by *Strickland v. State* (Sup.) 72 S. E. 260.

Error from City Court of Sparta; R. W. Moore, Judge.

William, alias Ula, Alexander, was convicted of carrying a weapon without a license, and brought error to the Court of Criminal Appeals, which certified the same to the Supreme Court. Questions answered.

Hawes Cloud, for plaintiff in error. R. L. Merritt, Sol., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 757)

TOOLE v. DANIEL. (No. 2,835.)

(Court of Appeals of Georgia. Sept. 28, 1911.)

*(Syllabus by the Court.)*

## 1. SALES (§ 358\*)—ACTION FOR PRICE—EVIDENCE.

Where, in a defense to a suit on promissory notes, the defendant pleads that there has been a total failure of consideration, because the notes were given for a machine which, by reason of defects, was wholly worthless, and the defendant has testified that it was worthless because, at the time the suit was filed, the machine was so out of fix that it could not be operated, it is proper for the court to admit testimony tending to show that the machine had been repaired, and had been successfully used and operated, since the suit was filed. The fact that a machine may not be capable of operation without repair does not necessarily render the machine totally worthless, and the fact that it did successfully operate when the repairs were made, irrespective of the time when they were made, tends to show that the machine was not in fact without some value.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 358.\*]

## 2. SALES (§ 347\*)—ACTION FOR PRICE—DEFENSES—FAILURE OF CONSIDERATION.

Where a defendant, upon being sued upon a promissory note, pleads that it was given for the purchase price of certain personal property, as to which there was a failure of consideration, because of certain latent defects undisclosed, it is error for the court to charge the jury that the defendant could not successfully assert failure of consideration without showing that he had offered "to restore the plaintiff to his former status within a reasonable time" from the moment he discovered the defects.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 962-972; Dec. Dig. § 347.\*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

Action by J. B. Daniel against J. E. Toole. Judgment for plaintiff, and defendant brings error. Reversed.

T. S. Hawes, for plaintiff in error. John R. Wilson, for defendant in error.

POWELL, J. [1] Upon the original consideration of this case the court affirmed the judgment, announcing its decision by syllabus only, the first paragraph of which was identical with what is contained in the first paragraph of the syllabus above. Additionally, it was held that, while there was an error in the charge of the court, it was not material. The plaintiff in error filed a motion for a rehearing. After considering the points presented therein, the court granted the rehearing, and what is now about to be said is explanatory of our reasons for withdrawing the former judgment and substituting the judgment of reversal.

[2] The defendant had pleaded total failure of consideration, and this, of course, includes the defense of partial failure. The evidence failed to establish the plea in toto (for the machine for which the note was

given was, notwithstanding its alleged deficiencies, plainly of some value), but it was shown that there had been a partial failure. In one portion of the charge the court instructed the jury that "where a party sets up, as a defense to an unconditional contract in writing, that the consideration totally fails, it is incumbent on the defendant, the moment he discovers the defects, to restore the plaintiff to his former status in a reasonable time." This, of course, was erroneous. The duty of restoring the status applies where the defendant sets up rescission for fraud or breach of warranty, and not where the defense is based on failure of consideration. We did not overlook this in the original decision of the case, but we were then of the opinion that under the peculiar facts of the case the error resulted in no injury. We reached this conclusion upon the following line of reasoning: The court (though without withdrawing or in any wise retracting the incorrect instruction) did at the very conclusion of the charge take up the matter again and correctly instructed the jury. There was some evidence that the defendant had offered to restore promptly. The verdict was for less than the amount due on the notes and claimed in the suit. We concluded that the jury had allowed an abatement of the purchase price because of the partial failure of consideration.

The motion for rehearing points out that the abatement allowed by the jury was not necessarily a deduction because of any failure of consideration, but might have been made because by another plea the defendant had claimed credit for certain payments. After carefully considering the arguments and calculations submitted on the rehearing, we are not at all sure that our former conclusion was not correct. However, such a state of doubt has been created in our minds that we think that the safest thing for us to do is to grant a new trial. The charge complained of is manifestly erroneous, and prima facie prejudicial. The doctrine of no reversal for harmless error should never be applied so as to prevent a new trial, unless the court is reasonably satisfied that the error was in fact harmless.

Judgment reversed.

(3 Ga. App. 824)

MITCHELL v. STATE. (No. 3,577.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

*(Syllabus by the Court.)*

## 1. REFUSAL OF CONTINUANCE.

There was no abuse of discretion in overruling the motion to continue.

## 2. AFFIRMANCE OF JUDGMENT.

No error of law appears, and the evidence supports the verdict.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Bob Mitchell was convicted of crime, and brings error. Affirmed.

Fondren Mitchell and Snodgrass & MacIntyre, for plaintiff in error. J. A. Wilkes, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 828)

FLAHIVE v. MAYOR, ETC., OF CITY OF MACON. (No. 3,598.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

ILLEGAL SALE OF LIQUORS.

The case is controlled by Callaway v. Mims, 5 Ga. App. 9, 62 S. E. 654; Athens v. Atlanta, 6 Ga. App. 244, 64 S. E. 711; Allen v. Jennings, 134 Ga. 338, 67 S. E. 883.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Mrs. J. J. Flahive was convicted of a violation of an ordinance of the City of Macon, and brings error. Affirmed.

John P. Ross, for plaintiff in error. Lane & Park, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 718)

MIMMS v. J. L. BETTS CO. (No. 3,054.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

(Syllabus by the Court.)

1. CONTRACTS (§ 10\*)—MUTUALITY—CONTRACT FOR HAULING LOGS.

Even though a proposal, whereby one party agrees to procure as many teams as he may be able to purchase, and to haul logs for another therewith, at a given rate of compensation per hundred feet, for a definite period, may be lacking in mutuality or definiteness on account of the uncertainty as to the number of teams which the first party may be able to purchase, still, when that party has purchased a given number of teams, and has entered into the performance of the contract, and the other party has accepted the number of teams so purchased and put to work as fulfilling the terms of the proposal, the contract becomes mutual, binding, and enforceable. And if, during the period agreed on, the second party breaches the contract by refusing to allow the first party to continue to perform the contract, a right of action arises in favor of the offended party for the recovery of such damages as he may have sustained, to be estimated in accordance with the usual rules for calculating damages for breach of contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10.\*]

2. DAMAGES (§§ 124, 62, 163\*)—BREACH OF CONTRACT—MITIGATION—BURDEN OF PROOF.

Where, in a transaction such as that outlined in the preceding headnote, the offended party sues for the breach of the contract, the measure of his recovery is prima facie full payment at the contract rate; but the defendant may mitigate the damages by showing that the plaintiff, by the exercise of ordinary care and diligence, could have rendered his net loss less than that amount; the burden being upon the defendant to allege and prove this de-

fensive matter. The ultimate measure of damage, after all the facts have been heard, is the net loss incurred by the plaintiff by reason of the defendant's refusal to permit continued performance of the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338, 119-132; Dec. Dig. §§ 124, 62, 163.\*]

(Additional Syllabus by Editorial Staff.)

3. DAMAGES (§ 124\*)—MEASURE OF DAMAGES—BREACH OF CONTRACT.

Where a party agrees to procure as many teams as he may be able to purchase, and to haul logs for another at a given rate of compensation per hundred feet, for a definite period, and the other party, after accepting the number of teams so purchased and put to work as fulfilling the terms of the proposal, breaches the contract by refusing to allow the first party to continue to perform, and the first party immediately sells his team, claiming that it would be more economical to do so than to continue to keep them until work could be obtained, the item of damages resulting from his loss in making such sale is not the difference between what the teams cost him and what he sells them for, but the difference between what he sells them for and what they would have been worth at the termination of the contract.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 124.\*]

Error from City Court of Ashburn; B. L. Tipton, Judge.

Action by J. J. Mimms against J. L. Betts Company. A judgment sustaining a general demurrer, and plaintiff brings error. Reversed.

Mark Tison, Perry, Foy & Monk, and Claude Payton, for plaintiff in error. John B. Hutcheson, J. H. Pate, and J. H. Tipton, for defendant in error.

POWELL, J. The case comes to this court on exceptions to the sustaining of a general demurrer. The material allegations are that the plaintiff made a contract with the defendant on the 1st day of January, 1908, by which it was agreed that the plaintiff would cut and haul logs for the defendant and place them on a tramroad, and that he was to use for that purpose as many teams, not exceeding seven, as he should be able to purchase. The contract was to continue through the year 1908; that is, up to January 1, 1909. In pursuance of the contract he purchased five teams, and worked them until the 1st of June, 1908, when the defendant breached the contract by refusing to allow the plaintiff to do any more hauling. It is further alleged that, if the defendant had allowed the plaintiff to continue to perform under the contract, he would have cut, hauled, and placed on the tramroad 300,000 feet of logs per month for seven months, for which he would have received, at the contract price of \$3.50 per thousand, the sum of \$7,350, and that, in order for him to have earned the same it would have been necessary for him to pay out as expenses of performing the contract \$3,500, which would

have left him a net profit of \$3,850. It is further alleged that, owing to the time of the breach of the contract (in June, when the season was dull), he was unable to get other employment for his teams, and was compelled to keep them on hand and to feed them, and that this cost the sum of \$400; that the teams cost him \$2,800; that it was more economical to sell them than to continue to feed them after he could not get employment for them; that he disposed of them at the price of \$1,300 whereby he incurred a loss of \$1,500. The petition sets forth the times when, and the prices at which, the various heads of stock, of which the teams were composed, were sold, and the specific loss incurred in each sale. But it is unnecessary for us to go into that in this feature of the case further than to say that some of them were sold during the fall of 1908, and the others in the year 1909.

[1] 1. The court having sustained the general demurrer, it is unnecessary for us to pass upon the special demurrers; for if a court errs in sustaining a general demurrer, this court reverses the judgment, and allows the court below to require that the petition be made more specific, in the event any allegation is too indefinite. It is insisted, in the first place, that the contract is unenforceable because it is too indefinite in its terms, and lacks mutuality. Even if it can be said, as it probably can, that in the beginning the contract was indefinite, or lacked mutuality by reason of the fact that the plaintiff did not undertake to furnish any specific number of teams, but only to furnish such teams as he might be able to purchase, still the contract became enforceable and mutually binding when the number of teams which the plaintiff might be able to furnish was duly ascertained by his procurement of five teams and by his putting them to work for the defendant under the contract, and by the defendant's accepting them as satisfying the terms of the contract. In other words, the fact that a definite number of teams were procured, and that both parties acted under the contract and regarded this number as fulfilling the terms of the contract, cured any indefiniteness as to this feature of the contract as originally proposed.

[2] 2. The defendant, having breached the contract in June by refusing to allow the plaintiff any longer to perform, became liable for such damages as arose "naturally and according to the usual course of things from the breach, and such as the parties contemplated when the contract was made, as the probable result of its breach." Civil Code 1910, § 4395. Under the particular facts in this case, the plaintiff would primarily be entitled to recover as damages the gross amount he would have earned with his teams during the remainder of the period throughout which the contract was to continue, less such expenses as he was

saved by reason of not being required to perform the contract. However, upon the defendant's breach of the contract, the plaintiff became duty bound to lessen the damages, as far as practicable, by the use of ordinary care and diligence. Civil Code 1910, § 4398. It consequently became his duty to make the deduction to which the defendant would be entitled under the measure of damages stated above, as large as possible; that is, it was his duty to cut out as much of the expenses as possible, or else to make the property which was causing the expenses to earn an income, as an offset against the damages. If it were not for this duty imposed on the plaintiff of lessening damages, he might have kept his teams idle until the end of the year, and have held the defendant liable for the full amount he would have earned by performing the contract, for it costs just as much to keep idle teams as it does to keep working teams. If, by the exercise of ordinary care and diligence, the plaintiff could have employed his teams profitably in other work, it was his duty to do so. But it was alleged that when the breach occurred it was a time of the year when other work was not available. The plaintiff was confronted with the proposition as to whether it would be more economical to keep the teams and continue to feed them until work could be obtained, or to dispose of them at a loss. It was his duty to act under the circumstances as an ordinarily prudent man would have acted.

[3] He alleges that it was more economical to sell them. If so, the loss thus incurred is an element which may properly enter into the calculation of damages. But as to this element in the calculation this must be remembered: His loss as to teams is not the difference between what they cost him and what he sold them for, but between what he sold them for and what they would have been worth on January 1, 1909, if he had continued to perform the contract with them. Such loss as he incurred by selling the teams after January 1, 1909, was in no sense a loss chargeable to the defendant; for, if he had continued to perform the contract until that date, he would have had the teams on hand, and would still have incurred the same loss. The court erred in sustaining the general demurrer, because the plaintiff showed a prima facie right to recover some amount. It was not necessary for him to allege those offsets to which the defendant may be entitled in diminution of the normal damages. These are matters of defense, as to which the burden of proof rests upon the defendant, *Ansley v. Jordan*, 61 Ga. 482 (1). The rule of damages and the measure of damages applicable to the present case are substantially the same as those mentioned and outlined in sections 3588 and 3589, of the Civil Code of 1910. When the evidence is all in, the calculation of damages, if liability is

established, should be upon the following basis: Take the gross amount the plaintiff would have earned, if he had been allowed to continue in the performance of the contract, and deduct from it such portions of the amount that he would necessarily have expended in fulfilling the contract as were saved to him by reason of his not being required to perform. This second element—the amount to be deducted—is to be ascertained after a consideration of all the facts, and after taking into consideration the duty resting upon the plaintiff of diminishing the damages by putting the teams to work, or by selling them economically. In other words, the verdict should represent the natural net loss to the plaintiff. *Chappell v. Western Ry. of Alabama*, 8 Ga. App. 787, 70 S. E. 208.

Judgment reversed.

(8 Ga. App. 733)

**COLUMBUS MFG. CO. v. GRAY.**  
(No. 2,868.)

(Court of Appeals of Georgia. Sept. 28, 1911.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 882\*)—REVIEW—ESTOPPEL TO ALLEGE ERROR.**

Where, in a suit for damages, the evidence offered is insufficient to sustain an allegation of one ground of negligence laid in the declaration, the court should give a peremptory instruction of nonliability upon that ground; but, if it should not give such instruction, and the defendant should thereafter make a request for instructions applicable to such ground of negligence, he could not thereafter complain that for want of evidence such instruction should not have been given, even though his request should not have been complied with; the general charge upon that subject being correct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**2. MASTER AND SERVANT (§ 201\*)—INJURIES TO SERVANT—FELLOW SERVANTS—CONCURRENT NEGLIGENCE.**

Among the absolute, continuous, and non-assignable duties of master to servant is the duty of the former to furnish to the latter a safe place to work, and also to refrain from giving orders which will require the servant to put himself in such position as that he will be subjected to risk of injury from a dangerous instrumentality. The failure to perform either of these duties gives rise to a cause of action to a servant injured in consequence of a breach thereof; and this is true, even though other causes, beyond the control of the servant, including the supervening negligence of a fellow servant, may have contributed to bring about the injury of which he complains.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

**3. DEMURRER TO DECLARATION—CHARGE OF COURT—SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.**

The declaration, as amended, was sufficient to withstand the demurrers, general and special, filed by the defendant. The requests to charge, other than as above treated, in so far as the same were legal and pertinent, were

covered by the general charge, which was itself full and free from error. The evidence was sufficient to sustain the verdict, and the discretion of the trial court in refusing a new trial was not abused.

Powell, J., dissenting.

Error from City Court of Columbus; G. Y. Tigner, Judge.

Action by H. B. Gray against the Columbus Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. E. Battle and Howell Hollis, for plaintiff in error. Hatcher & Hatcher and T. T. Miller, for defendant in error.

**RUSSELL, J.** The plaintiff brought an action against the defendant, to recover damages for personal injuries, wherein, in substance, she alleged, that at the time of her injury she was in the employment of the defendant company in its cotton mill, and her business was to operate machines known as warpers; that among other general duties imposed upon her was the duty to keep the warpers clean, and to clean them while they were standing idle; that these warpers were operated by pulleys running from overhead shafting; that on the day of her injury the defendant company was engaged in readjusting its shafting, so as to remove the warpers from one end of the room, where they had been theretofore operated, to the other end of the room; that there were a number of these warpers and they had been placed in position at the end of the room at which they were to be thereafter operated, and other workmen for the company, over whom she had no control, were engaged in transferring and installing the shafting in the new position; and that while they were so engaged in removing the shafting, and attaching it to the ceiling of the room above the place to which the warpers had been removed, she was ordered, by the boss or foreman under whom she worked, to proceed with the cleaning of the warpers; that while she was so engaged in and about her work, almost immediately under where the other servants of the defendant were engaged in installing the shafting, a piece of one of the fixtures connected with the shafting became detached, for some reason, and fell upon her head, causing the injury of which she complains.

She alleged that the persons engaged in removing the shafting were careless and inexperienced; that she did not know of their carelessness or inexperience in and about the work, and, by the exercise of ordinary care and diligence on her part, she could not discover the danger incident thereto; that the defendant knew or ought to have known of the danger, and should have given her warning thereof, but failed to do so. She alleged that the defendant was neg-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ligent, among other things, because of the failure to warn her of the dangers incident to the removal of the said shafting, boxing, and hangers, which dangers were alleged to be wholly unknown to her, and by the use of ordinary care on her part could not have been discovered by her, but were known, or ought to have been known, to defendant. She alleged that the defendant was negligent because the place where she was instructed to work, considering the character of the work and dangers incident to the removal of the shafting, pulleys, and hangers overhead, was not a reasonably safe place for her to work, and that she did not know, and had not equal means of knowing, that the place was unsafe, and the defendant knew, or ought to have known, of the dangers; further, that the defendant was negligent in not exercising ordinary care in the selection of the servants engaged in the removal of the shafting, boxing, and hangers before mentioned; that the servants so employed were careless, inexperienced, and negligent in said work; that the defendant knew, or ought to have known, of the incompetency of said servants, and that the plaintiff did not know thereof, and, further, that the defendant was negligent in mode and manner of taking down said shafting, pulleys, hangers, and boxing, and in knocking down said boxing, as aforesaid, a part of which fell upon the plaintiff's head. She avers, in respect to this act of negligence, that she did not know that the said boxing was liable to fall, and had not equal means of knowing of said danger, and by the exercise of ordinary care could not have known thereof; but the defendant knew, or ought to have known, of the danger.

Upon the trial of the case, the evidence in respect to all these matters was somewhat in conflict with the exception of the allegation of negligence of the master in the matter of the selection of his servants. Upon that proposition, the evidence seems to have been insufficient to sustain the allegation of negligence. A verdict was rendered in favor of the plaintiff, and a motion for new trial was made upon the general grounds, and in addition thereto upon a great many other grounds, only a few of which need be separately considered.

[1] 1. The court, among other things, charged the jury as follows: "I charge you, gentlemen of the jury, that the master is bound to exercise ordinary care in the selection of servants, and not to retain them after knowledge of incompetency." This charge was excepted to upon the ground that there was no evidence offered which would justify the submission of that issue to the jury. The evidence upon that point was from two witnesses, one of whom, for the plaintiff, testified as follows: "We had taken down shafting before this. \* \* \* There was a machinist helper. \* \* \*

We removed the other part of the shafting all right. I do not know whether I was competent or not. It was the first I had ever done, but we were proceeding to do it in the same way as we had been doing for two or three days before. I have seen shafting removed without using ropes."

Another witness for the defendant, testifying to that point, says: "I am now master mechanic for the Tallassee Mills, and was working with the machines, shafting, etc., of defendant when Mrs. Gray was hurt. The method in which we were proceeding to remove that shafting was in the regulation way, to my best knowledge, and was done with all safety possible. I had worked there ever since the mill was built, in the mechanical department, and I think I am capable and capacitated to do that character of work. We were taking every precaution possible. We were both proceeding in a proper manner to do the work, as near as we knew how. I had considerable experience in that class of work."

Thus it will be seen that the testimony was very slight, as to whether or not the servants were themselves competent to do the work; and the master's knowledge as to their competency or incompetency would necessarily be a matter of inference, as there is no evidence that any inquiry was made by the master to ascertain whether or not they were competent or incompetent, experienced or inexperienced. In this state of the record, it may have been proper for the court to give a peremptory instruction of non-liability upon that ground of negligence; but it appears from the record that the defendant, upon that subject, requested the court to charge as follows: "I charge you further, gentlemen, that the defendant, being a corporation, can only act through agents, and if these agents, no matter what you call them, whether superintendent, foreman, master mechanic, or otherwise, were engaged in and about the work of removing or taking down the shafting, there can be no recovery in this case because of the acts of such agents or servants, unless it be made to appear, by primary proof, that the master was negligent in selecting incompetent servants or agents, or in keeping them after knowing of their incompetency, or could have, by the use of ordinary care, known that they were incompetent. This incompetency must be proven. It cannot be presumed, as I have heretofore charged you, because the presumption is that they were competent." The court further charged upon this subject: "He [the master] is presumed, further, to have used the ordinary care and diligence required of him by law in the selection of his servants, and before the plaintiff could recover she would be bound to prove to your satisfaction to the contrary. The burden is upon her."

In this case it appears that the defend-

ant invoked an instruction from the court upon the very proposition upon which thereafter, in his motion for a new trial, he complains that there was no evidence to justify an instruction. It is true that the court did not give the instruction requested by the plaintiff, but had already given, as will be seen by the extracts from the charge above set out, the correct law upon the general subject. Had the plaintiff stood, in the first instance, upon the proposition that there was no evidence upon which to predicate such instruction, he might have called in question the charge of the court to which he now excepts; but his request, in and of itself, was an admission in judicio that there was an issue of fact in the case upon the question of incompetency of the servants, their inexperience, and the want of ordinary care on the part of the master in their selection, and we think that if there was error, in the first instance, in the court giving the instruction excepted to, that error was waived by the request to charge, which we have hereinbefore set out.

[2] 2. Upon the question as to whether or not the master was negligent in failing to furnish to the plaintiff a safe place to work, and as to whether or not she was working under orders of her superior, appointed by the master to control her movements in and about her work, which orders required her to work in a place where she would be subjected to the risk of injury from dangerous instrumentalities, the evidence was in conflict; but these issues were found for the plaintiff, and we are not disposed to disturb that finding. The evidence was such as to justify the jury in finding that under the circumstances under which the rearrangement of the pulleys and shafting was being made, the place at which the plaintiff did the work at the time she was injured was one at which she would be exposed to perils resulting not from her own negligence but from causes over which she had no control. The evidence further shows, to our satisfaction, that she was at work at this place under the orders of her superior, who, as to that matter, and so far as her movements were concerned, stood in the place of the master. The primary negligence of the master consisted in requiring her to work in a place where she was exposed to these dangers. The proximate cause of her injury was this requirement of the master. The proximate cause of the injury was the breach of the duty on the part of the master to furnish to her a safe place to work, and the breach of his duty, in that he required her to work at a place where she was, without fault on her part, exposed to these dangers. Whether the master knew, or ought to have known, of the dangers, whether he required her to work at this place, or whether she was a mere volunteer were questions which were submitted to the jury

fairly, and which they found against the defendant. We do not think that the mere supervening negligence of a fellow servant, or other causes over which the injured servant has no control, should defeat her recovery, where the proximate cause of injury is the breach by the master of either of his nonassignable duties. The various questions urged in the case have been presented in many forms in the various grounds of the motion for a new trial, but the substance of all of them are embraced in the propositions which we have mentioned above.

[3] 3. There was ample evidence to sustain the verdict, and the discretion of the trial judge in refusing a new trial was not abused.

Judgment affirmed.

POWELL, J. (dissenting). I concur in the opinion of the court generally; but there was one instruction on a vital point in the case (not specifically discussed in the opinion, and not of sufficient general interest to the profession to justify further discussion by me now) which seems to me to be directly contrary to the decision of the Supreme Court in *Georgia Coal Co. v. Bradford*, 131 Ga. 289, 62 S. E. 193, 127 Am. St. Rep. 228. The other members of the court are able to differentiate the facts of that case from those involved in the case at bar, and I am not; so I must dissent.

(9 Ga. App. 818)

STEED v. STATE. (No. 3,533.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

BRIEF OF EVIDENCE.

This case is controlled by *Blount v. State*, 71 S. E. 877.

Error from Superior Court, Talbot County; S. P. Gilbert, Judge.

Watsey Steed was convicted of crime, and brings error. Affirmed.

Bull & Smith, for plaintiff in error. Geo. C. Palmer, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 820)

COLLIER v. STATE. (No. 3,603.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No error of law is assigned, and there were circumstances from which the jury might have reasonably inferred that the accused was guilty as charged.

Error from City Court of Macon; Robt. Hodges, Judge.

Charlie Collier was convicted of crime, and brings error. Affirmed.

Jesse Harris, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 831)

**ROBERSON v. STATE.** (No. 3,612.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

(*Syllabus by the Court.*)

**REVIEW OF EVIDENCE.**

The only question made is as to the sufficiency of the evidence to support the indictment. It supports it.

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Homer Roberson was convicted of crime, and brings error. Affirmed.

Herbert L. Grice, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

**POWELL, J.** Judgment affirmed.

(9 Ga. App. 820)

**BROUGHTON v. STATE.** (No. 3,538.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

(*Syllabus by the Court.*)

**1. CRIMINAL LAW (§ 300\*)—HOMICIDE (§ 300\*)—ASSAULT WITH INTENT TO KILL—PLEA OF NOT GUILTY—ISSUES.**

Where the accused is indicted for the offense of assault with intent to murder, by shooting at another, a plea of not guilty is sufficient to raise both the defenses that the accused did not shoot as claimed, and that, if he did shoot, he was justifiable. However, where the accused unequivocally admits shooting at the person alleged to have been assaulted, and claims that he did it in self-defense, the court should not state to the jury that the defendant contends that he did not do the shooting, and that if he did do the shooting he was justifiable, thus putting him in the attitude of asserting inconsistent defenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 684-686; Dec. Dig. § 300.\* Homicide, Dec. Dig. § 300.\*]

**2. INSTRUCTIONS.**

For the reasons set forth in Fallon v. State, 5 Ga. App. 659, 63 S. E. 806, the court erred in not instructing the jury as to the statutory offense of shooting at another.

Error from Superior Court, Jasper County; J. B. Park, Judge.

Ed Broughton, alias Broddus, was convicted of assault with intent to kill, and brings error. Reversed.

Doyle Campbell, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

**POWELL, J.** Judgment reversed.

(9 Ga. App. 813)

**FREEMAN v. HARTE et al.** (No. 3,230.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICT.**

No error of law is complained of. The issues involved being questions of fact, and there being some evidence to support the verdict, this court cannot interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.\*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action between Mary Freeman and Henry Harte and others. From the judgment, Freeman brings error. Affirmed.

Geo. W. Owens, for plaintiff in error. Adams & Adams, for defendants in error.

**HILL, C. J.** Judgment affirmed.

(9 Ga. App. 766)

**HOUSER v. SAVANNAH ELECTRIC CO.**  
(No. 2,838.)

(Court of Appeals of Georgia. Sept. 30, 1911.)

(*Syllabus by the Court.*)

**1. CONTRACTS (§ 328\*)—ACTIONS—DEFENSES—FRAUD.**

When, in an action at law, one party seeks to enforce against the other either offensively or defensively a contract purporting to have been made by the latter, he may show, without resort to equity, that the contract was voidable because of fraud, and that with reasonable promptness after discovery of the fraud he offered to rescind and tendered restoration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1580; Dec. Dig. § 328.\*]

**2. RELEASE (§ 58\*)—RESCISSION—QUESTION FOR JURY.**

The question of fraud or no fraud, as presented by the facts stated in the plaintiff's amendment to his pleading, was a jury question. It was likewise a jury question as to whether the offer to rescind had been made with reasonable promptness.

[Ed. Note.—For other cases, see Release, Dec. Dig. § 58.\*]

**3. APPEAL AND ERROR (§ 694\*)—DISPOSITION OF CAUSE—REVERSAL.**

When it appears from the bill of exceptions that the plaintiff introduced evidence, and a motion for nonsuit was overruled, and that the defendant introduced in evidence a contract of release from liability, and the plaintiff offered, in rebuttal, to show that the release was procured by fraud, and that the contract had been rescinded therefor, and the court declined the proof for lack of pleading, and the plaintiff then tendered pleading setting up the fraud, which was rejected by the court, and that thereupon a verdict for the defendant was directed by the court, *held* that, upon this court determining that the trial court erred in rejecting the pleading and proof as to the fraudulent procurement of the release, the judgment will be reversed because of the direction of the verdict, although the record is silent as to the evidence introduced by the plaintiff in support of his case in chief; for, if it was insufficient to support a verdict in his favor, the court should have terminated the case by nonsuit, and not by direction of a verdict.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 694.\*]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by A. F. C. Houser against the Savannah Electric Company. Judgment for defendant, and plaintiff brings error. Reversed.



O'Byrne, Hartridge & Wright, for plaintiff in error. Osborne & Lawrence, for defendant in error.

RUSSELL, J. Mrs. Houser brought suit against the Savannah Electric Company for the homicide of her husband. Among other defenses the Electric Company pleaded that after Houser's death his widow received from the Savannah Electric Benefit Association a certain sum of money and executed a receipt therefor, which operated not only to release the benefit association from liability for death benefits under a fraternal insurance arrangement which was transacted through it, but also to release the Electric Company from liability for the homicide. The Savannah Electric Benefit Association was a relief association having an intermediate connection between the Electric Company and its employes, such as frequently exists between other railroad companies and their employes, and such as was discussed in the recent case of *Chandler v. A. C. L. Ry. Co.* (Sup.) 71 S. E. 1066. However, the transaction in the present case took place prior to the adoption of the statute now embodied in Civ. Code 1910, § 2785, so that under the rulings in the *Petty Case*, 109 Ga. 666, 35 S. E. 82, this release, if valid, would have been a complete defense to the plaintiff's action. After the plaintiff had introduced her evidence and had closed her case, the defendant introduced the release, whereupon the plaintiff offered evidence tending to show that the release was procured by a fraudulent representation and concealment of the facts. The court sustained objections to the testimony, on the ground that there was no pleading to authorize it. The plaintiff then tendered a supplemental pleading, in the nature of an amendment to the petition, setting up that the contract was void because procured by certain acts of fraud which were detailed. The court rejected this amendment, on the ground that the suit was proceeding in a court without any equitable jurisdiction, and that the contract of release could not be set aside without the court's exercising affirmative equitable relief. The amendment and the testimony in support thereof having been rejected, the court directed the verdict for the defendant. This is a somewhat meager statement of the facts, but it is sufficient to indicate in a general way the points which are to be decided, and which to our minds control the case.

1. The court ought to have allowed the amendment. When in an action at law one of the parties seeks to enforce against the other, either offensively or defensively, a contract purporting to have been made by the latter, he may show, without resort to equity, that the contract was voidable because of fraud, and that with reasonable

promptness after discovery of the fraud he offered to rescind and tendered restoration. Some courts make the distinction as to whether the fraud relates to the physical procurement of the paper or to the gaining of the consent of the contracting party. We think that the uniform practice in this state justifies us in holding that this difference does not apply in our jurisdiction. For example, if a promissory note is given for the alleged purchase price of property, and the holder thereof sues on it in a court of law in a strictly legal action, the defendant may plead that the contract was procured by fraudulent representations as to the property or as to the terms of the contract, or that his consent to the contract was in any other wise fraudulently procured, and that, upon discovering the fraud, he promptly tendered restoration of the status and rescinded or offered to rescind so far as he was able so to do. We have never heard it questioned that such a plea would be a valid defense in such a case, though the court in which the suit was pending had no equitable jurisdiction other than that quasi-equitable jurisdiction which all our courts have of entertaining equitable defenses not calling for affirmative equitable relief. That presents a case of an attempt to enforce the contract offensively. Now, here is a case in which the attempt is to enforce the contract defensively. It is well recognized in our system of pleading and practice that, whenever in an action at law the defendant offers an affirmative defense, the plaintiff may by an amendment to this petition in the nature of a replication set up anything in avoidance of the matter pleaded which he could have set up if the positions of the parties to the suit were reversed: that is, can defend against the matter pleaded by the defendant just as if the defendant as a plaintiff had sued him thereon. Of course, there are cases where the nature and form of the attack upon a contract alleged to have been fraudulently procured is such that affirmative equitable relief is required, and in such cases the attacking party must institute his attack in a court having jurisdiction to grant affirmative equitable relief; that is, in a superior court. For example, a city court, being without sufficient jurisdiction in equity, could not entertain a suit brought to set aside a formal contract on the ground that it was procured by fraud, but our courts have long recognized the very cardinal and essential difference between setting aside a contract for fraud and avoiding it defensively on a similar ground. For instance, a deed made to secure a usurious debt is void. A party may defend against it without resort to equity, but, if he would have the deed set aside or canceled as a cloud on his title, he would have to go into a superior court; the defense in the one

case requiring no affirmative equitable interposition, and the relief in the other case requiring it.

The objection, urged by able counsel for the defendant in error, that the benefit association with whom the contract of relief was actually made was not a party to the present case, and that this association was a necessary party to any attack made upon the contract for fraud, is not well taken. If Mrs. Houser had undertaken to set aside the release or to have had it canceled, then the relief association as well as the Electric Company would have been a necessary party to the suit. But not so in this case, where she merely sets up the fraud as a legal reason why the contract should not be enforced against her to the destruction of her legal cause of action. For instance, suppose a note is made payable to A., and A. transfers it to B. (not an innocent purchaser), and B. sues C. (the maker) on it, would it be necessary for C., before he could set up the defense that the note was procured by fraud or fraudulent misrepresentations, to have A. made a party to the suit? We do not understand that any such rule exists. If a principal sues on a contract taken in the name of his agent, does the defendant, who seeks to avoid the contract for fraud, have to make the agent a party? It is a departure from the general rule to allow a railroad company to take direct advantage of a contract made between other persons to the extent of asserting it offensively or defensively in a suit; for ordinarily a right of action or defense under a contract exists only between the immediate parties thereto, and the beneficiary cannot enforce the contract except in the name of the party to the contract suing for his use. However, there is a form of contract as to which the beneficiary may sue directly, and the analogy between the situation there and the situation here is such as to present a fair comparison. We refer to a contract of life insurance. In that case the beneficiary can sue in his own name. Suppose he does sue, and the company defends against the contract on the ground of fraud, is it necessary that the insured (or his personal representative, for generally the insured is dead at the time the suit is brought) should be a party before the defense can be entertained?

[2] 2. It is contended that the facts set up in the amendment to the petition did not show such a state of fraud as to constitute a defense against the contract of release. It will not be necessary for us to set out the facts relied on. It will be sufficient to say that in our opinion such a state of facts is alleged as to make the question of fraud or no fraud a question for the jury. It is further contended that the petition shows on its face that the offer of restoration which is essential to the rescission of a contract was not seasonably made. The release was signed on June 5, 1909, and tender back of the

money which she had received from the relief association was made on January 12, 1910. Under all the facts, we think that it was a jury question as to whether the tender was made with reasonable promptness or not. It is said in the argument (though this does not appear from the pleading which was rejected) that as early as June 14, 1909, the Electric Company notified the plaintiff that her claim against the company had been settled by her accepting the insurance money from the relief association. It should be kept in mind that this letter was mere notice that the company claimed that the payment of insurance money had released it, but was not necessarily notice of the actual existence (undisclosed to the plaintiff up to that time) of the by-laws of the benefit association under which such a release from liability could be successfully asserted by the company, and the plaintiff was entitled to a reasonable time within which to investigate the validity of the company's claim before she was required to tender back to the benefit association money to which she was apparently entitled as insurance on her husband's life. The duty of prompt restoration is not so imperative as to the element of promptness as to preclude opportunity for investigation as to one's legal rights in the matter.

[3] 3. Counsel for the defendant in error makes the point that the judgment should in any event be affirmed, because the plaintiff did not bring up the evidence introduced before the jury for the purpose of showing the defendant's liability for the homicide of the plaintiff's husband. The bill of exceptions recites that the plaintiff introduced evidence (without setting it forth); that the court overruled a motion for a nonsuit; that the defendant then introduced the release; that certain evidence tending to show fraud in the procurement of the release was offered and rejected for lack of pleading; that the pleading was then tendered and rejected; and that thereupon the court directed a verdict in the defendant's favor. It is not necessary for us to have this evidence as to the plaintiff's case in chief before us, and counsel for the plaintiff in error very properly left it out of the record. The best, the most effectual way to present a point is to submit it in its bold outline, without the incumbrance of other matter not material to a consideration of the legal proposition involved. A court has a right to direct a verdict for the defendant only when the plaintiff has made a prima facie case and the defendant's proof has overcome that case so fully as to leave no question for submission to the jury. If the plaintiff fails to make out a case of prima facie liability, the case should terminate in a nonsuit and not in the direction of a verdict against him, and, if the court does direct the verdict, the judgment will be reversed. *Proctor & Gamble v. Blakely Oil Co.*, 123 Ga. 606, 57 S. E. 879. So that it is immaterial to the consideration of the question here presented

whether the plaintiff's evidence was or was not sufficient to make out a case of prima facie liability. In either event the court ought not to have directed a verdict for the defendant. If the defendant in error had desired to raise any question as to the sufficiency of the plaintiff's evidence to withstand nonsuit, it could have raised that question by cross-bill of exceptions.

Judgment reversed.

(9 Ga. App. 814)

**GRESHAM v. FIRST NAT. BANK OF MILLEN.** (No. 3,238.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(*Syllabus by the Court.*)

**BILLS AND NOTES (§ 537\*)—DIRECTING VERDICT.**

There was sufficient conflict in the inferences to be drawn from testimony to make a question for solution by the jury as to whether the plaintiff was a bona fide holder of the notes sued on, for value, and without notice of dishonor, and the court erred in directing the verdict.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 537.\*]

Error from City Court of Waynesboro; Wm. H. Davis, Judge.

Action by the First National Bank of Millen against E. B. Gresham. Judgment for plaintiff, and defendant brings error. Reversed.

H. J. Fullbright, for plaintiff in error. E. L. Brinson, for defendant in error.

POWELL, J. Judgment reversed.

(9 Ga. App. 713)

**TIMMONS v. MATHIS.**

**MATHIS v. TIMMONS.**

(Nos. 2,976, 3,008.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

(*Syllabus by the Court.*)

**1. JUSTICES OF THE PEACE (§§ 141, 195\*)—CERTIORARI—JURISDICTION OF APPELLATE COURT.**

While the superior court is, ordinarily speaking, a court of general jurisdiction, still, on certiorari and appeal from a justice court, its jurisdiction is limited, and this limitation is, in the main, in accordance with the jurisdiction of the lower court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 467-476, 761; Dec. Dig. §§ 141, 195.\*]

**2. JUSTICES OF THE PEACE (§ 195\*)—CERTIORARI—JURISDICTION OF APPELLATE COURT.**

In a claim case, the only issue ordinarily presented is, Is the property subject? The exception to this general rule is where, by reason of the filing of supplemental equitable pleadings, the case is converted from a simple claim case into an equitable or quasi equitable proceeding. As a justice's court is without jurisdiction in equitable proceedings, the only issue that can arise in a claim case in a justice's court is, Is the property subject to the execution? Hence, on certiorari from a judg-

ment or verdict in a justice court in a claim case, the judge of the superior court has no jurisdiction to render against the claimant a judgment for the amount of the debt due by the defendant in fi. fa.; and where the judge, in addition to sustaining the certiorari, enters up final judgment against the claimant for the amount due on the fi. fa. the judgment of the superior court is pro tanto void, and may be attacked by illegality.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 195.\*]

**3. APPEAL AND ERROR (§ 747\*)—CROSS-BILL OF EXCEPTIONS.**

The cross-bill of exceptions, which relates merely to the manner in which the record is brought to this court, does not present any matter for consideration by this court, and is dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 747.\*]

Error from Superior Court, Berrien County; J. H. Merrill, Judge.

Claim case between W. W. Timmons and R. N. Mathis. To a judgment of the superior court, sustaining certiorari to a justice of the peace, Timmons brings error, and R. N. Mathis files a cross-bill of exceptions. Judgment on main bill of exceptions reversed. Cross-bill dismissed.

Alexander & Gary, for plaintiff in error. Hendricks & Christian, for defendant in error.

HILL, C. J. Judgment on main bill of exceptions reversed. Cross-bill dismissed.

(9 Ga. App. 806)

**GARRETT & CO. v. BETTMAN, COHEN & CO.** (No. 3,174.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§ 1028\*)—HARMLESS ERROR.**

The evidence so strongly supports the verdict that any error of law was immaterial and harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.\*]

Error from City Court of Tifton; R. Eve, Judge.

Action between Garrett & Co. and Bettman, Cohen & Co. From the judgment, Garrett & Co. bring error. Affirmed.

Jas. H. Price, for plaintiff in error. R. D. Smith, J. J. Murray, and Fulwood & Murray, for defendant in error.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 827)

**MILLER v. STATE.** (No. 3,584.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(*Syllabus by the Court.*)

**1. ADULTERY (§ 12\*)—EVIDENCE—MARRIAGE.**

In a prosecution for adultery, the fact that the alleged participants were, respectively, a married man and a married woman may be shown, either directly or circumstantially.

The fact of the marriage may be at least prima facie shown by either of the following methods: By proof of general repute in family (Civ. Code 1910, § 5764); by proof of general reputation in the community (Drawdy v. Hesters, 130 Ga. 161 [1], 60 S. E. 451, 15 L. R. A. [N. S.] 190; Clark v. Cassidy, 62 Ga. 407; Wood v. State, 62 Ga. 406); by proof of the fact that the man or the woman, as the case may be, lives together with a person of the opposite sex as his or her spouse, with general recognition in the community of their being married to each other. Clark v. Cassidy, supra.

[Ed. Note.—For other cases, see Adultery, Dec. Dig. § 12.\*]

## 2. SUFFICIENCY OF EVIDENCE.

The evidence fully supports the verdict.

Error from City Court of Reidsville; E. C. Collins, Judge.

John Miller was convicted of crime, and brings error. Affirmed.

H. H. Elders, for plaintiff in error. Robt. E. De Loach, Sol., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 827)

BREWTON v. STATE. (No. 3,582.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

### CRIMINAL LAW (§ 1160\*)—APPEAL—SUFFICIENCY OF EVIDENCE.

The evidence relied upon to support the verdict is slight and unsatisfactory, but it was enough to convince the jury and to meet the approval of the trial judge. This court cannot interfere. As to proof of marriage, see Miller v. State, 72 S. E. 279, decided this day.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

Error from City Court of Reidsville; E. C. Collins, Judge.

Jane Brewton was convicted of crime, and brings error. Affirmed.

H. H. Elders, for plaintiff in error. Robt. E. De Loach, Sol., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 814)

ELYEA-AUSTELL CO. v. WHITEHURST DRUG CO. (No. 3,291.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

### GUARANTY (§ 78\*)—ACTION—EVIDENCE.

The evidence demanded a verdict for the plaintiff, and the verdict for the defendant, being without any evidence whatever to support it, should have been set aside, and the plaintiff's motion for a new trial granted.

[Ed. Note.—For other cases, see Guaranty, Dec. Dig. § 78.\*]

Error from City Court of Dublin; N. J. Hawkins, Judge.

Action by the Elyea-Austell Company against the Whitehurst Drug Company. Judgment for plaintiff, and defendant brings error. Reversed.

Ira S. Chappell, for plaintiff in error. J. S. Adams, for defendant in error.

HILL, C. J. The Elyea-Austell Company brought suit against the Whitehurst Drug Company on an account with itemized bill of particulars, based upon the following written order: "Elyea-Austell Company. Atlanta, Ga. Date April 16, 1909. Ship to F. M. Harp, Dublin, Ga. One 24 in. frame Flco Bicycle, Kelley bars 1906 Corbin Duplex brake 1-5/8 clincher tires Troxel saddle black. One girl's bicycle, 18in. frame, 26 in. wheels, with a good grade of tires, black. One 22-in. Flco Bicycle, with Atherton brake collar, black. 1 dozen W. P. W. inner tubes, 28x1-5/8. 300 12-in. spokes. 3 dozen rubber cement. 5 pairs Winner single tube tires 28x1-5/8, Flco trade mark. O. K. Whitehurst Drug Company. Terms 2%, 10 days or net 30 days." The defendant admitted the written order, admitted that the goods as ordered were shipped by the plaintiff to F. M. Harp in accordance with the terms of the order, and that he received them and had not paid for them. The defendant refused to pay the account on the ground that the plaintiff had not sent to it an invoice of the goods shipped to Harp, but had sent the goods directly to Harp, accompanied by the invoice, and had entered the account on their book against Harp, claiming that the letters "O. K.," immediately preceding the name, "Whitehurst Drug Company," placed on the order by it, should be construed to mean that, if the goods were shipped to F. M. Harp, the invoice for the goods was to be sent to the Whitehurst Drug Company, and that, unless this was done, it was understood that the defendant would not be liable to pay the account. The jury found a verdict for the defendant, and the plaintiff's motion for a new trial was overruled.

The written order for the goods given by the defendant was an original undertaking by it, and made it primarily liable to the plaintiff. There was no evidence whatever in support of the plea that the letters "O. K." meant that the goods were to be shipped to F. M. Harp, while the invoice was to be sent to the Whitehurst Drug Company, or that there was any understanding between the plaintiff and the drug company that, unless this was done, the drug company would not be liable.

The evidence discloses the following facts: Harp was insolvent and unable to buy any goods from the plaintiff on his own credit, and he induced the Whitehurst Drug Company to order the goods from Elyea-Austell Company directly for him. The credit was extended to the Whitehurst Drug Company and expressly denied by the plaintiff to Harp, and this fact was known to the defendant when the order was given for the goods. There is no commercial or legal rea-

son why the Whitehurst Drug Company was entitled to an invoice for the bill of goods which it had ordered sent to Harp, but it was proper that an invoice should accompany the goods, in order that the party receiving them might verify the shipment. But, even if no invoice had been sent either to Harp or to the Whitehurst Drug Company, this would constitute no reason why the goods which had been ordered by a written order by the Whitehurst Drug Company, and which had been sent to Harp in compliance with this written order, on the faith of which credit was extended, not to Harp, but to the Whitehurst Drug Company, should not be paid, for in view of the fact that the goods as ordered were admitted to have been received by Harp, and the only complaint made is that the invoice was sent to Harp, and not to the Whitehurst Drug Company, of course, the letters "O. K." were subject to explanation by parol evidence. Ordinarily it is well understood that these two letters mean "approved" or "correct." If they had a different meaning in this special case, a meaning that the invoice should have been sent to the person ordering the goods, and not to the person receiving them, otherwise the person ordering them should be released from his contract, this would make a difference, and might be a defense, but there is no evidence whatever to sustain this contention. It did not affect the liability of the Whitehurst Drug Company that the goods were charged against Harp on the books of the plaintiff. The only significance of this fact would be that the Elyea-Austell Company regarded the Whitehurst Drug Company as the guarantor of the account. And, if it was the guarantor of the account, the guaranty was absolute in its terms, and no invoice was necessary to be sent to the guarantor in order to make it liable. The only essential questions were: Were the goods ordered by the defendant? Were they sent as ordered on the faith of the guaranty? And had they been received and not paid for? If so, the defendant was liable to pay for them, and the defense set up was wholly unsupported by the evidence, and the verdict for the plaintiff was demanded.

Judgment reversed.

(9 Ga. App. 324)

COCHRAN v. STATE (No. 3,581.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§ 250\*) — EVIDENCE — MANSLAUGHTER.

The evidence fully supports the verdict.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 250.\*]

2. CRIMINAL LAW (§ 823\*)—INSTRUCTION—CURE OF ERROR.

A palpable slip of the tongue on the part of the judge, in instructing the jury as to an ab-

stract proposition of law, is not sufficient cause for reversing the judgment, where, upon consideration of it in connection with the context and all the rest of the charge, it is plain that the jury could not have been misled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995; Dec. Dig. § 823.\*]

3. HOMICIDE (§ 300\*)—JUSTIFICATION—"FEARS OF A REASONABLE MAN."

The expression, "fears of a reasonable man," as used in Penal Code 1910, § 71, is identical in meaning with the expression, "fears of a reasonably courageous man."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

4. REVIEW ON APPEAL.

No material error appears.

Error from Superior Court, Fayette County; R. T. Daniel, Judge.

Sterling Cochran was convicted of manslaughter, and brings error. Affirmed.

A. O. Blalock, J. W. Culpepper, Lester Dickson, and J. F. Gollightly, for plaintiff in error. J. W. Wise, Sol. Gen., and Cleveland & Goodrich, for the State.

POWELL, J. [1] The deceased and the accused had a short quarrel as to the payment of certain rents. The deceased threw a rock of considerable size at the accused, and missed him. The accused jumped or fell out of the wagon in which he was standing, and the two went together, and the accused inflicted the mortal wounds by shooting with a pistol which he had. The deceased was unarmed. This statement of facts presents the case most favorably to the accused. It is substantially his own version of the affair, so far as physical facts are concerned. It is plain that this makes a case of manslaughter. Conceding that the initial attack of the deceased with a rock was intended to be a deadly attack, still when he had thrown the rock and had totally disarmed himself, the accused could claim no justification for shooting him thereafter. Justification cannot be based on a deadly assault, which has been completely ended, unless the assailant has some further apparent ability to continue it. It is true that the defendant in his statement to the jury said: "I done what I done to save my life; I was scared as the man was coming on me. I would not have done it for anything, except to save my life." As he sets up no facts showing any actual or apparent danger to his life at the time of the shooting, the statement which he made in the next breath, and which makes him guilty of voluntary manslaughter, seems thoroughly to justify the verdict of the jury. His further statement was: "He [the deceased] jumped on me, and through heat of passion I shot."

[2] 2. The judge, in the course of his instructions to the jury, by what was a palpable slip of the tongue, stated that in order to reduce a homicide from murder to man-

slaughter there must have been an assault on the part of the person killed, amounting to a felony; but, as a part of the same sentence, he told the jury that if it appeared that the deceased was making an assault, amounting to a felony, upon the accused, and the accused shot therefor, the homicide would be justifiable, and the verdict of the jury should be "not guilty." The inaccuracy came in such a context that no reasonable man, lawyer or layman, would have been confused. It was so plainly a slip of the tongue as not to be misleading. Counsel for the plaintiff in error seem to have recognized this up to the time of the argument of the case in this court; for, while an assignment of error is made upon that portion of the charge in which this inaccuracy appears, no complaint is made as to this particular portion on the ground which we have just been discussing.

[3] In instructing the jury as to the defense of justification through reasonable fears, the court, instead of using the expression, "fears of a reasonable man," used the expression, "fears of a reasonably courageous man;" that is, he told the jury that, before justification by fears alone could be complete, it must appear that the defendant was acting under the fears of a reasonably courageous man. The exact point made is that the Code (Penal Code 1910, § 71) uses the expression, "fears of a reasonable man," and that man who was not reasonably courageous might be a reasonable man. In our opinion, the two expressions, as related to the subject of the Code section, are identical. Fear is the subject under treatment, and, as to the subject of fear, courageousness (as that word is employed, both in judicial phrase and in common parlance) is that quality of the reasonable man to which the provision of the law applies. In other words, when the law states in effect that certain combinations of circumstances which, though not actually fraught with danger, are apparently so may justify a homicide, and then proceeds to define the conditions under which such a set of circumstances may justify, it merely lays down a standard, and that standard is that the circumstances must be such as that a man of normal courage would have been led into a belief of danger by them; and we know of no more accurate expression of common usage to convey this notion than the expression, "the fears of a reasonably courageous man." If reasonableness as to any other quality of human nature, except the quality of courageousness, were to be admitted into consideration in fixing this standard, and were allowed to take the place of courageousness, the standard would at once be destroyed. The expression, "reasonable man," so often found in legal or judicial writings, varies with the context. As to the subject of care, it means a reasonably prudent man; as to that duty of inquiry which

the law sometimes imposes for the purpose of affecting a party with notice, it means a man of reasonably good business judgment and acumen; as to fear, it means a man of reasonable courageousness, and so on throughout the whole range of varied human activities.

4. Certain other assignments are made, but, after carefully considering them all, we find that none of them are well taken.  
Judgment affirmed.

(9 Ga. App. 829)

KIRK v. STATE. (No. 3,600.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§§ 938, 956\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE—CUMULATIVE EVIDENCE.

A new trial will not be granted because of alleged newly discovered testimony where one of the attorneys of record for the movant fails to submit an affidavit showing his ignorance of such testimony at the time of the trial, and no reason is given for such failure, and where the affidavit of the alleged newly discovered witness himself is not produced, nor his absence accounted for, and where the alleged newly discovered evidence is substantially cumulative in character, and would not tend to produce a different result on a second trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2317, 2373-2391; Dec. Dig. §§ 938, 956.\*]

Error from City Court of Carrollton; Jas. Beall, Judge.

Jean Kirk was convicted of crime, and brings error. Affirmed.

B. F. Boykin, for plaintiff in error. C. E. Roop, Sol., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 832)

DEWBERRY v. STATE. (No. 3,552.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1159\*)—WRIT OF ERROR—REVIEW—QUESTIONS OF FACT.

The credibility of witnesses is exclusively for determination by the jury; and where there is some evidence to support the verdict this court will not set it aside, although that evidence is given by witnesses of bad character and interested motives.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Error from Superior Court, Pike County; Robt. T. Daniel, Judge.

Betsy Dewberry was convicted of violating the prohibition law, and brings error. Affirmed.

Henry O. Farr, for plaintiff in error. J. W. Wise, Sol. Gen., for the State.

HILL, C. J. Betsy Dewberry was convicted of violating the prohibition law of this state, and her motion for a new trial was overruled. Two witnesses were introduced by the prosecution. One was a detective, employed by the county commissioners, and paid \$10 for every case made and sustained. This witness testified that, on the 25th day of December, 1910, the chief of police of the city of Barnesville gave him an empty bottle and 25 cents with which to buy whisky from the accused; that he and the chief of police went to the house of the accused for that purpose, and he went inside and the officer remained on the outside; that in the house he paid the accused 10 cents for whisky, receiving 15 cents in change; that he took this whisky and the 15 cents and gave it to the officer; that he had no whisky in his possession when he went into the house, and no money, except the 25 cents. The whisky bought from the accused was produced and exhibited to the jury. The witness testified positively that he bought this whisky from the accused at the time and place stated in the accusation. The chief of police corroborated this witness, testifying that he gave him the money and the bottle, and went with him to the house of the accused; that before the detective went into the house with the bottle and the money he searched him carefully, and that he had neither money nor whisky on his person; that the detective went into the house, where he remained a few moments, and came back with the whisky in the bottle, and returned to him the 15 cents in change. The officer testified that the character of this witness for the prosecution was bad, and he would not believe him on his oath generally; but in the present case he believed him because of the facts he himself knew relating to the transaction. The principal witness stated that he knew his general character, and it was bad, and sometimes he would believe himself on oath, and sometimes he would not, but that in the present case he was telling the truth. The accused introduced no evidence, but made a statement to the jury, denying that she had sold the whisky to the detective on that day, or at any other time in her life.

The case is brought to this court solely on the ground that the state's principal witness was impeached, and the jury should not have believed him, and that it was the duty of the jury to accept the statement of the accused in preference to the testimony of an impeached witness, who was uncorroborated as to the main facts. There is no merit in this objection, for two reasons: The verdict does not depend solely on the testimony of an impeached witness; that testimony is substantially corroborated by

the evidence of the officer; and, secondly, the question of the credibility of this witness was exclusively a matter for the jury. The facts of this case afford this court an opportunity of repeating with emphasis that in no case will it interfere with the verdict of a jury, where that verdict is attacked solely on the ground that it is unsupported by credible evidence. The credibility of witnesses is wisely left by the law of this state exclusively to the determination of the jury; and this court has frequently held that it has neither the inclination nor the right to interfere with any verdict which is supported by some evidence, however slight that evidence, and however apparently unreliable the character of the witnesses who give that evidence. Judgment affirmed.

(9 Ga. App. 838)

COMBS v. STATE. (No. 3,625.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 642\*)—CERTIORARI—STRIKING OUT ANSWER.

The court did not err in refusing to strike the answer to the certiorari, or in overruling the certiorari.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 642.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

H. C. Combs was convicted of crime in the criminal court of Atlanta. From a judgment of the superior court overruling certiorari, Combs brings error. Affirmed.

P. H. Brewster, Jr., and Munday & Cornwell, for plaintiff in error. H. M. Dorsey, Sol. Gen., and Lowry Arnold, Sol., for the State.

POWELL, J. Combs was convicted in the criminal court of Atlanta and sought certiorari. At the first hearing of the case in the superior court the answer to the certiorari was stricken, because the judge had adopted an answer prepared for him by state's counsel. See Civil Code 1910, § 5197. The judge answered over; the second answer being substantially the same as the first. He also stated that he had prepared the second answer after refreshing his memory from the petition and the first answer, and that but for his ability thus to refresh his memory he could not remember the case well enough to make an answer. Counsel for the plaintiff in error moved to strike this answer also, on the ground that it was substantially a repetition of the first answer, which had been illegally prepared. Just what benefit could have accrued to the movant from the granting of his motion we do not see. Without an answer the plaintiff in certiorari could not travel. The only legal result in such a case would be a dismissal of

the certiorari. The last answer, so the judge states, embodied all the judge's recollection of the transaction. We do not think that the court erred in refusing to strike the answer, but, even if this were error, it has not injured the plaintiff in error.

The certiorari was not meritorious, and the judge of the superior court did not err in overruling it.

Judgment affirmed.

(9 Ga. App. 839)

**JACKSON v. STATE.** (No. 3,622.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**SECOND CERTIORARI.**

This case is controlled by *Combs v. State*, 72 S. E. 283, this day decided.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

George Jackson was convicted of crime, and brings error. Affirmed.

P. H. Brewster, Jr., and Munday & Cornwell, for plaintiff in error. H. M. Dorsey, Sol. Gen., and Lowry Arnold, Sol., for the State.

**POWELL, J.** Judgment affirmed.

(9 Ga. App. 840)

**DELL v. STATE.**  
**LANDRUM v. SAME.**  
(Nos. 3,623, 3,626.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**SECOND CERTIORARI.**

These cases are controlled by *Combs v. State*, 72 S. E. 283, this day decided by this court.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Willie Dell and John Landrum were each convicted of crime, and bring error. Affirmed.

P. H. Brewster, Jr., and Munday & Cornwell, for plaintiffs in error. H. M. Dorsey, Sol. Gen., and Lowry Arnold, Sol., for the State.

**HILL, C. J.** Judgments affirmed.

(9 Ga. App. 840)

**COMBS v. STATE.** (No. 3,624.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**ANSWER TO CERTIORARI.**

This case is controlled by *Combs v. State*, 72 S. E. 283, No. 3,625, this day decided.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Mose Combs was convicted of crime in the criminal court of Atlanta. From a judg-

ment of the superior court overruling certiorari, Combs brings error. Affirmed.

P. H. Brewster, Jr., and Munday & Cornwell, for plaintiff in error. H. M. Dorsey, Sol. Gen., and Lowry Arnold, Sol., for the State.

**RUSSELL, J.** Judgment affirmed.

(9 Ga. App. 828)

**CHEATWOOD v. CITY OF BUCHANAN.**  
(No. 3,585.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**1. INTOXICATING LIQUORS (§ 224\*)—CRIMINAL PROSECUTION—BURDEN OF PROOF—INTEREST OF ACCUSED IN TRANSACTION.**

On the trial of an accusation of selling intoxicating liquor, where the defense relied upon was that the accused had no interest whatever in the sale, but acted therein simply as the agent for the purchaser, the burden is on the accused to prove how, when, and from whom he obtained the liquor; and until this is done to the satisfaction of the jury this burden is not carried. Under the facts of this case, the jury were authorized to conclude that the defense was merely a subterfuge, and that the accused was himself the seller, or at least was interested in the sale otherwise than as agent for the purchaser. *Bray v. City of Commerce*, 5 Ga. App. 605, 63 S. E. 596; *Sessions v. State*, 6 Ga. App. 336, 64 S. E. 1101; *Roberts v. State*, 8 Ga. App. 476, 69 S. E. 585; *Gaskins v. State*, 127 Ga. 51, 55 S. E. 1045.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 224.\*]

**2. PROOF OF VENUE.**

The venue was sufficiently proved.

Error from Superior Court, Haralson County; Price Edwards, Judge.

D. R. Cheatwood was convicted of selling intoxicating liquor, and brings error. Affirmed.

E. S. Griffith, for plaintiff in error. Walter Matthews and C. B. Weatherly, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(9 Ga. App. 829)

**MORSE v. MAYOR, etc., OF CITY OF MACON.** (No. 3,599.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 59\*)—PRINCIPALS AND ACCESSORIES.**

By analogy to the rule in misdemeanor cases, all who participate either directly or accessorially in the violation of a municipal ordinance may be held as principals. *Toney v. Atlanta*, 6 Ga. App. 356, 64 S. E. 1106; *Harbuck v. Atlanta*, 7 Ga. App. 441, 67 S. E. 108.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 59.\*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Proceedings by the Mayor, etc., of City of Macon against Patrick Morse for violation



of a municipal ordinance. From the judgment, Morse brings error. Affirmed.

John P. Ross, for plaintiff in error. Lane & Park, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 824)

GASTON v. STATE. (No. 3,564.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence, though somewhat weak and circumstantial, is not legally insufficient to support the verdict.

2. CRIMINAL LAW (§ 442\*)—EVIDENCE—DOCUMENTARY EVIDENCE—AUTHENTICATION.

While the accused in a criminal case, in making his statement to the jury, has the right to state that he has received a certain letter, and to state its contents, it is not error for the court to refuse to allow him to make proof of the letter without proof of its genuineness, or, without such proof, to allow him to introduce the letter as a part of his statement. *Woodard v. State*, 5 Ga. App. 447, 63 S. E. 573, and cases therein cited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1027; Dec. Dig. § 442.\*]

3. OBJECTIONS TO EVIDENCE—PROPOSITION OF COMPROMISE.

The testimony objected to as being a mere proposition of compromise was not objectionable as such.

4. NO ERROR.

No material error appears.

Error from City Court of Bainbridge; W. M. Harrell, Judge.

S. G. Gaston was convicted of crime, and brings error. Affirmed.

Longley & Martin, for plaintiff in error. M. E. O'Neal, Sol., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 826)

HAYS v. STATE. (No. 3,602.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 507\*)—EVIDENCE—TESTIMONY OF ACCOMPLICES—DETERMINATION AS TO WHO ARE ACCOMPLICES.

Neither the joinder of a witness in an indictment with the defendant, nor a plea of guilty entered by the witness, necessarily makes him an accomplice with the defendant so as to require corroboration of the witness' testimony on the latter's trial. It is for the jury, from a consideration of the testimony of the witness, wherein he admits his presence at the scene of the crime at the time of its commission by his codefendant, but denies any participation therein by him, and the plea of guilty entered by the witness, as well as any other relevant circumstance, to determine whether the witness was an accomplice of the defendant on trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 507.\*]

2. CRIMINAL LAW (§ 742\*)—EVIDENCE—TESTIMONY OF ACCOMPLICES—DETERMINATION AS TO WHO ARE ACCOMPLICES.

The court properly left it for the jury to decide under the evidence whether the code-

fendant testifying was an accomplice; and the verdict may be upheld on the theory that the jury found that the witness was not an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1719-1721; Dec. Dig. § 742.\*]

Error from Superior Court, Campbell County; L. S. Roan, Judge.

Cleve Hays was convicted of crime, and brings error. Affirmed.

W. C. Wright, for plaintiff in error. C. S. Reid, Sol. Gen., for the State.

POWELL, J. The syllabus above is borrowed verbatim from the opinion of the Supreme Court in the case of *Hargrove v. State*, 125 Ga. 270, 54 S. E. 164. The principles in that case cover the case at bar, and are controlling upon all the propositions involved.

Judgment affirmed.

(9 Ga. App. 811)

ROGERS v. TIEDEMAN. (No. 3,217.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

1. PAYMENT (§ 73\*)—EVIDENCE—SUFFICIENCY.

The exceptions of law raised by the record are entirely without merit; and the verdict for the plaintiff is strongly supported by the evidence.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 73.\*]

(Additional Syllabus by Editorial Staff.)

2. PRINCIPAL AND AGENT (§ 119\*)—AUTHORITY OF AGENT—PRESUMPTIONS.

It will not be presumed that an agent had authority to accept a draft on a third person in payment of a debt due the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 391-401; Dec. Dig. § 119.\*]

3. BILLS AND NOTES (§ 395\*)—PRESENTMENT FOR PAYMENT—NOTICE OF DISHONOR.

Neither the drawer nor the indorser of a domestic bill of exchange not to be negotiated nor left for collection at a chartered bank is entitled to notice of dishonor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 996-1021; Dec. Dig. § 395.\*]

Error from City Court of Reidsville; C. L. Morgan, Judge.

Action by George W. Tiedeman against J. H. Rogers. Judgment for plaintiff, and defendant brings error. Affirmed, with damages.

Way & Burkhalter, for plaintiff in error. E. C. Collins, for defendant in error.

HILL, C. J. George W. Tiedeman brought suit against J. H. Rogers on an account with itemized bill of particulars. The defendant admitted the correctness of the amount of the account, but insisted that he paid it by giving two drafts for the amount

of the account drawn by D. A. Hodges of the Southern Pine Company, Savannah, Ga., and payable to himself, which he indorsed and delivered to the agent of the plaintiff, who accepted the drafts in payment of the account. He further defended on the ground that the plaintiff was guilty of negligence in not presenting the drafts to the drawee within a reasonable time; that, if the drafts had been presented within a reasonable time to the drawee, they would have been paid; that the delay in presenting them for payment resulted in their becoming worthless, for the reason that the drawer in the meantime had become insolvent; that at the time the drafts were given to the defendant by D. A. Hodges he was solvent and amply able to have paid them if the drawee had failed to accept or to pay them; that at the time he accepted the drafts from Hodges he did so in payment of a debt which he held against Hodges, and since the laches of the plaintiff in presenting the drafts for collection or acceptance they had been rendered worthless, and he would lose his debt by this want of diligence on the part of the plaintiff, and for this reason he should be released from payment of the account sued on.

[1] In support of his first defense the defendant testified that he had delivered a draft on the Southern Pine Company of Savannah for \$66 drawn to his order by D. A. Hodges, to the agent of the plaintiff, who accepted the draft as a credit on the account. The jury were fully authorized, under the evidence, to believe that the agent of the plaintiff who accepted the first draft from the defendant did so simply for the purpose of collecting it and applying the proceeds on the account. The undisputed evidence is that this agent had no authority to receive anything in payment of the account of his principal except the money.

[2] It certainly will not be presumed that the agent had authority to accept the draft in payment of the debt due his principal. The defendant failed absolutely to prove the two defenses relied upon. On the contrary, the evidence clearly shows that the drafts were presented by the plaintiff to the Southern Pine Company, the drawee, who refused to pay them on the ground that the drawer had no funds in their hands with which to pay them. While it does not distinctly appear when the plaintiff presented the drafts to the drawee for payment, there is no evidence whatever in support of the proposition that he delayed their presentation unreasonably. But any delay would have been entirely harmless in so far as the payee of the drafts were concerned because the drawer himself testified that he did not know whether he had sufficient funds in the hands of the drawee to pay these drafts when he drew them and delivered them to

the defendant; that at that time he himself was indebted to the drawee.

[3] The second defense relied upon is that the defendant had indorsed the drafts and as indorser thereof was entitled to notice of their dishonor, and that a failure to give this notice to him relieved him from the payment of the debt which he owed to the plaintiff. Of course, there is no merit in this defense. If the suit had been against him on the drafts as indorser thereof, he would not have been entitled to any notice of dishonor. Neither the drawer nor the indorser of a domestic bill of exchange not to be negotiated nor left for collection at a chartered bank is entitled to notice of dishonor. *Bank of Richland v. Nicholson*, 120 Ga. 622, 48 S. E. 240. It seems to us that the verdict in this case under the evidence is so strongly supported, and the exceptions of law are so barren of merit, that the judgment refusing a new trial should be affirmed, and 10 per cent. damages awarded against the plaintiff in error for the delay consequent from the suing out of the writ of error.

Judgment affirmed, with damages.

(9 Ga. App. 820)

FLANDERS v. STATE. (No. 3,544.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 252\*)—ACCUSATION IN CITY COURT—FORMAL REQUISITES.

The act creating the city court of Bainbridge prescribes no special form for the accusation to be preferred in criminal cases in that court further than that the accusation shall be founded on an affidavit, and shall be signed by the prosecuting officer of the court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 252.\*]

2. CRIMINAL LAW (§ 252\*)—ACCUSATION IN CITY COURT—FORMAL REQUISITES.

The provisions of Pen. Code 1910, § 954, relate to the form of indictments or accusations preferred by grand juries, and not to accusations in city courts.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 252.\*]

3. CRIMINAL LAW (§ 252\*)—ACCUSATION IN CITY COURT—FORMAL REQUISITES.

The accusation in the present case was sufficient as against motion to quash and motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. § 252.\*]

Error from City Court of Bainbridge; W. M. Harrell, Judge.

John Flanders was convicted of crime, and brings error. Affirmed.

P. D. Rich, for plaintiff in error. M. E. O'Neal, Sol., for the State.

POWELL, J. [1] 1. The accusation, attacked in the present case both by motion to quash made before the trial and by motion in arrest of judgment after the conviction

tion, is in the following form: "Georgia, Decatur County. In the city court of Bainbridge, June term, 1911. \* \* \* The following accusation is founded upon the foregoing affidavit of Nancy Flanders, who now in the name and behalf of the citizens of Georgia charges and accuses John Flanders with the offense of a misdemeanor, for that the said on the 15th day of March, in the year 1911, in the county aforesaid, then and there unlawfully and with force and arms did whip, beat, and otherwise cruelly maltreat his wife, Nancy Flanders, contrary to the laws of said state, the good order, peace, and dignity thereof. [Signed] M. E. O'Neal, Solicitor. Nancy Flanders, Prosecutor." The specific objection is that the accusation alleged that Nancy Flanders charges and accuses the defendant in the name and behalf of the citizens of Georgia when it should so read as to make M. E. O'Neal, the solicitor of the court, the accuser. The act creating the city court of Bainbridge (Acts 1900, p. 104) contains only the following provision on this subject: "That defendants in criminal cases in said city court of Bainbridge may be tried on written accusation founded on affidavit, which accusation shall be signed by the prosecuting officer of said court." The present accusation was founded on an affidavit, and was signed by the prosecuting officer of the court. It seems to be sufficient so far as the act creating the court is concerned.

[2] 2. Counsel for the plaintiff in error bases his contention as to the insufficiency of the accusation on the ground that Pen. Code 1910, § 954, prescribes the form for indictments and accusations. That section does prescribe a form for "every indictment or accusation of the grand jury." Under the form there prescribed the grand jurors, "in the name and behalf of the citizens of Georgia," are made the accusers. We do not think that this section of the Penal Code has any applicability to accusations in city courts further than to furnish a general outline as to how such accusations should be drawn.

[3] 3. We are of the opinion that an accusation in the city court of Bainbridge is sufficient where it is signed by the prosecuting officer of the court and is based on an affidavit, whether the name of the solicitor or the name of the maker of the affidavit is formally employed to designate the accuser who "in the name and behalf of the citizens of Georgia" charges the accused with the offense set out in the accusation. Either form may be adopted. Since the affidavit of the prosecutor is made a substitute for the formal finding of the grand jury as to these misdemeanors, it is perhaps the better practice to follow the form adopted in the present case.

Judgment affirmed.

(9 Ga. App. 830)

SUGGS v. STATE. (No. 3,607.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence is sufficient to authorize the conviction.

2. CRIMINAL LAW (§ 828\*)—INSTRUCTIONS—NECESSITY OF REQUEST.

In the absence of written request, it is not reversible error for the court to fail to charge on the subject of impeachment of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.\*]

3. CRIMINAL LAW (§ 355\*)—EVIDENCE.

Where the question as to whether a person was or was not drunk at sundown on a given day was in issue, it was not error to admit testimony that he "seemed to be drinking" at about half past 2 o'clock that afternoon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 761; Dec. Dig. § 355.\*]

Error from Superior Court, Miller County; W. C. Worrell, Judge.

G. M. Suggs was convicted of drunkenness, and brings error. Affirmed.

P. D. Rich, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and W. I. Geer, for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 807)

ROBERTS v. STATE. (No. 3,189.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159\*)—WRIT OF ERROR—REVIEW—QUESTIONS OF FACT.

While the evidence tending to show a felonious assault as charged in the indictment was weak and unsatisfactory, this court cannot say that there was no evidence from which the felonious intent may not have been inferred, and, as the question of intent is so peculiarly one for the determination of the jury, in the absence of any material error of law, the verdict will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW (§ 655\*)—TRIAL—REMARKS OF JUDGE.

In a prosecution for assault with intent to rape, that the Solicitor General took exceptions to the statement of defendant's counsel in his preliminary statement that he expected to show some improper conduct on the part of the girl with another man, to which the judge replied that he understood counsel to have made a statement as to what he expected to show by proof, and that what he had stated was not evidence, and could not be considered by the jury, does not require a reversal on the ground that it embarrassed accused in making his statement, nor that an expression used by the judge that the jury would not accept a word of the attorney's statement unless supported by proof led the jury to believe that he referred to the statement

to be made by the accused, and discredited the force of such statement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1522, 1523; Dec. Dig. § 655.\*]

### 3. CRIMINAL LAW (§ 786\*)—INSTRUCTIONS—STATEMENT OF ACCUSED.

An instruction to take the evidence in connection with defendant's statement measuring the statement under the rule of law the court has given, and to determine what the truth of the matter is, and let the verdict be in accordance with what the jury believes to be the truth, and that there is nothing in the case but the law and the evidence, was not erroneous as destroying the weight of the statement of accused, and directing the jury to disregard it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895-1901, 1960, 1984; Dec. Dig. § 786.\*]

### 4. RAPE (§ 59\*)—PROSECUTIONS—INSTRUCTIONS.

In a prosecution for assault with intent to rape where the indictment did not charge a battery, there was no error in not charging Pen. Code 1910, § 102, defining the offense of battery.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.\*]

### 5. RAPE (§ 47\*)—ADMISSIBILITY OF EVIDENCE—SUBSEQUENT CONDUCT OF PROSECUTRIX.

In a prosecution for assault with intent to rape, testimony of the prosecutrix giving her reason for remaining at the house of accused the night after she had been assaulted was admissible as explanatory of her conduct, in view of the alleged assault.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 66; Dec. Dig. § 47.\*]

### 6. RAPE (§ 43\*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for assault with intent to rape, testimony that the accused was drinking at the time was admissible to show a condition of mind which might render him reckless of consequences.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 43.\*]

### 7. CRIMINAL LAW (§ 938\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Newly discovered testimony purely impeaching in character, which would not probably produce a different verdict on the second trial, did not require a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2317; Dec. Dig. § 938.\*]

Error from Superior Court, Miller County; W. C. Worrill, Judge.

D. M. Roberts was convicted of assault with intent to rape, and brings error. Affirmed.

P. D. Rich and W. I. Geer, for plaintiff in error. J. A. Laing, Sol. Gen., and R. R. Arnold, for the State.

HILL, C. J. [1] Plaintiff in error was indicted for an assault with intent to rape, and was convicted; the jury in the verdict recommending him to the mercy of the court. He filed a motion for a new trial, which being overruled he brings error. The evidence in substance makes the following case: The alleged victim of the assault, a girl 16 years old, in the temporary absence of her rela-

tives from home, was staying at the house of the accused, who was a married man. She testified that on the day of the alleged assault the wife of the accused was absent from home; that she and four small children were at the house with the accused; that she went into a bedroom to let down a window, leaving the two doors to the bedroom open; that the accused came into the room where she was, and took hold of her and threw her down on the floor; that she attempted to scream, and he put his hand over her mouth and said, "Now, dog-gone you, holler"; that he got on top of her, but got up to shut the door, and came back to her and again threw her down on the floor, and that, when he again arose to close a door leading into the bathroom, she got up and escaped from the house, and went over to her home nearby. She testified that he said no word to her except those above quoted, that he did not attempt to unbutton his trousers, or to lift her dress, and that this assault took place while four children, ranging from four to nine years of age, were playing on the front porch right by the room. She further stated that in the scuffle between her and the accused her arm was scratched, but she did not know how it was done. She made no complaint that day, but did make complaint of the assault on the next morning to her aunt. She gave as a reason for not making complaint before that there was no one to whom she was willing to make her complaint except her aunt with whom she was living, but as soon as she saw her aunt next morning she told her; and this statement was fully corroborated by the testimony of the aunt. One or two other witnesses also testified that on the next morning after the alleged assault they saw her crying, and asked her what was the matter, and to one she replied that she could not tell, and to the other she said that the accused had hurt her feelings the day before; that she seemed to be in trouble. The evidence also discloses the fact that there were several houses immediately adjoining the one in which the alleged assault took place. There is some evidence that the accused was drinking on the day of the alleged assault. He introduced no evidence, but denied that he had made any assault whatever upon the girl at any time.

It will be seen from this brief statement of the substance of the evidence that the proof of any felonious intent was weak and unsatisfactory. If the accused assaulted the girl at all as described by her, it would be more reasonable to assume that his intent in doing so was for the purpose of overcoming resistance and obtaining a reluctant consent to sexual intercourse, rather than with an intent to commit the crime of rape. As individuals it seems to us incredulous that he

would have attempted to rape the girl under the circumstances, in the middle of the day, with four children playing near the room, with the doors of the room unlocked, with near-by neighbors, and while his wife was only temporarily absent from home. But the question of intent was one exclusively for determination by the jury, and, where acts are proved from which they could have by the exercise of their unlimited discretion deduced the intent of the actor, this court cannot as a matter of law interfere because in its opinion the conclusion that a felonious intent existed is based upon facts weak and unsatisfactory. Therefore, unless the judge in the trial of the case committed some prejudicial error against the accused, this court has no right to disturb the verdict on the ground that it was without any evidence to support it. We will consider the grounds contained in the amended motion for a new trial to determine if there was any material or prejudicial error of law committed on the trial.

[2] The first ground of the amended motion is that the judge erred in a colloquy which took place between him and the Solicitor General in the presence of the jury after the defendant's counsel had begun his preliminary statement as to what he expected to show in defense. The Solicitor General took exception to the statement of the defendant's counsel that he expected to show some improper conduct on the part of the girl with another man, objecting to this statement because it was wholly irrelevant and improper to be made to the jury. The judge stated: "I understand counsel to have made a statement as to what he expected to show by proof. What he has stated is not evidence, and should not be considered by the jury, and the jury would not accept a word of it as true unless supported by proof in the case, or by the evidence he offers." It is contended that this interruption by the Solicitor General and this remark of the judge in the presence of the jury "embarrassed and confused" the accused in subsequently making his statement to the jury in the case, and deprived him of his right to a fair and impartial trial; that the expression used by the judge that the jury would not accept a word of the attorney's statement unless supported by proof in the case or the evidence he offered led the jury to believe that the judge referred to the statement to be made by the accused, and discredited the force and effect which the jury were authorized to give to such statement. This objection to the remark of the judge is manifestly without any merit. He did not refer to any statement to be made by the accused in his defense. He expressly referred to what his counsel stated he expected to prove, and not to what the accused expected to state. The jury could not have understood the remark of the judge that the preliminary statement of counsel as

to what he expected to prove should be sustained by the evidence as referring to any statement which the accused subsequently made in his defense.

[3] The second objection made is that the judge erred in the following charge: "So take the evidence in this case, in connection with the defendant's statement, measuring the statement under the rule of law the court has given you, determine what the truth of the matter is, and then let your verdict be in accordance with what you believe to be the truth. There is nothing in this case but the law and the evidence."

It is contended that, when the court charged the jury that "there is nothing in this case but the law and the evidence," it destroyed the weight of the statement of the accused and amounted to an instruction by the court for the jury to wholly disregard his statement, and that as the accused did not introduce any evidence, but relied solely upon his statement, it was tantamount to an instruction to the jury not to accept any part of his statement. The language specifically objected to, that "there is nothing in the case but the law and the evidence," shows by the context of the charge that the learned trial judge was referring to the duty of the jury to disregard any sympathy or public sentiment, and to be guided solely by the evidence. Immediately preceding this general statement the judge instructed the jury that they were authorized to believe the statement of the accused in preference to the evidence, if they believed it to be the truth.

[4] In the third place, it is insisted that the court erred in not charging section 102 of the Penal Code of 1910, defining the offense of battery. While there was evidence of a battery, yet the indictment did not charge any battery. It simply charged an assault with intent to commit rape, and the jury could not legally, under this indictment, have found the accused guilty of assault and battery, even if they believed that the evidence showed that the offense amounted to nothing more than assault and battery. The judge did charge that, if they saw proper under the evidence, they could find the accused guilty of simple assault. This charge was more favorable to the accused than the evidence warranted, for under the evidence the jury could not have found him guilty of an assault, for the evidence proved that the assault was accompanied by a battery.

[5] The objections made to the rulings on the admission of testimony are without any merit. The portion of the testimony of the girl which gave her reasons for remaining at the house of the accused the night after she had been assaulted was admissible as explanatory of her conduct, in view of the alleged assault, and the judge restricted the evidence to this purpose.

[6] The testimony that the accused was drinking at the time of the alleged assault

was admissible for the purpose of showing a condition of mind which might have rendered him reckless of consequences.

[7] The alleged newly discovered testimony is purely impeaching in character, and on a second trial would not probably produce a different verdict. We find no legal error, and, while the evidence is not entirely satisfactory to us as individuals, we cannot say from a juridic viewpoint that the verdict is contrary to law, in that there was no evidence whatever to support it.

Judgment affirmed.

(9 Ga. App. 831)

**HOLLAND v. STATE (No. 8,618.)**

(Court of Appeals of Georgia. Oct. 10, 1911.)

*(Syllabus by the Court.)*

**1. INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.**

The grounds of the motion for a new trial are without merit, and the verdict is supported by the evidence.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

*(Additional Syllabus by Editorial Staff.)*

**2. CRIMINAL LAW (§ 590\*)—CONTINUANCE—GROUNDS—DISCRETION OF COURT.**

In a prosecution for keeping intoxicating liquors on hand at defendant's place of business, the refusal of a continuance on the ground counsel for defendant had been engaged for six days in the trial of cases in the court, and had had no opportunity to prepare the case or consult the witnesses, and was physically and mentally exhausted, was not an abuse of discretion, where the accused had other able counsel, who had not been so continuously engaged in the trial of cases, and time was allowed for the consultation with witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1316, 1317; Dec. Dig. § 590.\*]

**3. CRIMINAL LAW (§ 683\*)—TRIAL—RECEPTION OF EVIDENCE—EVIDENCE IN REBUTTAL.**

The determination whether evidence is in rebuttal is entirely for the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.\*]

**4. INTOXICATING LIQUORS (§ 233\*)—CRIMINAL PROSECUTION—ADMISSIBILITY OF EVIDENCE.**

In a prosecution for keeping intoxicating liquors on hand at defendant's place of business, evidence that a witness had on repeated occasions bought whisky from the accused was relevant.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297; Dec. Dig. § 233.\*]

**5. INTOXICATING LIQUORS (§ 239\*)—CRIMINAL PROSECUTION—INSTRUCTIONS—"PLACE OF BUSINESS."**

In a prosecution for keeping intoxicating liquors on hand at defendant's place of business, an instruction that any nearby room or place used by the proprietor in connection with the business, and in such relation to the actual place of business as to indicate a nearby room

or compartment, is also a part of his "place of business," was proper.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 239.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5390-5392.]

Error from Superior Court, Terrell County; W. C. Worrell, Judge.

Claude Holland was convicted of keeping intoxicating liquor on hand at his place of business, and brings error. Affirmed.

M. J. Yeomans and R. R. Marlin, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and M. C. Edwards, for the State.

HILL, C. J. Claude Holland was convicted of a violation of the prohibition law in keeping on hand at his restaurant and "soft drink" establishment (his place of business) spirituous liquor; and, his motion for a new trial being overruled, he brings error. While there are several special assignments of error which we will notice, the main question is one of fact. Did the evidence warrant the jury in coming to the conclusion that the room in which the whisky was found was a part of the restaurant, or place of business, of the accused? The accused ran a restaurant and "soft drink" establishment. In one corner of the room in which the restaurant was located, there was a peculiar little room, with one door opening into it from the restaurant, and in this little room there was a refrigerator. A suit case, or "telescope," containing 6 pint bottles of whisky, was found in this room, and on top of the refrigerator was also found a bottle about half full of whisky. Around in this room were many empty bottles, which had evidently contained whisky. No other furniture than the refrigerator was found in the room, and the room was quite small, about eight by ten feet. The officers who made the case against the accused did not find him at his place of business when they first went there for the purpose of raiding it. They found him somewhere else, and asked him to go with them to his place of business, which he readily did. He did not have his key to this little room, but stated that his brother Henry had it. After the officers told him that they had to get in there some way, if they had to take a hatchet and break it open, he struck open the door himself. After he had knocked off several planks, he struck with his hatchet inside the room, as though he was "striking at something," and hit the suit case containing the whisky. There was no exit from this little room, except through the restaurant. There were no windows to it, simply a little cut-off in the side of the restaurant. The accused had on several occasions sold whisky, before the whisky was found in his restaurant. He stated to the jury that he was absent from his restaurant the day before the whisky

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was found there, and he knew nothing of its presence in the little room. His brother Henry testified that he got the key to the little room from the accused, and that while he was present at the restaurant, in the absence of the accused, a man by the name of Lee Slaughter brought the whisky into the restaurant and gave it to him, and asked that he keep it for him until he called for it; that this whisky was in a crocus sack, and he (witness) took it out of the sack and put it in a suit case, where it was found by the officers, and that he and Lee Slaughter drank some of the whisky from the pint bottle, which was left half full on the refrigerator. Lee Slaughter testified that on that night, while on his way to church, he met a negro, who had two large crocus sacks containing bottles of whisky, laboriously carrying them on his shoulder; that the negro asked him to help carry the whisky; that he had never seen this negro before, and did not know who he was; did not ask him where he got the whisky from, or where he was going; that when the negro reached his destination he told the witness to help himself, and the witness took eight pint bottles of the whisky for his share; that he did not pay the negro for them, but the negro presented them to him for his assistance in carrying them; that not wishing to take the whisky to church, he took it to the restaurant of the accused, and there left it with Henry Holland until he could call for it. The foregoing is in substance the testimony illustrative of the presence of the whisky in the little room, with a description of the room and its connection with the restaurant.

[1] Taking all these circumstances together, we are inclined to come to the same conclusion reached by the jury, to wit, that the whisky was the property of the accused, and that the little room was a part of the restaurant. The peculiarity of the construction of this little room, its location with reference to the room in which the restaurant and "soft drink" establishment were operated, there being only one door leading from the little room to the restaurant, the absence of any furniture in the room, except the refrigerator, and the presence of a great number of empty bottles in the little room, would seem to indicate that it was used simply as a hiding place for spirituous liquors, and operated in connection with the restaurant and the "soft drink" establishment of the accused. It was conceded that the little room was entirely controlled by the accused; that only the accused ever went into the room, and that he always kept the key thereto, except on this particular night when it happened to be raided by the officers, and it is significant that, although the accused said that his brother had the key on this night, he failed to find his brother. Why should the brother of the accused have thought it necessary to change this whisky

from the sack into a suit case belonging to his brother? According to his statement, Lee Slaughter simply asked him to keep the whisky, which was already in the sack, until he called for it. The statement of Lee Slaughter as to how he came by the whisky was evidently not believed by the jury to be the truth. Indeed, the account which he gives of the negro who was burdened with his load of whisky, and the unprecedented generosity of this negro in giving him as much whisky as he wanted for his assistance, and his self-denial in only taking eight pint bottles of whisky, although the negro told him to help himself without limit, would be a severe tax on the credulity of any, except the most credulous. Certainly, weighing all the circumstances, it cannot be said that the verdict is wholly unsupported.

[2] The first assignment of error contained in the amended motion for a new trial is that the judge erred in refusing to continue the case at the request of Mr. Yeomans, the counsel for the accused. He had been engaged for six days in the trial of cases in the court, and when this case was called he stated in his place that he had had no opportunity to prepare the case, or to consult the witnesses, and was physically and mentally exhausted, and was unable to go into the trial and do justice to his client. In reply to a question from the judge, he stated that he was not sick, but was simply physically and mentally exhausted, and unable to try the case in justice to his client. The judge makes the following note to this ground of the motion: "The defendant had been under arrest about one week. There were two other counsel associated in the case, and one of the associates was a lawyer of about 15 years of practice and experience, and a clever practitioner and a capable lawyer, and a resident of Dawson, who had not been so constantly engaged as Mr. Yeomans, who, the evidence showed, had been active in looking after the evidence in the case and in consulting with the witnesses. While Mr. Yeomans stated that he was weary, and doubtless was, he represented this case with his usual ability, both in the examination of the witnesses and in his arguments to both the court and the jury. The court was nearing the end of the term. Besides, the court allowed him time to consult with his witnesses before the trial began." We do not think that the trial judge abused his discretion in refusing to continue the case, especially in view of the statement contained in the note of the judge that Mr. Yeomans, although he was doubtless weary from his previous labors, conducted the case with his usual ability, and in view of the further fact that he had two associates who had not been so constantly engaged as himself. It would seem that an accusation for violating the prohibition law did not involve difficulties that could not have been easily surmounted by three experienced and able lawyers, although one of

them was "weary, physically and mentally." *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *Brantley v. State*, 133 Ga. 264, 65 S. E. 426.

[3, 4] The second exception in the amended motion is that the judge erred in allowing a witness to testify that he had on repeated occasions bought whisky from the accused. The first objection to this evidence is that it was not in rebuttal, and the second objection is that it was not relevant or material to the issue then being tried. So far as the first objection is concerned, this was a matter entirely for the discretion of the court. Besides, an inspection of the brief of the evidence shows that it was in rebuttal, not only of the statement of the accused, but of the evidence in his behalf. It is clearly relevant, where one is charged with keeping whisky on hand at his place of business, as corroborative of that charge, to show that about the time he was charged with having it on hand at his place of business he was selling it illegally. If he was selling whisky illegally, it is not unreasonable to presume from these facts that he kept his liquor at some place; and what is more likely than that he kept it at his place of business, especially if the place of business was a restaurant and "soft drink" establishment, where there was a little room so conveniently constructed and located for the concealment of his supplies?

[5] The next ground of error that we deem it necessary to notice is the exception to the charge of the court in defining the phrase, "the defendant's place of business," appearing in the general prohibition act of 1907. The judge charged that "any nearby room or place used by the proprietor in connection with the business, and in such relation to the actual place of business as to indicate a nearby room or compartment, is also a part of his place of business." This charge of the court was not only fully justified by the evidence, but was in substantial accord with repeated definitions of this phrase by this court. *Bashinski v. State*, 5 Ga. App. 3, 62 S. E. 577; *Jenkins v. State*, 4 Ga. App. 859, 62 S. E. 574; *Hall v. State*, 8 Ga. App. 752, 70 S. E. 211. We conclude that the trial was conducted without error; that the exceptions of law are without merit; and that there is evidence to support the verdict.

Judgment affirmed.

(9 Ga. App. 745)

MAXWELL v. SPETH. (No. 2,955.)

(Court of Appeals of Georgia. Sept. 28, 1911.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 377\*)—WRONGFUL LEVY—PUNITIVE DAMAGES.

When the plaintiff sues for trespass because the defendant caused process against an outsider to be levied on property which the plain-

tiff owned and held in lawful possession, he cannot recover punitive damages without showing malice, or lack of probable cause, or without showing a willful or wanton trespass.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1389-1397; Dec. Dig. § 377.\*]

2. ATTACHMENT (§ 374\*)—JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED.

Where a plaintiff in attachment causes property in the possession of a third person to be levied on as the property of the defendant in attachment, and the third person files statutory claim and gets a judgment in his favor, and the claimant then files suit against the plaintiff in attachment, alleging that the levy was a trespass, the plaintiff in attachment (defendant in the pending suit), in order to avoid an implication of malice and lack of probable cause, may show that the judgment in the claim case, finding the property not subject, was erroneous, though he did not except to it.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 374.\*]

3. ATTACHMENT (§ 375\*)—WRONGFUL ATTACHMENT—DAMAGES—ELEMENTS.

Where a refrigerator used in a dairy business was levied on while in the possession of the proprietor of the dairy under an attachment against a third person, and the levy turned out to be a trespass, the proprietor of the dairy, upon suing the person who procured the illegal levy of the attachment, cannot recover as a part of his damages an alleged loss occasioned to him by his business being suspended for five months (during which the title to the refrigerator was being litigated) for lack of a refrigerator, in the absence of evidence that by the exercise of ordinary diligence he could not procure another refrigerator, or that from poverty or other sufficient reason he was unable to give the forthcoming bond authorized by the statute, which would have allowed him to keep the refrigerator.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1378-1399; Dec. Dig. § 375.\*]

4. ATTACHMENT (§ 375\*)—WRONGFUL ATTACHMENT—DAMAGES.

Where a tortious levy is made upon the property of one not a party to the process, and he files statutory claim to the property, and the levying officer holds the property in his possession awaiting the decision of the court, the claimant, upon recovering a judgment finding the property not subject, cannot refuse to take it back from the officer, and hold the person causing the levy to be made liable for its full market value.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1378-1399; Dec. Dig. § 375.\*]

Russell, J., dissents.

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by Gustave Speth against L. C. Maxwell. Judgment for plaintiff, and defendant brings error. Reversed.

C. H. & R. S. Cohen and C. E. Dunbar, for plaintiff in error. Wm. H. Fleming, for defendant in error.

POWELL, J. This case has been before the court previously, and the judgment then was reversed on the ground that the court erred in directing the verdict in favor of the defendant. See *Speth v. Maxwell*, 6 Ga. App. 630, 65 S. E. 580. On the next trial



of the case the plaintiff recovered a verdict for \$375, and the defendant excepts. The facts are these: Maxwell (whose estate the defendant represents as executrix) had sold to Benson & Devoe a refrigerator and ice box on conditional sale, evidenced by a writing not recorded. Devoe, of the firm of Benson & Devoe, mortgaged this property to Twiname, but in the mortgage there was a clause stating that it was "subject to claim for payment of balance of purchase money on separator and refrigerator." This mortgage was duly recorded. Twiname somehow secured the property, and sold it to the plaintiff, Speth. At the time of this transaction Speth called Twiname's attention to the clause in the mortgage, stating that it was subject to a claim for the balance due on the refrigerator and separator, and Twiname said that it had been paid. Speth, however, did not know who it was that held the alleged claim for the balance of the purchase money. Later on, Maxwell's agent, finding that Speth was in possession of the property, sued out a purchase-money attachment, under the provisions of Civ. Code 1910, § 5084, alleging in his affidavit, in accordance with that law, that Benson & Devoe still owed a balance of the purchase money, and that Speth was holding the property "in fraud" against Maxwell. The attachment ran against Benson & Devoe as defendants, but was levied upon the property while in the possession of Speth. Speth filed claim to the property, traversed the ground of the attachment, as he had the right to do, and the court in that case found the property not subject. Speth then brought this action against Maxwell for damages, alleging as his causes of action the levy of the attachment upon the property in his possession, the taking away from his possession of the refrigerator and ice box, and the removal of the contents thereof (consisting of milk and butter), causing him to have to close up his business—that of dealing in creamery products. He claimed \$200 actual damages for loss of the refrigerator and ice box and of the stock of goods contained therein, \$500 for the breaking up of his business, and \$1,000 for the humiliation caused him. He alleged malice and lack of probable cause. The court at the first trial considered the case one brought for the malicious use of civil process (i. e., as for a malicious prosecution of a civil remedy), and directed a verdict for the defendant. This court in reviewing that judgment took the view that the case was not an action for the malicious use of civil process, since Speth was not a party to the attachment as sued out (that being merely a case between Maxwell and Benson & Devoe); that the plaintiff's action was for the trespass involved in the levy of process against Benson & Devoe upon property which they did not own, and which he (the plaintiff) did own, and which was

in his possession at the time of the levy, thus bringing the case within the provisions of the ruling in the case of *Williams v. Inman*, 1 Ga. App. 321, 57 S. E. 1009, and cases there cited. We held that the plaintiff was entitled to recover his actual damages, irrespective of any proof of malice or want of probable cause, and that the case was purely one of trespass. The statement of facts attached by the reporter to our former decision may not as clearly disclose the rationale of the holding as it is here disclosed, and the court and counsel in the last trial seem to have been somewhat misled thereby.

[1] We have come to the conclusion that the present verdict cannot be sustained under the evidence. The actual damages suffered by the plaintiff were much less than the amount of the verdict, and we do not consider the evidence sufficient to authorize the recovery of punitive damages. While, as this court held in a former decision of the case, punitive damages might be allowed in the event it appeared that the plaintiff had committed the trespass maliciously and without probable cause, still the entire evidence here is sufficient totally to negative the existence either of malice or want of probable cause, or is insufficient to show that recklessness or wantonness of conduct which is usually essential to the allowance of damages of this character. It is not contended that the plaintiff or his agents who sued out this attachment and caused it to be levied were actuated by any actual malice or positive ill will toward the plaintiff, but it is said that legal malice may be inferred from the lack of probable cause existing for the issuance and levy of the attachment under all the circumstances of the case. We are of the opinion that whether the judgment in the claim case by which the property was found not subject to the attachment was correct or not probable cause nevertheless existed. The only theory on which Speth's title to the property could be considered as superior to Maxwell's reserved title is that he bought without notice, actual or constructive, of the fact that Maxwell had reserved the title in the conditional sale to Benson & Devoe. If with such notice he bought the property, he thereafter held it in fraud of Maxwell's rights, within the purview of Civ. Code 1910, § 5084, relating to attachments for purchase money. It is not insisted that he had actual notice, but it is insisted that, inasmuch as he saw the statement in the mortgage from Devoe to Twiname that Twiname's rights were subject to somebody's claim on the property for purchase money, he had actual knowledge of such facts as to put him upon inquiry, and that inquiry of Twiname alone was not sufficient. We incline strongly to the view that this statement appearing in the title papers by which Speth acquired the property was sufficient to put him upon further

inquiry than he made, and hence we lean strongly to the view that Maxwell's title was in fact superior to Speth's.

[2] So far as that title is concerned, the question is now foreclosed in Speth's favor by the judgment in the claim case, but that judgment is not at all conclusive upon the question now involved, as to whether Maxwell had probable cause to believe that the property was subject to his attachment. That question must be determined without reference to what the court finally held in the claim case. For the purpose of showing probable cause for an unsuccessful action, the prosecutor of that action may show that he lost it through an erroneous judgment of the court. Furthermore, he may show that, whether the judgment of the court was erroneous or not, the question involved was reasonably doubtful. Certainly in this case the question involved was reasonably doubtful. Both malice and want of probable cause are lacking. We have not quoted at length from the evidence to show how very cautiously Maxwell and his counsel proceeded in the attachment case, and how very solicitous they were to protect Speth from any injury while the question of his title to the property was being decided, but it is in the record. No part of the verdict can be sustained on the theory that it is a finding for punitive or exemplary damages.

[3] The plaintiff's actual damage consisted in the loss of a small amount of milk and butter, the value of which is not shown by the evidence, and, as he says, in the loss of the refrigerator and the ice box, the highest proved value of which did not exceed \$175. He then claims loss of profits from his business for five months at \$75 per month. We are of the opinion that the evidence discloses that Speth's damages, so far as they are ascertainable, except the milk and butter, are traceable to his own refusal to protect himself from the result of the defendant's tort in causing the refrigerator and ice box to be levied on. Maxwell's attorney testified that he offered to allow Speth to retain the property in his possession until the question of title could be decided in court, if he would merely give a receipt for the property, showing that he held it subject to litigation. Taking Speth's testimony as a whole, there is a more or less equivocal denial of this offer; but, even if we take his testimony as making an issue over this fact, still it is not denied that he was given every opportunity to hold the property by giving a bond, and that he refused to give any receipt or bond for the property, giving the purely captious and wholly mistaken reason therefor that to do so would be to admit that he held the property in fraud. There is no contention that he was not financially able to give the bond, or that he was not given ample opportunity to do so, and that, if he had given the bond, no damages would have ensued to him. Not

only did he have the opportunity of keeping this refrigerator by giving bond, so that his business would not have been broken up during the five months that followed, as he said it was, but there is no evidence that he could not have obtained suitable refrigerators in the city of Augusta, where he lived, for the purpose of carrying on his business; on the contrary, there is evidence that such refrigerators could have been obtained. Speth's only excuse for not buying another refrigerator is that he could not find anything in Augusta that he liked. In fact, he candidly and directly admits that he "made no effort to keep up the business," and for this reason we think that under the provisions of Civ. Code 1910, § 4398, and the cognate principles of our law, he could not recover for the loss arising from the suspension of his business during the five-months period that ensued immediately after the levy.

[4] As to the value of the refrigerator and ice box themselves, the rule ordinarily may be, as contended by able counsel for the defendant in error, that the wrongdoer cannot compel the adverse party to accept back the property even in mitigation of the damages, and it may be that, if Speth had not filed in court his claim whereby the sale of the property under the attachment was stopped, he could have sued in trover or in trespass, and have invoked this doctrine, but we do not believe that one who files a statutory claim to property and succeeds in having the property found not subject, thereby releasing the levy, can then refuse to take back the property, and hold the plaintiff in the attachment or other proceeding which has been instituted liable for its full value. If the property has been damaged or has deteriorated in value while in the possession of the officer, he may claim damages on that account. An execution or other similar process against one person levied upon the property of another person is a trespass. If the property proceeds to sale, the plaintiff in *fi. fa.* (and sometimes the levying officer) and the purchaser at the sale, either or all of them, may be held liable as for a conversion of the property, but if the owner of the property should bring trover or any other remedy, and should recover a judgment for the specific property itself, he could not then turn around, and sue and recover the value of the property. Our statute allows the third person whose property has been levied on to file a claim which is in the nature of an action brought for the recovery of the specific property, and, when the claimant succeeds in the claim, he recovers a judgment, the effect of which is to cause a restoration of the specific property to him, and it becomes his duty, therefore, to accept it back from the levying officer, who in the meantime is required to hold it, not as a trespasser, but as an officer of court. The only theory on which the owner of property

can recover for the value of it from one who has tortiously taken the possession of it is that he abandons his title so far as any right to own or control the property in future is concerned, and proceeds to hold the wrongdoer liable for the value of the property as if he had purchased it. If one whose property has been wrongfully levied on intends to treat the levy as a trespass and as a conversion of the property, he ought not to interfere with the course of the process by filing a claim; for the claim holds up the disposition of the property until the claim case can be settled. If the plaintiff in *fi. fa.* is to be considered as having converted the property so as to be liable for its full value, without any right to restore it in mitigation of the damages, he should be allowed to proceed with the conversion of it to his own use. It would be wholly unjust for the claimant to be allowed to file his claim and hold up the disposition of the property, perhaps for months, and it may be until the property has become much deteriorated in value, obtain a judgment declaring the property to be his, and then refuse to take it, and then hold the plaintiff liable for its value as it was on the date the wrongful conversion took place. We think, therefore, that the plaintiff in the present case cannot recover the full value of the refrigerator (it appearing that it had been held subject to his order ever since the judgment in the claim case). Only such damages as were done it during the pendency of that litigation could be recovered.

Throughout this opinion we have treated the proceedings by which Speth succeeded in defeating Maxwell's levy of the attachment as a claim case. The pleadings in that case are not set forth at length in the record, and Speth in the brief recital of these proceedings is not spoken of as a claimant, but as the defendant, and the parties in this court have not spoken of him as claimant, but we have felt it necessary to treat that proceeding as a claim case, for we know of no other procedure by which Speth, not being a party to the attachment, could have succeeded in having the levy dismissed. If it was not a statutory claim, strictly speaking, it must have been some proceeding essentially in the nature of a statutory claim. See Civ. Code 1910, § 5115 et seq. Otherwise, it was a wholly nugatory proceeding, and the judgment thereon was not entitled to any faith and credit as an adjudication. We reverse the judgment, on the ground that the verdict is without evidence to support it, but what we have said will be sufficient to guide the court in the next trial of the case, thus making it unnecessary for us to deal specifically with a number of the errors assigned in the record.

Judgment reversed.

RUSSELL, J., dissents.

(9 Ga. App. 797)

MUTUAL LIFE INS. CO. OF NEW YORK  
v. DURDEN.

DURDEN v. MUTUAL LIFE INS. CO. OF  
NEW YORK. (Nos. 3,466, 3,487.)

(Court of Appeals of Georgia. Oct. 7, 1911.)

(Syllabus by the Court.)

1. WORDS AND PHRASES—"WAIVER."

"A waiver is a voluntary relinquishment of a known right, benefit, or advantage, which, except for such waiver, the party would otherwise have enjoyed."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381; vol. 8, pp. 7831-7832.]

2. CONTRACTS (§ 138\*)—ESTOPPEL—WAIVER OF STATUTORY PROVISIONS.

"A person may lawfully waive the benefit of a statutory provision, where the rights of third parties are not involved, unless such waiver violates public policy."

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 138.\*]

3. CONTRACTS (§ 108\*)—LEGALITY—PUBLIC POLICY.

The only authentic and admissible evidence of public policy of a state are its Constitutions, laws, and judicial decisions. Courts should guard with jealous care the rights of private contracts, and give to them full effect when possible so to do. The provisions of Civ. Code 1910, § 4253 et seq., should not be enlarged without convincing and conclusive reasons.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-511; Dec. Dig. § 108.\*]

4. INSURANCE (§ 151\*)—CONSTRUCTION—PAPERS ACCOMPANYING POLICY.

In a suit by the beneficiaries against a life insurance company, the policy, and such papers as are made a part thereof, contain the contract entered into between the insured and the insurer, and must be looked to, in order to ascertain upon what terms the parties agreed, and what are the rights and liabilities of each.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 308-311; Dec. Dig. § 151.\*]

5. INSURANCE (§§ 445, 646\*)—FORFEITURE—"SUICIDE."

"Death by suicide \* \* \* releases the insurer from the obligation of his contract." Civ. Code 1910, § 2500. Suicide is intentional self-destruction by one who is sane. If insane or accidental, it is not legally suicide. The law never presumes suicide from the fact of self-destruction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1152-1158, 1663; Dec. Dig. §§ 445, 646.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6764-6769; vol. 8, p. 7809.]

6. INSURANCE (§ 400\*)—FORFEITURE—SUICIDE—WAIVER OF STATUTORY PROVISIONS.

Where the policy contained the clause, "The company shall not be liable hereunder, in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of the policy," the benefit of Civ. Code 1910, § 2500, was waived, unless such waiver was against public policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 400.\*]

7. INSURANCE (§ 445\*)—FORFEITURE—SUICIDE—FRAUD.

If one should procure life insurance upon a false promise, made to the insurer at the time of making the contract, that he would not commit suicide, when, in fact, it was his intention

to do so, it would be a fraud, entering into the consideration and into the procurement of the contract, which would render the contract void and against public policy, irrespective of the statute.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1152-1158; Dec. Dig. § 445.\*]

**8. INSURANCE (§ 445\*)—FORFEITURE—SUICIDE—PUBLIC POLICY.**

In the absence of the fraudulent intent at the time, it would be a fraud on the public, and against public policy, to declare a policy, such as is referred to above, void as against the beneficiaries when the insured had lived up to his contract. As a matter of public policy it is of great importance to hold the parties to a contract voluntarily made, especially when death has removed one of the parties, and closed his lips upon the question raised.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1152-1158; Dec. Dig. § 445.\*]

**9. INSURANCE (§ 445\*)—FORFEITURE—SUICIDE—PUBLIC POLICY.**

In the present case, there is no clearly defined public policy opposed to the waiver of the Georgia statute, and there is a clear and vitally important public policy demanding the enforcement of the contract according to its terms and the intention of the parties.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1152-1158; Dec. Dig. § 445.\*]

**10. INSURANCE (§ 146\*)—CONSTRUCTION—CONSTRUCTION AGAINST INSURED.**

If any doubt should exist in regard to the construction of the contract of insurance, the doubt should be resolved in favor of the insured, and the policy should be liberally construed in favor of the validity of the contract and against the insurance company which wrote the policy, and which is presumed to know the Georgia statute, the benefits of which it has waived.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292-298; Dec. Dig. § 146.\*]

**11. INSURANCE (§ 646\*)—ACTIONS ON POLICY—BURDEN OF PROOF—WEIGHT AND SUFFICIENCY OF EVIDENCE.**

When the insurance company defends upon the ground of suicide, the burden is upon the company to establish such contention by a preponderance of the evidence. While the authorities are not uniform upon the question, the weight of authority seems to hold that the presumption against suicide is not overcome by the introduction at the trial of the proofs of death in one of the affidavits composing which the cause of death is stated to be suicide. It is a matter of common knowledge that proofs of death are made under conditions of haste to comply with the company's requirements, and under circumstances not conducive to safe conclusions.

[Ed. Note.—For other cases, see Insurance Cent. Dig. §§ 1645-1668; Dec. Dig. § 646.\*]

**12. INSURANCE (§§ 445, 646\*)—ACTION ON POLICY—DIRECTION OF VERDICT.**

The insured died after the expiration of one year from the issuance of the policy, the terms of which are not void as against public policy, and hence the trial court properly directed a verdict for the plaintiff.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. §§ 445, 646.\*]

Conyers, J., dissenting.

Error from City Court of Covington; W. H. Whaley, Judge.

Action by J. G. Durden, guardian, against the Mutual Life Insurance Company of New York. To a judgment for plaintiff, defend-

ant brings error, and plaintiff files a cross-bill of exceptions. Judgment affirmed on main bill of exceptions, and cross-bill dismissed.

Jas. H. Gilbert and Rogers & Knox, for plaintiff in error. Napier & Cox, for defendant in error.

GILBERT, J. This is a suit upon a policy of life insurance issued by the plaintiff in error upon the life of Mattie L. Durden, brought by the defendant in error as guardian for the beneficiaries named in the policy. The answer of plaintiff in error set up various defenses, only one of which is to be considered here under the evidence, viz., that the insured committed suicide, whereby plaintiff in error was discharged from liability under the policy, thus claiming the protection afforded by section 2500 of the Civil Code of 1910. At the trial defendant in error made out his *prima facie* case by proof of the guardianship, and of the insurance contract, and rested. Plaintiff in error introduced in evidence the application for insurance and the proofs of death made to it by defendant in error, as alleged in his petition, and also rested. Defendant in error offered no further evidence. The case being thus closed, plaintiff in error moved the court to direct a verdict in its favor, upon the ground that the proof of death, uncontradicted, showed that the insured had committed suicide, and therefore plaintiff in error, by force of Civ. Code 1910, § 2500, was released from liability under the policy. The motion was denied, and the court directed a verdict in favor of the plaintiff below.

[1] 1. After an exhaustive search, we have been unable to find an adjudicated case in any jurisdiction upon the controlling point in this case, and hence the conclusion must be reached from premises, most of which fortunately are well established and comparatively uniform. As we view the matter the correct conclusion depends upon whether an insurance company may by contract waive the benefits of section 2500 of the Civil Code 1910, and whether the contract of insurance in the present case constitutes such a waiver. It is insisted by the plaintiff in error that such a waiver would be void and of no effect, even if attempted, as against public policy; that such contracts, if allowed, would encourage suicide, and would result in legalizing insurance against self-destruction. "A waiver is a voluntary relinquishment of a known right, benefit, or advantage, which, except for such waiver, the party would otherwise have enjoyed." *Kennedy v. Manry*, 6 Ga. App. 819, 66 S. E. 31.

[2] 2. A person may lawfully waive the benefit of a statutory provision where the

rights of third parties are not involved, unless such waiver violates public policy. 9 Cyc. 480.

[3] 3. The only authentic and admissible evidence of public policy of a state are its Constitutions, laws, and judicial decisions. As the habits, opinions, and wants of the people vary with the times, so public policy may change with them. So, because these habits, opinions, and wants are different in different places, what may be against public policy in one state or country may not be so in another. "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and of competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by the courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." 9 Cyc. 482, 483, and note. The provisions of Civ. Code 1910, § 4253 et seq., should not be enlarged without convincing and conclusive reasons. In the case of *Phoenix Insurance Co. v. Clay*, 101 Ga. 332, 28 S. E. 854, 65 Am. St. Rep. 307, Chief Justice Simmons has forcefully summed the whole matter up in these words: "It is well settled that contracts will not be avoided by the courts as against public policy, except where the case is free from doubt, and where an injury to the public interest clearly appears."

[4] 4. In a suit by the beneficiaries against a life insurance company, the policy and such papers as are made a part thereof must be looked to in order to ascertain upon what terms the parties agreed, and what are the rights and liabilities of each. Civ. Code 1910, § 2471; *Mass. Life Ass'n v. Robinson*, 104 Ga. 268, 30 S. E. 918, 42 L. R. A. 261.

[5] 5. "Death by suicide \* \* \* releases the insurer from the obligation of his contract." Civ. Code 1910, § 2500. Suicide is intentional self-destruction by one who is sane. If one is insane, his self-destruction cannot legally be suicide, nor is self-destruction legally suicide when due to accident. The law never presumes suicide from the fact of self-destruction alone; but, upon the contrary, it does presume that death ensues from natural causes. *Life Ass'n v. Waller*, 57 Ga. 535; *Jenkins v. National Union*, 118 Ga. 588, 45 S. E. 449. Self-destruction is never a legal presumption. The fact that the insured committed suicide is not of itself evidence of insanity. Upon the contrary, where it is shown that the insured committed suicide, the law in this state, as well as in most other states, presumes sanity. *Merritt v. Cotton States Life Ins. Co.*, 55

Ga. 103. Were this question not settled in Georgia, the writer would have no hesitation in holding that suicide is itself evidence of an unbalanced mind. 4 Wigmore, Ev. § 2500 (c). "So strong is the instinctive love of life in the human breast, so uniform the efforts of men to preserve their existence, that suicide cannot be presumed. It is contrary to the general conduct of mankind." *Travelers' Insurance Co. v. McConkey*, 127 U. S. 681, 8 Sup. Ct. 1360, 32 L. Ed. 308; *Connecticut Mutual v. Akins*, 150 U. S. 475, 14 Sup. Ct. 155, 37 L. Ed. 1148. In *Buchanan v. Buchanan*, 103 Ga. 92, 29 S. E. 609, Justice Cobb said: "Self-destruction is a circumstance tending to show mental disorder, but it is not conclusive proof of its existence."

[6] 6. Where the policy contained the clause, "the company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of the policy," the benefit of Code section 2500 was waived, unless such waiver was against public policy. If it is established that the insured came to his death by his own intentional act, nothing else appearing, it is presumed that the act was that of a sane man. Consequently it becomes necessary to determine what effect the clause just quoted has upon Civ. Code 1910, § 2500, which itself has reference only to intentional self-destruction by one who is sane. The clause referred to may be divided into two parts, one having reference to the act of one when sane, and the other having reference to the act of one when insane; and, eliminating that part which has reference to an insane act for present purposes, the clause would read as follows: "The company shall not be liable hereunder in the event of insured's death by his own act during the period of one year after the issuance of the policy." Thus it will be seen that the company was dealing directly and specifically in the policy itself with the matter of self-destruction by one sane at the time for its own protection, and presumably for the purpose of securing business, and entered into a contract which provided that the company should not be liable if the insured died by his own act within a period of one year. The company is presumed to have been aware of the provision of Civ. Code 1910, § 2500, and, unless it was the purpose of the company in this contract to waive the benefit of said code section, the language employed would have been redundant. In construing the contract, the intention is to be collected, not from detached parts of the instrument, but from the whole of it. And all parts of the writing, and every word in it, will, if possible, be given effect. 9 Cyc. 579, 580. No word in a contract is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given to it. *Id.* 583.

[7] 7. If one should procure life insurance upon a false promise, made to the insurer at the time of making the contract, that he would not commit suicide, when, in fact, it was his intention at the time so to do, it would be a fraud, entering into the consideration and into the procurement of the contract, which would render the contract void and against public policy, irrespective of section 2500 of the Civil Code of 1910.

[8] 8. In the absence of such a fraudulent intent at the time of making the contract, it would be a fraud on the public and against public policy to declare a policy such as is referred to above void as against the beneficiaries, when the insured did live up to the terms of his contract. *Supreme Lodge, etc., v. Trebbe*, 74 Ill. App. 545; *Campbell v. Supreme Conclave*, 66 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576; *Supreme Conclave v. Miles*, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528. As a matter of public policy it is of great importance to hold the parties to a contract voluntarily made, especially when death has removed one of the parties and closed his lips upon the questions raised by the company when sued for the amount of the policy. When a contract grows immediately out of and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it. But a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote. *Phoenix Insurance Co. v. Clay*, 101 Ga. 332, 333, 28 S. E. 853, 65 Am. St. Rep. 307. The record in the present case does not disclose anything to indicate an intention on the part of the insured at the time of making the contract to die by her own hand. "If performance by an insurer is in general terms conditioned on the death of the insured, there seems no valid reason why death by committing suicide should not be included; and such is the general doctrine." *Cooke, Life Ins.* § 41. A contract of life insurance is not a contract of indemnity, and there is no force in any argument derived from contracts of indemnity. "Granting the inherent wrongfulness of suicide, which is matter for the moralist rather than the judge, the doctrine derived from contracts of indemnity falls when applied thereto. No one in this world can derive a benefit by his own death. By that final event all earthly profit ends for him to whom it comes. He is for this life equally beyond gain and loss, and to him the rules that govern mundane intercourse become no longer applicable. Those who derive the benefit will have done no wrong. But it is said that suicide is a fraud on the insurer. To procure insurance with intent to commit suicide is a fraud on the insurer that should defeat recovery at the option of the insurer, and, with all the incidents of a rescission, will

avoid the contract, even as against beneficiaries or assignees. *Smith v. National Benevolent Society*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616. But to argue that suicide, not previously intended, is such a fraud as to defeat recovery, is to beg the very question of what is the contract; and the argument assumes that insurance rates are fixed upon a basis excluding death by suicide, while, as we have seen, the contrary must be the case, for the experience tables include all forms of death. Moreover, it would be next to impossible to fasten the fraudulent intent." *Campbell v. Supreme Conclave Improved Order Heptasophs*, 66 N. J. Law, 274, 49 Atl. 550, 54 L. R. A. 576. So far as the writer has been able to discover, every case holding a contrary doctrine has been based upon the case of *Ritter v. Mutual Life Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, as, for instance, the case of *Hopkins v. Northwestern Life Insurance Co. (C. C.)* 94 Fed. 729, where a United States Circuit Court, being bound by the *Ritter* Case, held likewise. A careful examination of the *Ritter* Case will disclose the fact that the proof was plenary that the insurance was procured with intent to commit suicide.

[9] 9. In the present case there is no clearly defined public policy opposed to the waiver of the Georgia statute. In Georgia, as well as in most of the states of the American Union, suicide is not a crime. Formerly, by the common law of England, the penalty attached to an act of suicide consisted in giving the body of the criminal an ignominious burial in the highway, and in the forfeiture of his lands and chattels to the king; but the law was later altered, so that now the only consequence following an act of self-destruction is the denial of Christian burial. In this country there is generally neither the forfeiture of goods nor other penalty attached to suicide. The Athenian law provided for cutting off the hand which committed the act. Under the Massachusetts act of 1660 (*Colonial Laws* [Ed. 1672] p. 137), suicides were denied the privilege of Christian burial, and were directed to be buried in the highway, with a cart load of stones laid upon the grave, "as a brand of infamy." 37 Cyc. 521, 522.

[10] 10. If the policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. *Thompson v. Insurance Co.*, 136 U. S. 287-297, 10 Sup. Ct. 1019, 34 L. Ed. 408. *Deemer, J.*, in *Goodwin v. Provident Savings Life Ass'n*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411, uses the following language, which is quoted with approval by Justice Cobb in the case of *Mass. Life Ass'n v. Robinson*, 104 Ga. 279, 30 S. E. 928 (42 L. R. A. 261): "The tenets established for the guidance of courts in such mat-

ters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity." This was a case in which the company defended itself on the ground of suicide by the insured.

[11] 11. When the insurance company defends upon the ground of suicide, the burden is upon the company to establish such contention by a preponderance of the evidence. While the authorities are not uniform upon the question, the weight of authority seems to hold that the presumption against suicide and in favor of death from natural causes is not overcome by the introduction at the trial of the proofs of death, or even of the verdict of a coroner's jury. 25 Cyc. 930, 931; *Union Mut. v. Payne*, 106 Fed. 172, 45 C. C. A. 193; *Supreme Lodge v. Beck*, 94 Fed. 751, 36 C. C. A. 467; *Goldsmith v. Mutual Life*, 102 N. Y. 486, 7 N. E. 408. Contra, see *Spruill v. Northwestern*, 120 N. C. 141, 27 S. E. 39; *Newark Mutual v. Newton*, 22 Wall. 32, 22 L. Ed. 793. In the present case the cause of death is stated to be suicide in one of the affidavits composing the proofs of death. It is a matter of common knowledge that proofs of death are made under conditions of haste, for the purpose of complying with the rules of the company, and are generally made under circumstances which are not conducive to accuracy. The conclusions are frequently stated from imperfectly formed views, and frequently from the statements of others.

[12] 12. The insured in the present case died after the expiration of one year from the issuance of the policy. There is nothing to indicate a fraudulent intent at the time of making the contract upon the part of the insured. The construction of the policy under the plain requirements of the law unquestionably shows a waiver of the benefits of the Georgia statute by the insurance company; and, such waiver not being void as against public policy, the trial court properly directed a verdict for the plaintiff. This is true independently of the legal presumption that the trial court was without error in the judgment rendered.

From the above it follows that the judgment on the main bill of exceptions must be affirmed, and, inasmuch as the result of this is to leave the verdict and judgment below undisturbed, the cross-bill of exceptions is dismissed.

Judgment affirmed on main bill of exceptions; cross-bill dismissed.

Judges S. P. GILBERT, Z. A. LITTLE-JOHN, and C. B. CONYERS, of the superior courts, were designated by the Governor and presided in these cases in place of the judges of the Court of Appeals, all of whom were disqualified.

CONYERS, J. (dissenting). 1. In my opinion both sound reason and the weight of au-

thority are against the conclusion that an effective waiver resulted from the language of the contract. This would be true, I think, even if there were no positive declaration of our Legislature upon the subject. As Mr. Justice Harlan says in the *Ritter Case*, 169 U. S. 154, 18 Sup. Ct. 305, 42 L. Ed. 693: "A contract the tendency of which is to endanger the public interest or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment. If, therefore, a policy taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns, expressly provided for the payment of the sum stipulated when or if the assured in sound mind took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him or to whom he was indebted." But, aside from this, our Legislature (Civil Code 1910, § 2500) has declared such a contract illegal. This is a positive and long-established declaration of the policy of the state. I cannot believe that in enacting this principle of law the Legislature had in mind the rights of individuals that could be waived by contract. In fact, it was not dealing with private rights at all, but with the public welfare; and the principle announced is a sound moral timber in the social structure of the state. An implied waiver is not more effective than an express contract, and therefore I think it unnecessary to decide whether a waiver would or would not result from language such as is used in the contract.

2. The proofs of death are the mechanical foundation of the plaintiff's suit. Without them, under the contract, his suit could not be maintained. He could not, therefore, object to their introduction in evidence by the defendant. They showed that the cause of death was suicide, and there was no further evidence upon the subject by either party. The fact that the proofs of death were made hastily and without forethought would not affect their character as admissions against the plaintiff's interest, requiring from him a showing to the contrary if they were untrue.

While, if it were an open question, I might hold otherwise, our Supreme Court has held in *Merritt v. Insurance Co.*, 55 Ga. 103 (6), that proof of suicide without more does not authorize a presumption that the deceased was insane at the time of the act. This ruling, though by a partial bench of only two justices, is binding upon this court.

It follows from the above that the judgment of the trial court should be reversed on the main bill, and affirmed on the cross-bill of exceptions.

(9 Ga. App. 385)

**MUNDY v. STATE.** (No. 3,619.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

*(Syllabus by the Court.)***1. SUFFICIENCY OF EVIDENCE.**

The uncontradicted testimony demanded the conviction of the defendant, so far as the evidence in any criminal case can ever be said to demand a conviction.

**2. CRIMINAL LAW (§ 768\*)—TRIAL—INSTRUCTIONS—DUTIES OF JUROR.**

There was no error in the court's charging the jury as follows: "It is unlawful, under the laws of Georgia, to keep on hand at one's place of business spirituous, alcoholic, malt, and intoxicating liquors. You and I form part of the judicial system of the state, and are not concerned, in any way, with the propriety, wisdom, or policy of the legislative branch of the government in passing this law. Sufficient it is for you and me to know it is the law of Georgia, and that, as a part of the judicial branch of the law of Georgia, it is our duty to enforce the law as we find the law written; and in the enforcement of the law we carry with that the term, not only the conviction of the guilty, but the exoneration and justification of the innocent who may be charged with a violation of that law." Nor was the following instruction erroneous: "In this case you are not concerned in any way with the result or effect of your verdict, just as long as you, as jurors under your oaths, know and believe that that verdict is the truth of the case based upon a consideration of the evidence adduced upon the trial of the case, under the rules of law as given you in charge by the presiding judge."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1798-1802; Dec. Dig. § 768.\*]

**3. CRIMINAL LAW (§ 308\*)—EVIDENCE—PRESUMPTIONS—INNOCENCE OF ACCUSED.**

The following instruction is not erroneous: "The accused enters upon his trial with the presumption of innocence in his favor, and that presumption of innocence remains with him throughout the trial, unless it is overcome by evidence sufficiently strong to satisfy your minds and consciences to a reasonable and moral certainty of his guilt, and beyond a reasonable doubt."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. § 308.\*]

**4. CRIMINAL LAW (§ 789\*)—TRIAL—INSTRUCTIONS—"REASONABLE DOUBT."**

The following instruction was not erroneous: "Reasonable doubt means just what the two terms imply, a doubt based upon reason, for whose existence you could give a reason founded upon the evidence based upon the trial of the case, or a want of evidence in the trial of this case."

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 789.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

**5. INTOXICATING LIQUORS (§ 238\*)—DEFENSES—INTOXICATING CHARACTER OF LIQUOR.**

The following instruction was not erroneous: "I charge you gentlemen of the jury that rye whisky and gin whisky is as a matter of law alcoholic and intoxicating liquor."

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 326; Dec. Dig. § 238.\*]

**6. INTOXICATING LIQUORS (§ 239\*)—PROSECUTION—INSTRUCTIONS.**

The accused having offered no explanation as to the liquors found in his place of business,

the following instruction was not error: "The state contends that certain quantities of rye whisky were found, alcoholic, spirituous, and intoxicating liquors were found, in the grocery store or the 'soft drink' place conducted by the defendant. If that appears to be the truth of the case to a moral and reasonable certainty under the rules of law I have given you in charge, then I charge you the state would be entitled to a verdict of guilty, for no one is entitled to keep on hand at any place of business in this state any quantity of alcoholic, spirituous, or intoxicating liquors." Nor was the following instruction erroneous: "I charge you if you believe that contention [of the state] to a moral and reasonable certainty—that is to say, that alcoholic, spirituous, and intoxicating liquors were found or kept on hand at the time laid in the bill of indictment, or within two years next preceding that time, in the county of Bibb, by the prisoner at the bar, in a nearby room to his place of business, and used in connection with his place of business—if that appears to be the truth of the case to a moral and reasonable certainty, the state would be entitled to a verdict of guilty."

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 239.\*]

**7. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.**

The court having charged the jury that they must be satisfied beyond a reasonable doubt that the liquors found in the defendant's place of business were intoxicating liquors, it was not error to fail to give in totidem verbis an instruction to the effect that, if the liquors found were mere imitations of intoxicating liquors, the defendant should be acquitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

**8. NO ERROR.**

None of the errors assigned are meritorious.

Error from City Court of Macon; Robt. Hodges, Judge.

Edward Mundy was convicted of keeping intoxicating liquors at his place of business, and brings error. Affirmed.

Napier & Maynard, Jesse Harris, C. A. Glawson, and John P. Ross, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

**POWELL, J.** Judgment affirmed.

(9 Ga. App. 759)

**ÆTNA INS. CO. v. PEAVY.** (No. 3,116.)  
(Court of Appeals of Georgia. Sept. 11, 1911.  
Rehearing Denied Sept. 30, 1911.)

*(Syllabus by the Court.)***1. INSANE PERSONS (§ 97\*)—ACTIONS—NEXT FRIEND.**

While it is true, as was held in Stanley v. Stanley, 123 Ga. 122, 51 S. E. 287, that a suit instituted by one as a next friend of a person duly adjudged insane is subject to dismissal upon timely special demurrer (unless amended), if the petition fails to disclose that the insane person has no guardian, and alleges no other reason why it is necessary or proper for him to sue by next friend, rather than by a duly appointed guardian, nevertheless, where a suit is instituted in the name of a person who, pending the trial of the suit, is found



to be insane, and it appears from the record that the court itself appointed a guardian ad litem to represent the interests of the plaintiff in the case, and thereupon an amendment was filed, duly making the guardian ad litem a party, special demurrer will not lie on the ground that the petition fails to allege that no legal guardian has been appointed. It is to be presumed, until the contrary is shown, that the court acted lawfully and upon proper showing in appointing the guardian ad litem.

[Ed. Note.—For other cases, see *Insane Persons*, Dec. Dig. § 97.\*]

**2. APPEAL AND ERROR (§ 750\*)—ASSIGNMENTS OF ERROR—SPECIFICATIONS.**

The point that the verdict should have specified the damages in solido, instead of finding for a designated sum, with interest thereon, cannot be raised under the general ground that the verdict is contrary to law and contrary to the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 750.\*]

**3. APPEAL AND ERROR (§ 926\*)—REVIEW—PRESUMPTIONS—ADMISSIBILITY OF EVIDENCE.**

"An objection that a document offered in evidence was not admissible, because the execution of the same was not proved as required by law, being overruled, the presumption is that the execution was duly proved, unless the contrary affirmatively appears, either by an authentic statement (in the motion for a new trial, usually) that there was no evidence of execution, or by setting out such evidence on that subject as was adduced to the presiding judge. Mere preliminary evidence upon such a question is not for insertion in the brief of evidence requisite to support a motion for a new trial. Consequently its absence from the brief does not warrant the conclusion that the overruled objection should have been sustained." *Arnold v. Adams*, 4 Ga. App. 56 (2), 60 S. E. 815; *Kelly v. Kauffman Milling Co.*, 92 Ga. 103, 18 S. E. 363; *Arnold v. Adams*, 4 Ga. App. 56, 60 S. E. 815.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3735-3747; Dec. Dig. § 926.\*]

**4. APPEAL AND ERROR (§ 926\*)—REVIEW—PRESUMPTIONS—ADMISSIBILITY OF EVIDENCE.**

An objection that a letter purporting to have been written by a person in behalf of the corporation was not admissible, because the authority of the person to write the letter was not shown, is substantially an objection to the execution of the letter, and falls within the spirit of the rule just quoted.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 926.\*]

**5. REQUEST TO CHARGE—GENERAL CHARGE.**

The requests to charge, so far as pertinent and in legal form, were covered by the general charge.

**6. CHARGE OF COURT—DAMAGES.**

The errors assigned as to the charge of the court are not well founded, so far as they are material, except as to the matter of damages, as to which direction is herein given.

**7. ADMISSION OF TESTIMONY—EXCEPTIONS.**

None of the exceptions to the admission of testimony, in so far as the exceptions themselves are in proper legal form, are meritorious.

**8. SUFFICIENCY OF EVIDENCE—AMOUNT OF RECOVERY.**

The evidence, though it in some parts smacks of improbability, is not, from a legal standpoint, insufficient to support the verdict,

so far as relates to the principal sum recovered.

**9. SUFFICIENCY OF EVIDENCE—PROOF OF LOSS—NONSUIT.**

There was sufficient evidence of the furnishing of the proofs of loss to avoid a nonsuit.

**10. SUFFICIENCY OF EVIDENCE—VIOLATION OF IRON SAFE CLAUSE.**

The proof submitted as to the violation of the "iron safe clause" was not such as to demand a verdict in favor of the defendant.

**11. SUFFICIENCY OF EVIDENCE—DAMAGES AGAINST INSURANCE COMPANY—AFFIRMANCE ON CONDITION.**

Under all the facts appearing in the record, the verdict is unauthorized, so far as it assesses damages against the insurance company; and the verdict is affirmed, on condition that the plaintiff in the court below will write off from his recovery the amount of the damages.

Error from City Court of Ocilla; H. E. Oxford, Judge.

Action by H. R. Peavy, guardian ad litem, against the Aetna Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed, on condition.

King & Spalding, E. Marvin Underwood, and Elkins & Wall, for plaintiff in error. J. J. Walker, Newbern & Meeks, and J. L. Mayson, for defendant in error.

RUSSELL, J. Judgment affirmed, on condition.

(9 Ga. App. 818)  
WILLIAMS v. STATE. (No. 3,536.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 742\*)—APPEAL—QUESTIONS OF FACT.**

No error of law is complained of, and the finding of the judge without the intervention of a jury is fully supported by the evidence, since the credibility of the witnesses as to the one issue of fact is entirely a matter for his determination.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1138, 1719-1721; Dec. Dig. § 742.\*]

**2. CRIMINAL LAW (§ 1156\*)—NEW TRIAL—AFFIDAVIT AS TO CREDIBILITY.**

This court will not interfere with the discretion of the trial judge in refusing to grant a new trial on the ground of newly discovered testimony, where the motion on this ground contains no affidavit accrediting the character of the persons relied upon to give the alleged newly discovered testimony.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1156.\*]

**3. CRIMINAL LAW (§ 942\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

The alleged newly discovered testimony was both impeaching and cumulative, and would not probably have changed the result.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 942.\*]

Error from City Court of Houston County; C. E. Brunson, Judge.

Frank Williams was convicted of selling liquor in violation of law, and brings error. Affirmed.

M. Kunz and R. N. Holtzclaw, for plaintiff in error. R. E. Brown, Sol., for the State.

HILL, C. J. Frank Williams was convicted of selling spirituous and intoxicating liquors in violation of what is commonly known as the "prohibition law," and his motion for a new trial was overruled. In his motion he complains of no special legal error, but contends that his conviction was without any evidence, and in his amended motion he asks for a new trial on the ground of newly discovered evidence. The case was tried by the judge without the intervention of a jury. Two witnesses swore positively that on the day stated in the accusation they were at the house of the accused, and that on that day they, in company with four others, made up a "pot" amounting to \$1.40, which they gave to the accused, and for which he then delivered to them whisky and beer. One of the witnesses swore that she had had a fight with the accused that day, and he cut her in the face. This was all the testimony for the state. The four other persons designated by the state's witnesses as having been contributors to the "pot of money" testified that they were present, but denied that they did so contribute, or that they saw any whisky or beer sold by the accused to any one, and testified that they saw no whisky or beer delivered by the defendant to the two witnesses for the state, or to any one else. The defendant in his statement denied that he sold whisky or beer to the two witnesses for the state, or to any one else on the Sunday indicated, or at any other time.

[1] The credibility of the witnesses being for the judge, he accepted the testimony of the state's witnesses as the truth of the transaction, and this court has no power and no inclination to interfere with his discretion in the matter. [2, 3] The newly discovered evidence has two infirmities. (1) There is no affidavit in support of the character of the affiants who are expected to give the newly discovered testimony, and for this reason alone this court would not interfere with the discretion of the trial judge in refusing to grant a new trial on this ground. *Polite v. State*, 78 Ga. 347. (2) The alleged newly discovered testimony tends only to discredit and impeach the two witnesses for the state. It would hardly produce a different result on a second trial. It appears, also, that the testimony alleged to be newly discovered could by the exercise of due diligence have been obtained at the first trial as the affiant relied upon to give this evidence was a witness for the defense. The trial was conducted without any legal error. The finding of the court is amply supported by evidence, and the ground asking for a new trial on account of newly discovered evidence is palpably without merit.

Judgment affirmed.

(3 Ga. App. 723)

MITCHELL v. RUTHERFORD.

RUTHERFORD v. MITCHELL.

(Nos. 3,111, 3,122.)

(Court of Appeals of Georgia. Sept. 23, 1911.)

(Syllabus by the Court.)

1. LIFE ESTATES (§ 25\*)—LEASES BY LIFE TENANT—NOTES FOR RENT.

Where a life tenant rents land for the year, taking a negotiable promissory note for the year's rent, and transfers it for value to a third person, and dies during the year without collecting any of the rent from the undertenant, the transferee of the rent note ordinarily has the right to collect the full amount of the note from the undertenant.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 47; Dec. Dig. § 25.\*]

2. LIFE ESTATES (§ 25\*)—LEASES BY LIFE TENANT—NOTES FOR RENT.

Where a negotiable rent note is transferred by the life tenant to secure the payment of a debt which he owes to the transferee, and the life tenant dies during the year, the transferee ordinarily has the right to recover the full amount due on the note, accounting to the remainderman for any excess of the note over his debt.

[Ed. Note.—For other cases, see *Life Estates*, Dec. Dig. § 25.\*]

3. LIFE ESTATES (§ 25\*)—LEASES BY LIFE TENANT—NOTES FOR RENT.

Where an undertenant who gives a rent note is also entitled to the rented land as remainderman, and the transferee of the rent note brings suit thereon against him, the transferee has the right to show that the note was transferred by the life tenant as collateral security, and that the rent note exceeded the amount of the debt which it was transferred to secure, and to limit the recovery by the transferee to the actual amount of his debt against the life tenant.

[Ed. Note.—For other cases, see *Life Estates*, Dec. Dig. § 25.\*]

4. APPEAL AND ERROR (§ 1004\*)—REVIEW—CONFLICTING EVIDENCE—DAMAGES.

The principles of law announced in the foregoing headnotes were given in charge to the jury. The evidence was in conflict as to the amount of the indebtedness which the rent note was given to secure, and the verdict will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3944; Dec. Dig. § 1004.\*]

Error from Superior Court, Greene County; R. H. Lewis, Judge.

Action by J. T. Mitchell against J. J. Rutherford. Judgment for plaintiff for less than amount claimed, and he brings error, and defendant assigns cross-error. Affirmed on both bills of exceptions.

W. O. Mitchell and Jas. Davison, for plaintiff in error. Saml. H. Sibley, for defendant in error.

HILL, C. J. Dickinson had a life estate in land; Rutherford being the remainderman. Dickinson rented the land to Rutherford, taking his two negotiable rent notes for the year 1908. The undertenant went into possession as undertenant. The life tenant died January 20, 1908, before any part of the rent was due. He was indebted to Mitchell for mon-

ey advanced to him and on an account, and, to secure this indebtedness, he transferred to Mitchell the two negotiable rent notes. When these rent notes matured, Mitchell brought suit against Rutherford, claiming that he was entitled to recover the full amount of the notes, first, because he held them as an innocent purchaser for value before due, and further, because the amount of the indebtedness which he held against Dickinson was greater than the amount of the rent notes transferred to him as collateral security. It was conceded that there was no rent due on the estate of the life tenant; none of the rent having accrued at the date of his death. Rutherford filed a defense, in which he claimed that the rent notes were transferred to Mitchell simply as security for the indebtedness of the life tenant to Mitchell, and that the amount of the notes exceeded the amount of this indebtedness, and that he was entitled to this excess as remainderman. There was conflict in the evidence as to the amount of the indebtedness secured by the transfer of the rent notes. The jury solved the conflict by finding that Mitchell was entitled to recover \$100, with interest and attorney's fees, as the actual amount of this indebtedness. Mitchell made a motion for a new trial, which was overruled, and he brings error.

[1] Under the provisions of our Civil Code 1910, § 3669, as construed by this court in *Story v. Butt*, 2 Ga. App. 119, 58 S. E. 388, and *Butt v. Story*, 5 Ga. App. 540, 63 S. E. 658, where a life tenant rents land for the year, taking for the rent a negotiable promissory note, and transfers it for value to a third person, and dies during the year, and none of the rent has accrued to the life tenant and none has been collected by him, the transferee of the rent note would ordinarily have the right to collect the full amount of the rent note from the undertenant.

[2] But where this rent note is transferred by the life tenant to secure the payment of a debt which the life tenant owes to the transferee, and the life tenant dies during the year and before any of the rent has accrued to him, the holder of the note would ordinarily have the right to recover from the undertenant the entire amount due on it, accounting to the remainderman for any excess in the amount of the rent note over the debt which he held against the life tenant, and which was secured by the transfer of the note.

[3] In this case the undertenant, Rutherford, being also the remainderman, was entitled to any excess in the rent notes after the full amount of the indebtedness of the transferee against the life tenant had been paid therefrom. *Butt v. Story*, supra; *Hatcher & Co. v. Independence National Bank of Philadelphia*, 79 Ga. 547, 5 S. E. 111. Therefore, when Mitchell, as the transferee of the rent notes, brought suit thereon, the re-

mainderman, Rutherford, who was also the undertenant and the maker of the notes, had the right to contest in that suit Mitchell's right to the full amount of the note, and to limit the recovery by Mitchell to the actual amount of the indebtedness which the life tenant owed him. Mitchell would only have the right; the notes having been transferred to him as collateral security, to recover on the notes the amount of this indebtedness. He would not be entitled to more than this amount, since he did not buy the notes outright, but received them as collateral security for the indebtedness. And Rutherford, the remainderman, would be entitled, under the law, to any excess in the notes over this indebtedness, and, as he had been sued by Mitchell on the notes, he had the right in that suit to set up his claim to the excess in the rent notes, and if he proved that there was an excess, to have Mitchell's recovery limited accordingly. This we think not only to be the law, but the plain equity and justice of the case.

[4] The evidence was in conflict as to the amount of Mitchell's claim against the life tenant. The jury settled that conflict by giving Mitchell a certain amount in their verdict against Rutherford, and as there was no legal error committed by the trial court this court will not disturb the verdict.

Judgment on both bills of exceptions affirmed.

(9 Ga. App. 811)

L. BLACK CO. v. KAPLAN. (No. 3,196.)  
(Court of Appeals of Georgia. Oct. 10, 1911.)

(Syllabus by the Court.)

1. NONSUIT—FORMER DECISIONS CONTROLLING.

No fact in the present case distinguishes it in any respect from the cases of *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112; and *Rounsaville v. Leonard Mfg. Co.*, 127 Ga. 735, 56 S. E. 1030 (6); and as, under the decisions in those cases applicable to the evidence there could have been no legal recovery in the form of action adopted by the plaintiff, a nonsuit was properly awarded.

2. SALES (§ 340\*)—REMEDIES OF SELLER—ACTION FOR PRICE—DELIVERY OF SWATCHES.

The delivery of "swatches" or samples, from which goods ordered are selected, does not make the contract for the delivery of the goods executed, so as to take it out of the principle announced in the two cases above cited.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 340.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the L. Black Company against H. Kaplan. Judgment for defendant, and plaintiff brings error. Affirmed.

Walter R. Brown, for plaintiff in error. Morris Macks and Paul E. Johnson, for defendant in error.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 818)

**CONNELL v. STATE.** (No. 3,504.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

*(Syllabus by the Court.)***1. ADULTERY (§ 11\*)—EVIDENCE.**

In a prosecution against a man for fornication or adultery, testimony that the female with whom the intercourse is alleged to have taken place had had intercourse with another man is immaterial, even though the female herself is a witness for the state.

[Ed. Note.—For other cases, see *Adultery*, Dec. Dig. § 11.\*]

**2. WITNESSES (§ 344\*)—IMPEACHMENT.**

A female witness cannot be impeached by proof of specific acts of illicit intercourse.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1120-1125; Dec. Dig. § 344.\*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

J. T. Connell was convicted of crime, and brings error. Affirmed.

Robinson & Edwards and W. W. Mundy, for plaintiff in error. J. R. Hutcheson, Sol. Gen., E. S. Ault, and Griffith & Matthews, for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 887)

**HARDAWAY v. CITY OF ATLANTA.**

(No. 3,620.)

(Court of Appeals of Georgia. Oct. 10, 1911.)

*(Syllabus by the Court.)***CRIMINAL LAW (§ 1179\*)—APPEAL—SUFFICIENCY OF EVIDENCE.**

Where a certiorari attacks the finding of the recorder of a municipal court on the sole ground that it was without any evidence to support it, and, on the hearing of the certiorari, this finding is approved by the judge of the superior court, and it appears that there was some evidence to support the finding of the recorder, this court will not interfere.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3001; Dec. Dig. § 1179.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Will Hardaway was convicted of violating the "traveling blind tiger" ordinance. On certiorari his conviction was sustained, and he brings error. Affirmed.

Burton Cloud, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

HILL, C. J. Hardaway was convicted in the recorder's court for violating what is commonly known as the "traveling blind tiger" ordinance, and on certiorari his conviction was sustained. The question presented is only one of fact—Is there any evidence to sustain the finding of the recorder?

Substantially stated, the evidence is as follows: Hardaway was seen by a policeman of

the city of Atlanta to deliver a bottle to a white man on a stairway at number 60½ Decatur street. He was also seen by another officer to deliver "something" to another white man in an alley around the corner from 60½ Decatur street, and the white man passed "something" back to him. When arrested and searched, 8½ pints of whisky were found on his person. No objection was made to the legality of this evidence. The accused in his statement explained the possession of the whisky by stating that he had bought 12½ pints of whisky from a "fellow" Saturday night for \$3; that when he "was turned out" on Sunday morning he went to get his whisky, where he had left it, at 60½ Decatur street, and he gave the white man a "match," and did not sell to any man on the stairway or in the alley any whisky. The whisky found on the person of the accused was rye and corn whisky. The officers testified that the accused tried to avoid them. This was all the material evidence, and while we cannot say that it is conclusive of guilt, yet there were certainly circumstances which raised more than abated suspicion of guilt, and from which the recorder was warranted in inferring that the accused had violated the "traveling blind tiger" ordinance.

According to the statement of the accused, he had bought, on the Saturday before, 12½ pints of whisky. When he was arrested he had only 8½ pints on his person. He was seen to deliver a bottle to a white man on the stairway at 60½ Decatur street, where he says he left the whisky. It is not unreasonable to presume that this was a bottle of whisky, and that he was not presenting it as a gift to the white man. Going around the corner, he was again seen to give "something" to another white man, and to receive in exchange "something" from the white man. It is reasonable to assume that this "something" was a bottle of whisky, and that the "something" given by the white man to the accused was money for the whisky. He was well equipped in the assortment of his supplies to gratify the taste of customers. He had both corn and rye whisky. He also had it in one-half pints, a quantity that probably would satisfy the thirst of any chance customer; and besides, according to the testimony of the patrolman, his movements indicated that he was endeavoring to avoid the officers.

These facts, taken all together, may have been susceptible of explanation consistent with the innocence of the accused, but this was a matter for determination by the recorder; and, since he saw the witnesses and heard their testimony and the explanation of the accused, he was in a much better position to judge of the probative value of the evidence than this court.

Judgment affirmed.

(156 N. C. 210)

**WILEY v. BROADDUS & IVES LUMBER CO.**

(Supreme Court of North Carolina. Oct. 11, 1911.)

**1. LOGS AND LOGGING (§ 3\*) — CONTRACTS (§ 10\*)—SALES OF STANDING TIMBER—UNILATERAL CONTRACTS.**

A contract for the sale of standing timber, with the privilege of removal within a given time, is so far unilateral that the purchaser, who has paid for the timber, is not obligated to cut and remove the same; and where he fails to do so his estate therein inures, as a rule, to the owner of the land.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. § 3; Contracts, Dec. Dig. § 10.\*]

**2. CONTRACTS (§ 147\*) — CONSTRUCTION — INTENTION OF PARTIES.**

The court, in construing a contract, must ascertain the intention of the parties as embodied in the instrument, and must give effect to each and every part thereof, if the same can be done by any reasonable interpretation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.\*]

**3. CONTRACTS (§ 10\*) — LOGS AND LOGGING (§ 8\*)—MUTUALITY—CONSTRUCTION.**

A contract stipulating that plaintiff shall cut and deliver timber, and that defendant shall pay therefor at \$4 per thousand feet, and providing that \$450 referred to as the consideration shall be only an advancement on the price, and to be accounted for as the timber is delivered, is bilateral in its obligations, and defendant must receive all the timber contracted for.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10; Logs and Logging, Cent. Dig. §§ 15-17; Dec. Dig. § 8.\*]

**4. LOGS AND LOGGING (§ 8\*) — BREACH OF CONTRACT—MEASURE OF DAMAGES.**

Where plaintiff contracted to cut and deliver pine and gum timber at \$4 per thousand feet, and he sold the pine timber at a less price than it was worth alone, because of the sale of the gum timber, which was not by itself worth the contract price, and defendant accepted the pine timber, but refused to accept the gum timber, plaintiff was entitled to recover the contract price, less the value of the timber as it stood on the ground, and less the expense of cutting and delivering.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 8.\*]

Appeal from Superior Court, Craven County; G. S. Ferguson, Judge.

Action by J. R. Wiley against the Broaddus & Ives Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

It appeared that on the 12th of May, 1906, plaintiff and another sold to defendant "all the pine and gum timber of every description above the size of 12 inches at the base on a certain tract of land"; the written contract of conveyance and sale providing that defendant should have full time to have said timber cut and removed from said land, and extending in any event for such purpose to the full term of three years. The instrument also conveyed to defendant (the grantee) the

privilege to have a right of way over the grantors' lands, and to erect thereon necessary tramroads, etc., for the purpose of carrying out the timber; and there was further provision that the grantors were to cut and deliver said timber at the logged of defendant's tramroad, and to be paid therefor at the rate of \$4 per thousand, etc. It was admitted that the present plaintiff was the owner of one-half interest in the land and timber and the contract concerning same, and that defendant had acquired the rights and interests of the other parties. There was allegation, with evidence on part of plaintiff, tending to show that plaintiff was ready, able, and willing to cut and deliver all the timber as provided for by the contract, and that defendant, after having received the pay for the greater part of the pine timber, wrongfully, and in breach of the contract, had refused to receive the gum timber, and had torn out and removed the tramroad, etc., to plaintiff's damage. Recovery was resisted on part of defendant, on the ground, chiefly, that the contract only conveyed the timber, giving the right to remove the same in three years, and that no breach thereof was committed in leaving part of the timber on the land. Second. That in any event the damages would be only nominal, as the timber not taken would remain on the land and become property of plaintiff. On issues submitted, the jury rendered the following verdict: "(1) Were plaintiffs at all times able, ready, and willing, during the term of the contract, to perform the contract as alleged? Answer: Yes. (2) Did defendant fail and refuse to perform the contract on its part as alleged? Answer: Yes. (3) If so, what damage is plaintiff entitled to recover therefor? Answer: \$300, being for the plaintiff's half, without interest." Judgment on the verdict, and defendant excepted and appealed.

Moore & Dunn, for appellant. Gulon & Gulon and W. D. McIver, for appellee.

HOKE, J. (after stating the facts as above). [1] There is no reversible error shown in the record. Defendant is right in the position that when one has bought and paid for a lot of growing timber, and same has been conveyed him, with the privilege of removal within a given time, the contract as to the removal is so far unilateral that the purchaser is not obligated to cut and remove the timber. If he fails to do so within the time, his right or estate therein is forfeited, and inures, as a rule, to the owner of the land. We have so held in two cases at the last term. *Hornthal v. Howcutt*, 154 N. C. 228, 70 S. E. 171; *Bateman v. Lumber Co.*, 154 N. C. 248, 70 S. E. 474.

[2, 3] But the contract in question here is not of that character. Applying to it the accepted rule of construction "that the intent

of the parties as embodied in the entire instrument is the end to be attained, and that each and every part must be given effect, if this can be done by any fair and reasonable interpretation" (Davis v. Frazier, 150 N. C. 451, 64 S. E. 200), a perusal of this entire instrument will disclose that, while it begins by reciting \$450 as the consideration, the controlling stipulation of the contract provides that the parties plaintiff were to cut and deliver "said timber" at the logbed, and the parties defendant were to pay for the same the sum of \$4 per thousand "feet"; and it is also expressly provided that the \$450 first referred to as the consideration was only an advancement on the contract price, and to be accounted for as the timber was delivered. The contract in this instance was therefore bilateral in its obligations, and the verdict has established that there was a breach of same on the part of defendant giving plaintiff a right to recover.

[4] On the issue as to damages, there was testimony from plaintiff tending to show that he had bargained the pine timber at a less price than it was worth by itself, because of the fact that he had sold the gum with it, and this last, which was what defendant had failed and refused to receive, was not by itself worth the contract price, and by reason of the removal of defendant's tramroad was of very little value. There was testimony on part of defendant on this issue in contradiction of that of plaintiff, and also tending to show that plaintiff's damage was not near so much as he claimed; but the question was submitted to the jury under a correct charge, and we find no valid reason for disturbing their verdict. After laying down the general rule of damages and giving special illustration in aid of its application, the court further said: "That will explain what I mean when I say he is to have \$4 per thousand, less the value of the timber as it stood upon the ground, whatever you may find that to be, and less whatever you find from the evidence the expense would be to deliver to cut and deliver it to the tramroad, the place stipulated in the contract. But understand that as the plaintiff is not the only one interested in the quantity of timber, he would be entitled to only half, because the other half is not his, and he would not be entitled to recover for that. Something has been said about the character of the timber. I charge you that such timber as was not of any use, of no value, would not be in the contemplation of the parties to the contract, and would not be included in the description of 'all timber,' and yet it would not mean only such timber as was first quality timber; it would mean such timber as could be used and sawed up and put into boards for ordinary purposes for which gum timber can be used by sawmill men." We are of opinion,

as stated, that the cause has been fairly and correctly tried, and that the judgment in plaintiff's favor should be affirmed.

No error.

(156 N. C. 232)

**ELECTROVA CO. et al. v. SPRING GARDEN INS. CO.**

(Supreme Court of North Carolina. Oct. 11, 1911.)

**1. INSURANCE (§ 139\*)—LEGALITY—PUBLIC POLICY.**

Where plaintiffs placed a mechanical piano in a house of ill fame to induce the proprietress to purchase it without any other understanding, a fire policy covering the piano which was burned in the house could not be defended on the ground that it was void as against public policy, because in aid of an agreement between plaintiff and the proprietress.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 139.\*]

**2. INSURANCE (§ 139\*)—VALIDITY—PUBLIC POLICY—REMOVEDNESS OF EFFECT.**

The effect upon the public interest of a fire policy covering a piano placed in a house of ill fame to enable the proprietress to try it and induce her to purchase, because of the illegal nature of the house, is too remote to make the insurance policy void as against public policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 139.\*]

**3. CONTRACTS (§ 108\*)—LEGALITY—CONTRACTS AGAINST PUBLIC POLICY.**

A contract should be declared void as against public policy only when it clearly appears that the public injury is direct and substantial and not theoretical or problematical, and should not be declared void where it is not directly connected with the illegal act, so that plaintiffs will not have to rely thereon to enforce the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 498; Dec. Dig. § 108.\*]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Action by the Electrova Company and another against the Spring Garden Insurance Company. From a judgment for defendant after vacating a verdict for plaintiffs, plaintiffs appeal. Reversed and remanded for judgment for plaintiffs.

These issues were submitted to the jury:

"First. Did the defendant insure the piano of the plaintiffs as alleged in the complaint? Answer: Yes.

"Second. If so, what sum, if any, are plaintiffs entitled to recover of the defendant for its destruction by fire, if it was destroyed? Answer: \$248.75. Destroyed by fire.

"Third. Was the piano an electric one, played by putting a nickel or dime in the slot? Answer: Yes.

"Fourth. Was said piano at the time it was burned placed by plaintiffs in the house of a woman who kept a house of ill fame for trial with a view of selling the same to the keeper of said house, and with the knowledge that said house was a house of ill fame? Answer: Yes; the day before the fire.

"Fifth. After the fire, did plaintiffs take out of the piano any money put in the slot? Answer: Yes.

"Sixth. If so, how much? Answer: \$1.25."

Upon the verdict plaintiff and defendant moved for judgment. The court rendered judgment for the defendant. Plaintiffs accepted and appealed.

G. V. Cowper and J. Paul Frizzelle, for appellants. Simmons & Ward, Loftin & Dawson, and McLean, Varser & McLean, for appellee.

**BROWN, J.** The Electrova Company is a corporation engaged in the manufacture and sale of a piano which plays tunes by mechanical means when a nickel is inserted in a slot. On August 11, 1900, plaintiff's sales agent, Rackley, placed an instrument in a house of ill fame in Kinston belonging to Mabel Page for trial, with the view to sell it to her. It was not placed there to be operated for plaintiffs, but only with the purpose to induce the proprietress to buy it eventually. About 6 p. m. on April 12th the house caught fire, and the piano was practically destroyed by the flames. The charred body of the piano was opened, and the agent Rackley took out \$1.25 in nickels, which had been put in the slot by visitors of the house. On April 12, 1910, in the town of Greenville, the agent, Rackley, took out from defendant's agent there a "floating policy" insuring all plaintiffs' instruments in Greenville and Kinston, effective after 12 o'clock noon that day.

[1, 2] The defense is that the contract of insurance between plaintiffs and defendant was void because the piano had been placed in a house of ill fame with a view to selling it to the proprietress. It is urged that such a transaction is against public policy to such an extent that it avoids the policy of insurance on the piano. The defense has the merit of novelty at least. But we think it must fail for two reasons: First. The theory of the defense is that the piano was insured in aid and furtherance of a contract or agreement entered into between the plaintiffs and Mabel Page, which was against public policy. The defendant fails to establish any contract or agreement of any sort between the plaintiffs and Page. There was no contract or agreement to sell the piano. It was placed in her house only in the hope of a sale. The title and right of possession was never out of the plaintiffs. They had the right to remove it at any moment, and by legal process, if necessary. The instrument was not placed in the house to earn nickels for plaintiffs, although Rackley found same in its remains. But, if it had been placed there as slot machines frequently are placed in public places to earn nickels for the owner, the plaintiffs would not have thereby forfeited their title to the property. The insurance policy was not

taken out in aid and furtherance of a contract and agreement entered into between plaintiffs and Mabel Page, for there was none entered into, moral or immoral. The rule of law which the defendant invokes applies only to executory contracts or agreements which are to be performed in the future, and not to transactions which are past and closed. *Brown v. Kinsey*, 81 N. C. 245. Second. The effect upon the public interest under the facts of this case is too remote entirely to justify a court in refusing its aid to plaintiffs to enforce the payment of the policy.

[3] The reason that some contracts and agreements are declared void as against public policy is because the enforcement of them by the courts would have a direct tendency to injure the public good. The law does not consider the advantage or interests of either party to the contract, but acts only from considerations of the public good. *Harrell v. Watson*, 63 N. C. 454; *Brown v. Kinsey*, supra; *Collins v. Blanten*, 1 Smith, Ldg. cases, 153. It has been said by learned judges and text-writers that a court should declare a contract void as against public policy only when the case is clear and free from doubt, and the injury to the public is substantial, and not theoretical or problematical. *Navigation Co. v. Dumas*, 181 Fed. 782, 104 C. C. A. 641; *Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956. Where the contract or agreement sought to be enforced has no direct connection with the illegal act, but is collateral to it, then the contract is not tainted or affected by the illegal act. The principle of law is thus stated by Chief Justice Marshall: "Where a contract grows immediately out of and is connected with an illegal or immoral act, a court of justice will not lend its aid to enforce it." "But if the promise be entirely disconnected with the illegal act, and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act." Again, the Chief Justice expresses the same principle in simpler language, when he says: "A new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful." *Armstrong v. Toler*, 24 U. S. (11 Wheat.) 253, 6 L. Ed. 468. Where the connection between the illegal act and the agreement sought to be enforced is not direct but remote, the latter will be upheld. The decision of this court in *McKesson v. Jones*, 66 N. C. 264, is founded in the principles laid down by Chief Justice Marshall, and recognized in the English courts by Mellish, L. J., in *Taylor v. Bowen*, 1 Q. B. D. 291. This was an action on a note given for the rent of land leased for the purpose of raising food for laborers in the employ of the Confederate government. In the opinion

Mr. Justice Rodman says: "In the present case the aid given the Rebellion was much more indirect. It was, at best, two steps further off. It was not a sale of military materials, nor even a sale of provisions to laborers making material, but a lease of land upon which provisions might be raised, which might be applied to feed laborers engaged in an unlawful occupation." Again, we read from the same case: "It is possible to foresee and calculate the direct consequences of an act. If we attempt to follow it out into its direct and more remote consequences, our reasoning becomes soon uncertain, and after a few steps altogether unsatisfactory. When we confine ourselves to direct consequences, we feel that we are treading on tolerably firm ground; but, if we go further, there is no telling into what calculations of remote and merely possible consequences we may not be compelled to plunge." In *Powell v. Smith*, 66 N. C. 401, this court held that where a principal and surety gave a note for a consideration against public policy, and the surety paid same at the request of the principal, the principal giving a new note to the surety, the latter note could be collected. In *Poin-dexter v. Davis*, 67 N. C. 114, Reade, J., says: "The facts in this case are that the county had contracted a debt to equip soldiers in the Confederate service, and then contracted this debt to pay that off. The first transaction was clearly in aid of the Rebellion, and for that reason illegal. But how did it aid the Rebellion to pay that debt off? \* \* \* The argument is a refinement, and the illegality too remote." The true test of the illegality of a contract is thus stated by this court in *State v. Bevers*, 86 N. C. 595. "The principle upon which the courts refuse their aid in such cases is this: No court will lend assistance to one who founds his cause of action upon an illegal act. \* \* \* But to put this principle into operation in any particular case it must appear that the very party who is seeking aid from the court participated in the unlawful purpose. Indeed, it is said that the very test of its application is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction, to which he was himself a party." It has been also held by other jurisdictions that, if the plaintiff does not require the aid of an illegal transaction to establish his claim, he may recover. In *re Bunch Co.* (D. C.) 180 Fed. 519, and cases cited; *Fruit Association v. Stelling*, 141 Cal. 713, 75 Pac. 320.

There are cases which hold that, if this piano had been sold to Mabel Page to enable her to better carry on and conduct a house of ill fame, the seller could not recover in an action for the purchase price.

*Fur. Co. v. Van Alsteine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960; *Reed v. Brewer*, 90 Tex. 148, 37 S. W. 418. Those cases are founded upon the principle we have adverted to, that the plaintiff could not make out his case without resorting to and putting in evidence an illegal transaction. But nowhere can there be found a case, so far as we are advised, which holds that, if Mabel Page had purchased the piano, she could not have lawfully insured it, and recovered the insurance had it been destroyed by fire. It is very generally held to be vicious and in some states it is made a crime for the owner of a house to lease it for immoral purposes. Yet it has never been held that, if the house so leased is insured and destroyed by fire, the owner cannot recover on his policy. There is no direct connection between the immoral or unlawful act of leasing, and the lawful and (so far as the public is concerned) harmless act of insuring. The evil effect upon the public interests is entirely too remote and problematical to avoid the lawful contract of insurance. Fire insurance contracts are recognized by the laws of all civilized nations. They are based upon a cash consideration, and from their very character cannot have an immoral tendency. They are not entered into to promote vice, but solely to secure the owner of property against loss. The contract sued on is based upon a new and cash consideration, and not upon an immoral one. Neither do plaintiffs have to resort to an immoral or illegal transaction to make out their cause of action. How the taking out of this floating policy upon all their pianos in Kinston and Greenville could in any way aid and abet the sale of one of the pianos so insured to Mabel Page is difficult to see. She could derive no benefit from the insurance, and it was therefore no inducement for her to purchase. The moment the piano became her property it lost the protection of the plaintiff's floating policy, and was no longer insured. No public interest is involved, much less injured, by the enforcement of this contract. And we think what is said by the Supreme Court of California in the case cited may well apply to this: "Parties should be careful about making contracts, but, when once made, the courts will not relieve them for light or trivial reasons. Public policy is better served by leaving the parties and their rights to be measured by the terms of their contract."

Upon the issues as answered by the jury the plaintiff, the Electrova Company, is entitled to judgment for \$248.75, interest and costs. Let the cause be remanded, with instructions to the superior court of Lenoir county to enter judgment accordingly.

Reversed.



(156 N. C. 228)

**PARK v. EXUM et al.**

(Supreme Court of North Carolina. Oct. 11, 1911.)

**1. BILLS AND NOTES (§ 327\*)—BONA FIDE PURCHASER—HOLDER IN DUE COURSE.**

To make one a holder in due course of a negotiable instrument, under the negotiable instruments act (Revisal 1905, § 2208), the instrument must be regular on its face, and the holder must have acquired title in good faith, and for value before maturity, and without knowledge of fraud or other impeaching circumstances.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. § 327.\*]

**2. BILLS AND NOTES (§ 496\*)—NEGOTIABLE INSTRUMENTS—HOLDER IN DUE COURSE.**

Except in case of instruments payable to bearer, to make one a holder in due course of a negotiable instrument, the burden is upon him to prove indorsement to him, if it be denied.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1669-1674; Dec. Dig. § 496.\*]

**3. TRIAL (§ 140\*)—PROVINCE OF JURY—CREDIBILITY.**

When proof is required to establish an issue, the credibility of the evidence is for the jury, and not for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.\*]

**4. TRIAL (§ 29\*)—REMARKS OF JUDGE.**

Where the question was in issue, in an indorser's action on a negotiable note, whether the note was indorsed to plaintiff, and whether he was the holder in due course, it was error for the judge to remark, in the jury's hearing, that he would not allow a verdict for defendant to stand.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 80-84; Dec. Dig. § 29.\*]

Appeal from Superior Court, Lenoir County; Justice, Judge.

Action by Howard C. Park against W. P. Exum, Jr., and others. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

Plaintiff sued, claiming to be indorsee for value and holder in due course of a negotiable note for \$500, given by defendants to McLaughlin Bros. in part obligation for purchase price of a stallion. The deposition of plaintiff was introduced, containing full and direct statement that plaintiff bought the note for full value, and same was duly indorsed to him by the payees before maturity, and without notice of any fraud or other infirmity affecting its validity. The indorsement was denied in the pleadings, and there were also allegations, on the part of defendants, to the effect that there was a breach of warranty on the part of McLaughlin Bros. in the sale; and, further, that the sale was procured by false and fraudulent representations on the part of the said vendors, to defendants' damage. The jury having been impaneled and evidence offered, at the close of the testimony, the court intimated that he would charge the jury that if

they found the facts to be as testified in the deposition the plaintiff could recover, to which defendants then and there excepted. Counsel for defendants then stated to the court "that they took the position that there was sufficient evidence to be found in the testimony to go to the jury on the question as to whether the jury believed the evidence of the plaintiff in the action. The court stated he would not allow a verdict to stand in favor of the defendants," this statement being made in the hearing of the jury, and defendants excepted. There was verdict for plaintiff for full amount of the note and interest, judgment according to verdict, and defendants excepted and appealed, alleging errors.

G. V. Cowper and T. C. Wooten, for appellants. McLean, Varser & McLean and Loftin & Dawson, for appellee.

HOKE, J. (after stating the facts as above). [1-3] Our statute on negotiable instruments (Revisal 1905, § 2208), as applied and construed in several recent decisions of the court, is to the effect that, in order to establish the position of holder in due course, when required to shut off counterclaims and defenses otherwise available, it must be shown that the instrument is complete and regular on its face, and that title thereto was acquired in good faith, and for value before maturity, and without knowledge or notice of fraud or other impeaching circumstance; and, except in case of instruments payable to bearer, when the indorsement is denied, the same must be proved. Myers v. Petty, 153 N. C. 462, 69 S. E. 417; Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879; Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803. In the present case there was allegation, with evidence on the part of defendants, tending to show that there was a breach of warranty, in the sale on the part of these vendors. On a perusal of the entire testimony, we think there was evidence, tending to show fraud and deceit on their part, inducing the sale and causing damage, under the principles stated in Myers v. Petty, supra; Whitehurst v. Insurance Company, 149 N. C. 273, 62 S. E. 1067; May v. Loomis, 140 N. C. 350, 52 S. E. 728, and cases of like import. The instrument, too, was payable to order, and the indorsement was denied in the pleadings, thus putting on plaintiff, in order to shut off the defenses arising on the testimony, the burden of showing that the instrument had been indorsed, and that he was otherwise a holder in due course. True the deposition of plaintiff, introduced on the trial, contains full and direct statement tending to show that plaintiff was indorsee for value, before maturity, and in all respects a holder of the note in due course, and it may be that his honor was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

right in intimating that he would charge the jury "that if they found the facts to be as testified to in the deposition there should be a verdict in plaintiff's favor; but in this and every other case, when proof is required to establish a determinative issue, the credibility of the evidence is for the jury, and they must be allowed to consider and pass upon it themselves. We have so held in a case on this very subject (*Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738), and a new trial was granted in that case, because the court erroneously invaded the province of the jury by telling them that the prima facie case of plaintiff had been restored by the uncontradicted evidence of the president of the bank, etc. The opinion in question quotes with approval from *Bank v. Iron Works*, 159 Mass. 158, 34 N. E. 93, as follows: "In an action on a promissory note, which was defended on the ground that the note had been fraudulently put into circulation by the P. L. Co., a Massachusetts corporation, organized for the purpose of 'doing a brokerage business in commercial paper, stocks, bonds, and other property,' from whom the plaintiff company acquired it, the plaintiff's officers testified that the note was taken by them in good faith and for value before maturity, and the defendant introduced no testimony to contradict these officers. Held, that the defendant was entitled, nevertheless, to go to the jury on the question whether the plaintiff took the note for value and without notice of fraud."

[4, 5] Under the conditions stated, therefore, with the controlling issue to be determined, and involving the credibility of plaintiff's testimony tending to establish it, his honor had no right to say, in the hearing of the jury, "that he would not allow a verdict to stand in favor of defendants." The court has been always swift to enforce obedience to our law, which forbids a presiding judge to express an opinion on the disputed facts of a trial, and under numerous decisions, construing the statute, we must hold this remark of his honor, in the presence of the jury and before verdict, to be reversible error. *State v. Railroad*, 149 N. C. 508, 62 S. E. 1088; *Withers v. Lane*, 144 N. C. 184, 56 S. E. 855; *State v. Dixon*, 75 N. C. 275; *Nash v. Morton*, 48 N. C. 3. The expression objected to was undoubtedly an inadvertence. From a long, intimate, and much valued association with his honor, when we were at the bar together, and from observation of his work as a judicial officer, the writer knows of a certainty that there is no man or judge who places higher estimate on the value of the trial by jury, or holds deeper conviction that it should now and always be preserved in its fullest integrity. For the error indicated, defendant is entitled to a new trial, and it is so ordered.

New trial.

(156 N. C. 250)

Ex parte HINSON.

(Supreme Court of North Carolina. Oct. 11, 1911.)

1. CRIMINAL LAW (§ 982\*)—JUDGMENT—SUSPENSION.

A judgment is valid where the judge suspended judgment, and afterwards passed sentence pursuant to its terms.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.\*]

2. CRIMINAL LAW (§ 982\*)—JUDGMENT—TIME OF SENTENCE—SENTENCE IN FUTURE.

A judgment, sentence under which begins at some future time, is valid.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.\*]

3. CRIMINAL LAW (§ 982\*)—SUSPENDING SENTENCE.

Where the judgment of conviction was that "defendant be imprisoned in the county jail for eight months," the fact that the judge told accused that, if she would leave the county and not return, she would not be imprisoned, and directed the clerk verbally not to issue capias for 15 days after adjournment of court, did not make the sentence one of banishment, or prevent accused from being imprisoned upon the capias issued 15 days after adjournment upon her return to the county, after having remained out of it for 8 months.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.\*]

In the matter of the petition of Leo Hinson, alias Mrs. Ernest Rochelle, for habeas corpus. On certiorari to review a judgment denying the writ. Judgment affirmed.

W. S. O'B. Robinson, Geo. E. Hood, and R. M. Robinson, for petitioner. The Attorney General, opposed.

CLARK, C. J. This is a certiorari in lieu of an appeal to review a judgment denying the discharge of the petitioner on habeas corpus. In re Holley, 154 N. C. 163, 69 S. E. 872. At August term of Wayne, 1910, the petitioner was convicted of retailing spirituous liquors. The entry on the docket is simply: "Judgment of the court that the defendant be imprisoned in the county jail for eight (8) months." The judge below in this proceeding finds that the trial judge said to the defendant that, if she would leave the county of Wayne and not return, she would not be compelled to serve the sentence of imprisonment, and directed the clerk of the court verbally not to issue capias to carry into effect the judgment pronounced until 15 days after the adjournment of the court. Within that time the petitioner left the county of Wayne, and took up her abode in the adjoining county of Wilson, where she abided until after the expiration of the eight months, when she returned to Wayne. Thereupon she was taken in arrest upon the

capias issued by the clerk as directed by the trial judge 15 days after the adjournment of said court, and was imprisoned in the county jail in execution of the judgment above set out. The petitioner being in jail under a judgment of the court, his honor properly refused to discharge her.

[1] If the judge had suspended judgment and afterwards in accordance with the terms thereof had passed sentence, it would have been valid. *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011.

[2] The judge might in his discretion have passed judgment to begin at some future time (*State v. Hamby*, 126 N. C. 1066, 35 S. E. 614), as, for instance, to begin 15 days after the adjournment of the court. But he did neither of these things. He did less.

[3] He rendered an absolute judgment of imprisonment and simply directed the clerk not to issue capias thereon for 15 days. This was in his discretion. This is sometimes done to give the defendant time to go home and arrange his affairs. In this case the kind-hearted judge, doubtless on account of the sex of the defendant, purposely gave her an opportunity to avoid execution of her sentence. In *State v. Hatley*, 110 N. C. 522, 14 S. E. 751, the court said that "such course is not infrequent, and, though dictated by the best intentions to benefit the public, as well as offenders, is not to be commended," adding that the court had no power to pass a sentence of banishment, and that the judgment of the court could not be fairly so construed, and that, if the defendant returned after the time specified, capias should be issued to execute the judgment. The judgment of the court herein is unequivocal. The opportunity which the withholding of the capias afforded the defendant to escape was not a decree of banishment. There was nothing requiring her to leave. If she left, it was of her own free will and accord, and was legally a flight from justice. The defendant cannot plead her own wrong in leaving the jurisdiction of the court by her own voluntary act as a protection against a legal sentence.

The distinguished counsel who represented the defendant attempted to distinguish this case from *State v. Hatley*, supra, on the ground that in this case the defendant remained in the adjoining county for the full eight months of the sentence. There is no statute of limitations in such case. The position of counsel could be sustained only on the ground that eight months sojourn in another county is the equivalent of eight months imprisonment in the county jail of Wayne. His loyalty to his home is like that of "the Argive, who, in dying, remembers sweet Argos."† His position, if submitted as a proposition of fact to a Wayne county

jury, might possibly not be altogether hopeless, but we cannot sustain it as a proposition of law.

The judgment is affirmed.

(156 N. C. 246)

#### WELLS v. WELLS et al

(Supreme Court of North Carolina. Oct. 11, 1911.)

#### 1. DESCENT AND DISTRIBUTION (§ 57\*)—PERSONS ENTITLED—PARENTS—MOTHER.

Where, besides his widow, intestate's mother and several brothers and sisters survived him, the mother, being the next of kin, was, under Revisal 1905, § 132, subsec. 3, providing that, if there be no children or legal representatives of a deceased child, one-half of the estate shall be allotted to the widow and the residue distributed among the next of kin, entitled to one-half of the personal estate, despite subsection 6, providing that if after the death of the father in the lifetime of the mother any child shall die intestate, without wife or children, that every brother and sister shall have an equal share with the mother, for in this case intestate left a widow.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 145, 159; Dec. Dig. § 57.\*]

#### 2. STATUTES (§ 176\*)—CONSTRUCTION—POWERS OF COURT.

Where a statute is plain, it is the duty of the court to observe it as written, regardless of the reasons of its passage.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 255; Dec. Dig. § 176.\*]

Hoke, J., dissents.

Appeal from Superior Court, Duplin County; Ward, Judge.

Action by Kate M. Wells against Julia F. Wells and others for distribution of the estate of W. D. Wells, deceased. From judgment of the clerk distributing one-half of the personal estate to Julia F. Wells, the other defendants appealed to the superior court, wherein that judgment was reversed, and defendant Julia F. Wells appeals. Judgment overruling the clerk reversed.

Aycock & Winston, Geo. R. Ward, and Stevens, Beasley & Weeks, for appellant. D. L. Ward, for appellee.

CLARK, C. J. W. D. Wells, deceased, left surviving him a widow, who, it is admitted, is entitled to half of the personal estate, and his mother, who claims to be entitled to the other half of the personal estate, also two sisters and a brother, who claim that they are entitled to share equally with the mother in that half of the estate; that is, they contend that the mother, the brother, and the two sisters is entitled, each, to one-eighth.

[1] The distribution of the personal estate of an intestate is entirely statutory. Rev. 1905, § 132 (3), provides: "If there be no child nor legal representative of a deceased child, then half of the estate shall be allotted to the widow, and the residue be distributed to every of the next of kin of the intestate, who are in equal degree, and to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Dulces moriens reminiscitur Argos. Verg. 10 En. 733.

those who legally represent them." This language is so explicit that it should leave no room for doubt. The next of kin of the intestate in this case is his mother. His brother and sisters are one degree farther removed. It follows, therefore, that the mother is entitled to half of the personalty. The brother and sisters rely upon Rev. § 132, subsec. 6: "If, after the death of the father and in the lifetime of the mother, any of his children shall die intestate, without wife or children, every brother or sister, and the representatives of them, shall have an equal share with the mother of the deceased child." But this case does not come within that section for the intestate left a widow. It does come within the state of facts provided in subsection 3, above quoted. It may be asked why the Legislature gives the mother only a child's share when the intestate leaves no widow, and gives her as next of kin half of the personalty if the intestate leaves a widow. Such is the plain letter of the law, and we do not have to supply reasons for legislative action. But it may be surmised that the difference is due to this: That, when the intestate leaves no wife or children, the entire estate is to be divided, and therefore the children share in it; whereas, when the intestate leaves a widow, there is only half the estate left, and the statute gives that to all who are the next of kin "in an equal degree." Another reason for subsection 6 is that, under Rev. subsec. 5, formerly on the death of the intestate without leaving widow or children, the entire personalty would have gone to the father as the next of kin because *ex jure mariti* he would take his wife's share. Subsection 6, carrying out the same idea, provided that in case of the death of the son, leaving neither widow nor children, the personalty should be distributed equally between the children and the mother, just as if the property had gone to the father and was to be distributed as his personalty under Rev. § 132, subsec. 2.

[2] It would be useless to cite cases from other jurisdictions having statutes more or less similar to ours or reason by analogy from decisions on a somewhat different state of facts. As already said, we cannot surmise as to the reasons for the statute. When, as here, the statute is plain, it is the duty of the court to observe it as written. *Lex scripta est* is sufficient for us. In this case we have not the state of facts provided for by Rev. § 132, subsec. 6, and we do have the state of facts provided for by Rev. § 132, subsec. 3. The clerk, therefore, properly held that the widow is entitled to one half of the personalty of the intestate, and that the mother of the deceased as "next of kin" is entitled to the other half.

The judgment overruling the clerk is reversed.

HOKE, J., dissents.

(156 N. C. 255)

SMITHFIELD IMPROVEMENT CO. v.  
COLEY-BARDIN.

(Supreme Court of North Carolina. Oct. 11 1911.)

1. LANDLORD AND TENANT (§ 130\*)—QUIET ENJOYMENT—COVENANTS OF LANDLORD.

The law without any express stipulation in the lease implies a covenant of quiet enjoyment by the landlord, and the covenant extends to water and sewer connections existing at the date of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 470-481; Dec. Dig. § 130.\*]

2. LANDLORD AND TENANT (§§ 125, 150\*)—OBLIGATION OF LANDLORD—OBLIGATION TO REPAIR.

At common law a landlord is under no obligation to his tenant to keep the premises in repair in the absence of any agreement to that effect, nor does he impliedly covenant that the premises shall be fit for the purpose for which they are rented.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 441-443, 536-557; Dec. Dig. §§ 125, 150.\*]

3. LANDLORD AND TENANT (§ 192\*)—LIABILITY FOR RENT.

At common law a lease for years of a hotel, including the waterworks and connections used to supply it with water, creates an estate for years to which the tenant takes title, and the tenant must pay the stipulated rent notwithstanding any injury to the waterworks and connections, in the absence of any agreement by the landlord to keep the same in repair.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 777-786; Dec. Dig. § 192.\*]

Appeal from Superior Court, Johnston County; Whedbee, Judge.

Summary proceedings in ejectment by the Smithfield Improvement Company against Mrs. Coley-Bardin. From a judgment for plaintiff, defendant appeals. Affirmed.

The question of possession was not at issue as defendant had surrendered possession. At the close of the evidence the court instructed the jury to return a verdict for the plaintiff for \$163.50, \$150 balance due as rent and \$13.50 amount due for pillows. It is admitted that is the sum due plaintiff by defendant for rent and towels. The defendant offered certain evidence tending to establish a counterclaim, which was excluded, and defendant excepted.

Abell & Ward, for appellant. F. H. Brooks, for appellee.

BROWN, J. Plaintiff leased, by contract in writing, to defendant its hotel, including the waterworks and connections used exclusively to supply it with water. This proceeding was brought to eject defendant and recover balance of rent due plaintiff. Defendant pleaded a counterclaim, viz., that under the rental contract between the plaintiff and the defendant the plaintiff rented to the defendant the waterworks and all connections thereto belonging. It was the duty of the plaintiff to keep said waterworks and con-

nections in proper repair and in good condition, so that a supply of water could be had at all times for necessary use in said hotel; that on account of the carelessness and negligence of the plaintiff in not keeping said waterworks and connections in proper repair and in good condition, thereby cutting off the water supply necessary for use in the said hotel, and in the failure to furnish water necessary for the same, the defendant has been damaged. The defendant offered evidence tending to prove that the waterworks and pipes got out of order during her tenancy, that plaintiff neglected to repair them, and that defendant was damaged thereby. His honor excluded the evidence upon the ground that it was defendant's duty to repair the waterworks in the house during her tenancy, and not plaintiff's.

We have examined the written lease with care, and are unable to find any covenant in it by which the landlord binds himself to keep the property or the waterworks during the lease in repair. Whether the tenant obligated himself to do it is immaterial.

[1] Without express stipulation in a lease, the law implies a covenant of quiet enjoyment upon the part of the landlord, and, if the tenant be rightfully evicted by another, he may recover damages, and this covenant extends to water and sewerage connections existing at date of lease. *Huggins v. Waters*, 154 N. C. 444, 70 S. E. 842.

[2] Under the civil law, in case of tenancies for short terms, the landlord was under implied obligation, without special agreement, to keep the premises in repair. 4 Kent, Com. 110; *Felton v. Cincinnati*, 95 Fed. 336, 37 C. C. A. 88; *Viterbo v. Friedlander*, 120 U. S. 707, 7 Sup. Ct. 962, 30 L. Ed. 776. But under the common law it is well settled that, in the absence of any agreement between the parties, the landlord was under no obligation to his tenant to keep the demised premises in repair.

[3] The common law considers such a lease as the one in evidence as the grant of an estate for years, to which the lessee takes title. The lessee is bound to pay the stipulated rent notwithstanding injury by flood, fire, or other external cause. It required a statute of the state to relieve the lessee where the property is destroyed by fire. By the common law the lessor is under no implied covenant to repair, or even that the premises shall be fit for the purpose for which they are rented. 3 Kent, Com. 465; *Brown, Leg. Max.* (3d Ed.) 213, 214; *Fowler v. Bott*, 6 Mass. 63; *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47; 2 *McAdam on Landlord & Ten.* § 383; 1 *Taylor on Landlord & Ten.* § 327; *Viterbo v. Friedlander*, *supra*. Chancellor Kent states the distinction between the civil and common law as follows: "The Roman law made some compensation to the lessee for the shortness of his five-year lease, for

it gave him a claim upon the lessor for reimbursement for his reasonable improvements. The landlord was bound to repair, and the tenant was discharged from the rent if he was prevented from reaping and enjoying the crops by an extraordinary and unavoidable calamity, as tempests, fire, or enemies. In these respects the Roman lessee had the advantage of the English tenant, for, if there be no agreement or statute applicable to the case, the English landlord is not bound to repair, or to allow the tenant for repairs made without his authority; and the tenant is bound to pay the rent, and to repair at his own expense, to avoid the charge of permissive waste." "The rule of caveat emptor applies to leases," says the *Encyclopædia*, "and the landlord is not even under an implied obligation to remedy defects in the demised premises existing at the time of the demise. It follows, therefore, in the absence of any agreement on the part of the landlord to repair, a tenant cannot recover from the landlord the cost of repairs made by him," etc. 18 Am. & Eng. p. 215. In regard to waterworks, it has been held in New York that, when water pipes are arranged for an entire building occupied by different tenants, it is the duty of the landlord to keep the pipes in repair, or the failure to repair may amount to a constructive eviction. *Bank v. Newton*, 76 N. Y. 616. But the Massachusetts court holds that a landlord is under no implied obligation to keep in repair water pipes used exclusively in carrying water to the part of the building demised to the tenant, and therefore is not liable to such tenant for leakage from such pipes. *McKeon v. Cutter*, 156 Mass. 296, 31 N. E. 389.

Upon a review of the record, we find no error.

(156 N. C. 239)

#### STEPHENS v. HICKS et al.

(Supreme Court of North Carolina. Oct. 11, 1911.)

#### 1. MECHANICS' LIENS (§ 38\*)—RIGHT TO LIEN—"LABORERS."

Under Revisal 1905, § 2016, giving laborers and mechanics a lien for work done upon buildings, a laborer or mechanic is one engaged in manual labor or onerous work with his hands, and so one superintending the erection of a building is not entitled to a lien for his services.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 42; Dec. Dig. § 38.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 3952-3968; vol. 8, p. 7700.]

#### 2. MECHANICS' LIENS (§ 36\*)—RIGHT TO LIENS—"MECHANICS."

Under Revisal 1905, § 2016, giving mechanics and laborers lien for work done upon buildings, an architect who furnished plans and specifications for a building is not entitled to a lien, having neither performed labor upon it, nor being a "mechanic"; the term as used in the lien laws meaning a person

skilled in the practical use of tools (citing 5 words and Phrases, p. 4457).

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 41; Dec. Dig. § 36.\*]

### 3. MECHANICS' LIENS (§ 36\*)—RIGHT TO LIENS—"MATERIALS."

Plans and specifications drawn by an architect for the erection of a building are not "materials," within the purview of Revisal 1905, § 2016, giving a mechanic's lien upon buildings for materials furnished.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 41; Dec. Dig. § 36.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4409-4413.]

### 4. HUSBAND AND WIFE (§ 82\*)—DISABILITIES OF COVERTURE—CONTRACTS.

A contract made before the passage of Acts 1911, c. 109, providing that married women shall have power to contract, whereby a married woman agreed to compensate an architect for drawing the plans and specifications and overseeing the construction of a building, is void.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 324; Dec. Dig. § 82.\*]

### 5. CONSTITUTIONAL LAW (§ 89\*)—RIGHT OF FREE CONTRACT—STATUTE VALIDATING VOID CONTRACTS.

A statute attempting to validate the void contracts made by married women before its passage is unconstitutional, because making a new contract for the parties.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 157; Dec. Dig. § 89.\*]

### 6. HUSBAND AND WIFE (§ 57\*)—WIFE'S POWER TO CONTRACT—STATUTES—CONSTRUCTION—RETROACTIVE OPERATION.

Acts 1911, c. 109, providing that married women "shall be" authorized to contract, and that the act "shall be" in force from and after its ratification, is wholly prospective in its terms, but even were the language doubtful it should be construed as prospective.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 274; Dec. Dig. § 57.\*]

Appeal from Superior Court, New Hanover County; Peebles, Judge.

Action by B. H. Stephens against Sallie M. S. Hicks and husband. From a judgment sustaining a demurrer to his complaint, plaintiff appeals. Affirmed.

Kenan & Stacy, for appellant. Rountree & Carr, for appellees.

**WALKER, J.** This action is brought by the plaintiff, an architect, against the defendants. Mrs. Sallie M. S. Hicks and her husband, to recover of the feme defendant damages alleged to be due for a breach of a contract, by the terms of which the plaintiff agreed to prepare and furnish plans and specifications for an apartment house, to be erected by her, for which he was to receive \$700, and was actually paid the sum of \$350, and he further agreed to superintend the construction of the building, as her architect, for the sum of \$300, which she has prevented him from doing. Plaintiff seeks also to enforce a mechanic's and laborer's lien upon the property. The defendant demurred to

the complaint, and plaintiff appealed from the judgment sustaining the demurrer.

[1] Whatever may be law, as declared in other jurisdictions, this court has thoroughly settled the principle that a mechanic or laborer, within the meaning of our lien laws, is one who performs manual labor; one regularly employed at some hard work; or one who does work that requires little skill, as distinguished from an artisan. *Whitaker v. Smith*, 81 N. C. 340, 31 Am. Rep. 503. In that case, Justice Ashe, for the court, thus explained the lien law of our state by the circumstances which caused its enactment: "A very large proportion of the laboring population of the state had just recently been released from thralldom and thrown upon their own resources, perfectly ignorant of the common business transactions of social life, and this provision of the Constitution, and the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual toll for subsistence. The law was designed exclusively for mechanics and laborers." And it was held that an overseer is not a mechanic or laborer under our lien law, and is not entitled to a lien on the building and premises, where his work is done or labor performed for the price or value of his services. The case of *Cook v. Ross*, 117 N. C. 193, 23 S. E. 252, is quite as much to the point, for there it was held that one who, under a contract, assists the owner of a mill in purchasing machinery and superintends the installation of the same and the repairing of the mill, so as to put it in proper condition for the manufacture of yarns, was in no view justified by our statute a mechanic or laborer. "He was superintendent of the work which was done," says the court, "but was in no sense employed as a laborer by the day to do toilsome and manual labor. His business, under the agreement, was not to labor with his hands, but to oversee those who did the work in subjection to his authority." So it has been held that one who acts as bookkeeper in the reconstruction of a building, under a contract with the owner for his services, is not entitled to a lien. *Nash v. Southwick*, 120 N. C. 459, 27 S. E. 127. To the same effect is *Moore v. Industrial Co.*, 188 N. C. 304, 50 S. E. 687, where it was held that a lien is not given by our Constitution and statute for services rendered, under contract, as superintendent of a milling business, conductor of a commissary or store connected therewith, and as bookkeeper in the same concern. This court, in deciding that case, adopted the definition of the English courts in construing their statute that a laborer or mechanic is "a servant employed in some manual occupation." It is further said that "the word 'labor,' in legal

parlance, has a well-defined, understood, and accepted meaning. It implies continued exertion of the more onerous and inferior kind, usually and chiefly consisting in the protracted exertion of muscular force. Labor may be business, but it is not necessarily so, and business is not always labor. "In legal significance, labor implies toil; exertion producing weariness; manual exertion of a toilsome nature"—citing *Bloom v. Richards*, 2 Ohio St. 387. It was said in *Cook v. Tramway Co.*, 18 Q. B. Div. 684, in construing the English employer's liability act, that, "the expression used [in that act], it should be noted, is not manual work, but manual labor. Many occupations involve the former, but not the latter; for instance, telegraph clerks, bookkeepers, and all persons engaged in writing." *Morrison v. Mining Co.*, 143 N. C. 250, 55 S. E. 611. The plaintiff, therefore, is entitled to no lien under his contract to superintend the work, even if he had performed this duty, and certainly he cannot be heard to say that he should have a lien for what he did not do.

[2] Nor is he entitled to a lien for the building plans and specifications, either upon principle or well-considered authority. The language of the statute is that the mechanic or laborer shall have a lien on the property, real or personal for work done on the same. It could hardly be said with correctness and a proper appreciation of the meaning of well-defined terms that an architect, in furnishing plans and specifications for the guidance of the contractor and his mechanics and laborers, is engaged in the act of performing labor upon the building. He uses his brain far more than he does his brawn—his trained mental faculties, rather than his physical or muscular powers—and herein, to a large extent, is to be found the distinction between men employed in his kind of work and the laborer, who works mechanically, though under his direction. We are ably and strongly supported in our view of the law by the cases of *Mitchell v. Packard*, 168 Mass. 467, 47 N. E. 113, 60 Am. St. Rep. 404, and *Libbey v. Tidden*, 192 Mass. 193, 78 N. E. 313. It has been decided also in other jurisdictions that the word "mechanic," as used in the lien laws, does not include an architect or draughtsman. See cases on this question in 5 Words and Phrases, p. 4457, title "Mechanics," and subtitle, "Architect or draughtsman," a mechanic or laborer (within the meaning of these laws) being a person skilled in the practical use of tools; a workman who shapes and applies material in the building of houses or other structures mentioned in the law; "one actually employed with his own hands in constructive work;" or one so engaged in the application of his own labor to such construction, as contradistinguished from a superintendent or overseer. 5 Words and Phrases, 4457; *City of New Orleans v. Lagman*, 43 La. Ann. 1180, 10 South. 244; S. &

C. R. Co. v. Callahan, 49 Ga. 506; *People v. Board of Aldermen*, 18 Misc. Rep. 533, 42 N. Y. Supp. 545; *Parkerson v. Wightman*, 4 Strob. (S. C.) 363; *Raeder v. Bensberg*, 6 Mo. App. 445; *In re Osborn* (D. C.) 104 Fed. 780; *Price v. Kirk*, 13 Palla. (Pa.) 497. The authorities are not uniform, but those cited are in line with our decisions.

[3] The learned counsel for the plaintiff did not contend that their client had furnished any material to be used in the construction of the house, because he had prepared the plans and specifications, and their position, in this respect, was the correct one. No one would ever think of an architect's building plans and specifications as "material," within the meaning of the statute (Revisal 1905, § 2016), and we do not suppose that architects would classify themselves as "mechanics or laborers." One class is of as high dignity as the other in every way, but they are dissociated in our mental conception of the two; and when we think and speak of them they are naturally differentiated as belonging to separate and distinct callings, or avocations, though held in the same estimation, so far as the worthiness of the pursuit is concerned. We conclude that the architect was not in the mind of the Legislature when it was providing for the lien of mechanics, laborers, and materialmen, not being considered as in the same category, and as requiring the same protection. They can secure themselves in advance against the danger of loss, or at least have a freer hand than the daily laborer, who is often entirely dependent upon his wages for support and maintenance of himself and family, and sometimes at the mercy of an impecunious or dishonest debtor, with whom he is not on equal terms. He occupies more a position of dependence, if not helplessness, than does the architect. Every consideration of fairness and justice favors him, and for this reason were his interests safeguarded by the law, under whose special care and protection he has been taken.

[4-6] Another question remains for decision. If there is no lien, it follows that we have only an unsecured and executory contract of a married woman, which is not enforceable against her, according to our decisions. The cases of *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890, and *Ball v. Paquin*, 140 N. C. 83, 52 S. E. 410, 3 L. R. A. (N. S.) 307, are not in point. In *Finger v. Hunter*, we held that the act of 1901, c. 617 (Revisal, § 2016), giving a laborer's lien on the real property of a married woman for work done on her building and for material furnished, was constitutional and valid; and in *Ball v. Paquin*, we held that the plaintiff acquired a lien for work done and material furnished for the construction of a dwelling on a married woman's land, under a written contract with her and her husband, which was duly proved, as to both, with her privy examina-

tion. In both cases there were liens, while in this case there is none, and it is therefore governed by *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567; *Weir v. Page*, 109 N. C. 220, 13 S. E. 773; *Thompson v. Taylor*, 110 N. C. 70, 14 S. E. 513; *Weathers v. Borders*, 124 N. C. 610, 32 S. E. 881; *Harvey v. Johnson*, 133 N. C. 353, 45 S. E. 644; and the recent case of *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747, in which Justice Allen learnedly considers the question. The contract in this case was made before the passage of the act of 1911, c. 109, and is therefore not governed by it. When it was made, the law declared such contracts to be void, which means, of course, that it is the same as if the contract had never been made at all. That which is void, or a nullity, can have had no legal existence or binding obligation, and if the act of 1911 had professed to be retroactive in its operation, and to emancipate married women as to all past, as well as future, contracts, it would have been an unauthorized exercise of legislative power under the Constitution. It may do many things with reference to contracts, but it cannot make a contract between parties, because a contract implies volition and the agreement of two or more minds to one and the same thing; in other words, consent. The Legislature can no more make a contract for parties without their consent, than it can take away a vested right, or impair the obligation of a contract already made. This case is not like *Spring v. Scott*, 132 N. C. 548, 44 S. E. 116, *Anderson v. Wilkins*, 142 N. C. 159, 55 S. E. 272, 9 L. R. A. (N. S.) 1145, and other decisions of a like kind, in which the Legislature was dealing with the remedy and with contingent and not vested interests. Parties are entitled to contract according to their free will. They make contracts for themselves, and not by legislative compulsion. The freedom of the right to contract has been universally considered as guaranteed to every citizen. However this may be, we find that the act of 1911 is not retrospective, but prospective, by its very terms, and so the question does not arise as to the power of the Legislature to declare valid a married woman's contract made prior to the act of validation. The language of the act is that a married woman "shall be authorized to contract," which means thereafter; and, further, that the act "shall be in force from and after its ratification," which necessarily, and without express words of retrospection, refers to future transactions. Even in a doubtful case, it should be construed as prospective. We would defeat the legislative intent and make the law, should we decide otherwise. This court said, in *State v. Littlefield*, 93 N. C. 615: "Such a construction would be giving a retrospective operation to the act, which is in violation of

the general rule that 'no statute should have a retrospective effect.' Although the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless a contrary intention is unequivocally expressed therein. *Potter's Dwarrior*, p. 162, note 9, and cases cited. There is nothing in the act tending to show an intention in the Legislature to make it retrospective, but, on the other hand, from the use of the term 'original jurisdiction,' it would seem that it was intended that the indictments for such offenses as the inferior court then had jurisdiction of, should thereafter be *originated* in that court, and that was what was meant by the use of the word 'original' in the statute."

The demurrer was properly sustained.  
Affirmed.

(156 N. C. 215)

#### ROBERTSON v. HALTON.

(Supreme Court of North Carolina. Oct 11, 1911.)

##### 1. FRAUD (§ 59\*)—DAMAGES.

Where defendant exchanged his mule and \$20 for plaintiff's mare, and, upon plaintiff becoming dissatisfied, traded him another mare for the mule, plaintiff was not, in the absence of special damage from the first trade, entitled to recover damages upon each transaction for defendant's misrepresentations, the deceit first practiced upon defendant having been made good by the exchange of the mare for the mule, and plaintiff's ultimate damage was the difference in value between the two mares.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 60-62; Dec. Dig. § 59.\*]

##### 2. FRAUD (§ 54\*)—ACTIONS—EVIDENCE.

Where defendant traded his mule and \$20 for plaintiff's mare, and, upon plaintiff becoming dissatisfied, traded him another mare for the mule, the deceit in the first transaction, if any, is evidence of the intent or scienter in the last, the two trades being so closely connected; but evidence of the first is relevant only in tending to show deceit in the last.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 50, 51; Dec. Dig. § 54.\*]

##### 3. EXCHANGE OF PROPERTY (§ 13\*)—ACTIONS—INSTRUCTIONS.

In an action for breach of warranty and deceit in an exchange of personal property, there being no special or punitive damages, the damages for the deceit and for the warranty are the same.

[Ed. Note.—For other cases, see *Exchange of Property*, Dec. Dig. § 13.\*]

##### 4. SALES (§ 261\*)—WARRANTIES—STATEMENTS CONSTITUTING.

A statement made by a seller which amounts to nothing more than a mere commendation of the goods is not a warranty; but where it takes the form of an opinion, and it is doubtful whether a warranty was intended, the question of warranty is one of fact for the jury.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 727-735; Dec. Dig. § 261.\*]



**5. SALES (§ 445\*)—WARRANTIES—QUESTIONS OF LAW.**

Where the words or language used by a seller clearly show a warranty, it is the duty of the court to so declare as a matter of law.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1303–1308; Dec. Dig. § 445.\*]

**6. FRAUD (§ 9\*)—DECET—ELEMENTS.**

The elements of actionable deceit consist of an untrue statement by defendant, made either with knowledge of its falsity or in reckless disregard of plaintiff's right, and with intent that plaintiff act upon it, and plaintiff's reliance upon the statement to his damage.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 9.\*]

Appeal from Superior Court, Craven County; Ferguson, Judge.

Action by John A. Robertson against T. W. Halton. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Moore & Dunn, for appellant. Simmons & Ward, for appellee.

**WALKER, J.** This action was brought to recover damages in the sum of \$125 for deceit and false warranty in a horse trade, and was tried upon issues which, with the answers thereto, are as follows: "(1) Did the defendant procure the exchange of his mule for plaintiff's mare by fraud and misrepresentation as alleged in the complaint? Answer: Yes. (2) If so, what damages is plaintiff entitled to recover by reason thereof? Answer: Fifty dollars. (3) Did defendant procure the exchange of his mare for the mule swapped him by plaintiff by fraud and misrepresentation, as alleged in the complaint? Answer: Yes. (4) If so, what damages is plaintiff entitled to recover by reason thereof? Answer: Seventy-five dollars." Plaintiff alleged that he was fraudulently induced by the defendant to exchange a bay mare he owned and valued at \$200 for a mule owned by the defendant, and \$20 as the difference in the value between the two animals, with the understanding that the mule could be returned and another mule substituted, if desired by plaintiff; that, in order to induce the plaintiff to trade, the defendant warranted the mule in several respects, and made certain false and deceitful representations to him as to the fine qualities of the mule. When the plaintiff discovered that he had been deceived, he told the defendant that he was not satisfied with the trade, and that he must make his representations good, whereupon the defendant said that he had a good mare he would substitute for the mule, and at the same time made certain warranties and deceitful representations as to her fine qualities. Judgment was entered upon the verdict, and the defendant appealed.

[1] It will be observed at a glance by any one reading the evidence sent up that this case has been tried upon a wrong theory.

Why should the defendant be twice mulcted in damages? The trade was, at first, that they should exchange the plaintiff's mare for the mule and \$20. If there had been no further exchange or negotiation and there was a breach of warranty, as to the mule, or a deceit practiced upon the plaintiff, he would be entitled to recover this difference between the value of the mule as he was and as he was represented to be, or as, under the contract or the representation, he should have been. When they again traded, the defendant's mare took the place of the mule, and why is not the measure of damages the difference between the value of the defendant's mare, which he substituted for the mule, as it was and as it should have been. The defendant's mare took the place of the mule, and in this way any damages for deceit in the exchange of the mule and \$20 "to boot" for the plaintiff's mare were satisfied. If the mare, which was substituted for the mule in the trade, had answered the terms of the warranty or representation, the plaintiff surely could not recover damages for the first deceit, unless he had suffered some special loss in addition to the ordinary damages which result in such cases from the deceit or false warranty, as in *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696, 38 L. Ed. 810, where the warranty or representation was that certain rags, which the plaintiff sold to the defendant, were clean and in sanitary condition, and they turned out to be infected with germs of smallpox, and consequently the disease broke out in the defendant's mill and spread among his employes, causing him great loss and damage, and the court held that the defendant was entitled to recover damages for the wrong commensurate with loss, either upon the warranty or the count for deceit, and in this connection Justice Gray, who wrote the opinion, said: "The damages recoverable for a breach of warranty, or for a false representation, include all damages which in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act. For instance, if a man sells hay or grain for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury. *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Wilson v. Dunville*, 4 L. R. Ir. 249, and 6 L. R. Ir. 210. So, if one sells an animal, warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals, either in an action for tort for the false representation (*Mullett v. Mason*, L. R. 1 C. P. 559; *Jeffrey v. Bigelow*, 13 Wend.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(N. Y.) 518, 28 Am. Dec. 476; *Faris v. Lewis*, 2 B. Mon. (Ky.) 375; *Sherrod v. Langdon*, 21 Iowa, 518; *Marsh v. Webber*, 16 Minn. 418 [Gil. 375]), or in an action on the warranty, either in tort (*Packard v. Slack*, 32 Vt. 9; *Smith v. Green*, 1 C. P. D. 92), or even in contract (*Black v. Elliott*, 1 Fost. & Fin. 595. See, also, *Randall v. Newson*, 2 Q. B. D. 102)." There is no evidence now in this case of any damage of that kind and the ordinary rule prevails which may be thus expressed: The difference in actual value between the article as warranted and the article as delivered is all that can be properly recovered as damages, unless in exceptional cases of special damages. Whatever that difference in the actual circumstances of the case is shown to be is the true rule and measure of damages, where the articles delivered are not what the contract calls for. *Marsh v. McPherson*, 105 U. S. 709, 26 L. Ed. 1139.

[2] While the court seems to have given the correct instruction in regard to the measure of damages—that is, the difference between the value of the mare, as represented by the defendant, and its real value—the jury were permitted, under the direction of the court, to assess damages as to both transactions, the first swap and the second or substituted one. This was error. The charge of the court is also very meager, and as to the deceit it omitted an essential element—the scienter. There was abundant proof of a scienter, but it was not correctly applied, if considered at all in the charge, and for that reason we have called attention to the law, as stated in former decisions of this court, and it will be well in such cases to be guided by them. The deceit in the first transaction, if established, will be evidence of the intent or scienter in the last, as the two are so closely connected with each other, and such evidence is admissible to show fraud in the second exchange, under the rule in *Brink v. Black*, 77 N. C. 59, and subsequent cases approving it. *Gilmer v. Hanks*, 84 N. C. 317; *Coble v. Huffines*, 133 N. C. 422, 45 S. E. 760. A case directly in point is *State v. Weaver*, 104 N. C. 758, 10 S. E. 486. But the first transaction is not a separate cause of action, and is only relevant to the controversy as tending to show the deceitful purpose in the last exchange.

[3] We decide, therefore, that there should have been two separate issues, one as to the warranty, and the other as to damages, unless the case is so presented at the next trial that the rule of damages for the deceit and the one for the warranty will not be the same, in which case there may be an issue as to the damages for each cause of action, but we hardly see how this can be upon the evidence as it now appears. When there are no punitive damages, one issue as to damages, in cases like this, is generally sufficient, unless there is more than one cause of ac-

tion, so relating to different transactions as to entitle the plaintiff or other party to an assessment of damages upon each of them.

[4-6] In regard to the nature of the warranty or deceit, much must depend upon the facts and circumstances of each case, as it is presented. We have stated some general rules, though, which will serve as guides to us in such matters: (1) When the statements made by sellers amount to nothing more upon their face than a mere commendation of the goods which is usual in sales, a puffing of wares, as it is sometimes called, there is no warranty or deceit. *Cash Register Co. v. Townsend*, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349. (2) Where the statement takes the form of an opinion or estimate of value or quality, and it is doubtful whether or not a warranty was intended, the question should be submitted to the jury to say whether one was, in fact, intended. *Unitype Co. v. Ashcraft*, 155 N. C. 63, 71 S. E. 61, citing authorities. In *McKinnon v. McIntosh*, 98 N. C. 89, 3 S. E. 840, it was said upon a kindred question, relating to a sale of fertilizers: "The defendant had a right to have the question whether the force and effect of the affirmations of the plaintiff in regard to the quality of the fertilizer did not constitute a warranty of the quality, go to the jury. If the vendor represents an article as possessing a value which upon proof it does not possess, he is liable on a warranty express or implied, although he may not have known such an affirmation to be false, if such representation was intended, not as a mere expression of opinion, but the positive assertion of a fact upon which the purchaser acts; and this is a question for the jury. *Thompson v. Tate*, 5 N. C. 97 [3 Am. Dec. 678]; *Inge v. Bond*, 10 N. C. 101; *Foggart v. Blackweller*, 26 N. C. 238; *Bell v. Jeffreys*, 35 N. C. 356; *Henson v. King*, 48 N. C. 419; *Lewis v. Rountree*, 78 N. C. 323; *Baum v. Stevens*, 24 N. C. 411." (3) Where, though, the words or language clearly show a warranty, it becomes a question of law for the court, without the aid of the jury, to so declare, as in *Unitype Co. v. Ashcraft*, supra; *Machine Co. v. Feezer*, 152 N. C. 516, 67 S. E. 1004; *Audit Co. v. Taylor*, 152 N. C. 272, 67 S. E. 582. (4) In order to constitute a deceit, several facts must concur and be established by the proof. There must be a statement made by the defendant (a) which is untrue. (b) The person making the statement, or the person responsible for it, either must know it to be untrue or be culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not. (c) It must be made with the intent that the plaintiff shall act upon it or in a manner apparently fitted to induce him to act upon it. (d) The plaintiff must act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffer damage. 71 S. E. 62, second column; *Pollock on*

Torts (7th Ed.) 276; *Whitehurst v. Insurance Co.*, 149 N. C. 273, 62 S. E. 1067; *Unitype Co. v. Ashcraft*, supra. The gist of the action for deceit is fraudulently producing a false impression upon the mind of the other party by words or acts, or concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff. *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439. In order to maintain the action, it is sufficient to show that the defendant practiced a deception with the design of depriving the plaintiff of some right, profit, or advantage, and to acquire it for himself or avail himself of it in some way. *National Bank v. Petrie*, 189 U. S. 423-425, 23 Sup. Ct. 512, 47 L. Ed. 879. In *Whitmire v. Heath* (at last term) 155 N. C. 304, 71 S. E. 314, the three requisites of an actionable deceit were thus stated: "(1) The representation must be false. (2) The party making it must know that it is false, commonly called the 'scienter.' (3) It must have misled the other party and induced him to contract upon the faith of the representation as true" — citing numerous cases and specially *Lunn v. Shermer*, 93 N. C. 164; *Black v. Black*, 110 N. C. 308, 14 S. E. 971; *Ashe v. Gray*, 88 N. C. 190 (s. c. on rehearing, 90 N. C. 137)—all actions against horse dealers. (5) A warranty is contractual, but may be joined with a cause of action for deceit which is a tort. The old and new mode of pleading is clearly stated in *Ashe v. Gray*, supra, and, quoting from the opinion of the court (by Chief Justice Pearson) in *Bullinger v. Marshall*, 70 N. C. 520, Chief Justice Smith says: "If there be a warranty of soundness in the sale of a horse, the vendee may sue upon the contract of warranty, and the justice of the peace has jurisdiction, or may declare in tort for a false warranty and add a count in deceit, in which case a justice of the peace has not jurisdiction, the plaintiff being permitted to declare collaterally in tort for a false warranty in order to enable him to give in a count for the deceit, which, of course, was in tort." *Ashe v. Gray*, 88 N. C. 192. See, also, same case (*Ashe v. Gray*) on rehearing, 90 N. C. 137.

For the error noted by us, a new trial upon all the issues will be had in the lower court.

New trial.

(156 N. C. 140)

### BLOW v. JOYNER.

(Supreme Court of North Carolina. Oct. 4, 1911.)

#### 1. JUDGMENT (§ 111\*)—DEFAULT—EFFECT.

A judgment by default and inquiry, in an action for unliquidated damages, establishes plaintiff's right of action, entitling him to nominal damages; and evidence is not admissible on the inquiry as to damages to bar plaintiff's

right of action, though it may be admissible to fix the amount of the damages.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 202; Dec. Dig. § 111.\*]

#### 2. ASSAULT AND BATTERY (§ 39\*)—PUNITIVE DAMAGES.

Punitive damages may be recovered, in an action for forcible trespass accompanied by assault upon the person, if the injury is willful and malicious, or wanton.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 54; Dec. Dig. § 39.\*]

#### 3. DAMAGES (§ 208\*)—PUNITIVE DAMAGES—JURY QUESTION.

Where the action is such that punitive damages may be awarded, the question of whether they shall be allowed should be left to the jury, under instructions as to the law applicable.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 208.\*]

#### 4. JUDGMENT (§ 111\*)—DEFAULT—EFFECT.

A judgment by default and inquiry, in an action for unliquidated damages, only entitles plaintiff to nominal damages as a matter of law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 202; Dec. Dig. § 111.\*]

#### 5. TRIAL (§ 191\*)—INSTRUCTIONS—"ACTUAL DAMAGES."

Where plaintiff was only entitled to nominal damages as a matter of law, in a forcible trespass action, the judgment being by default and inquiry, and the evidence of actual damage being conflicting, it was error to charge that plaintiff was entitled to some "actual" damages in any view of the case; the term "actual damages," as used, meaning "substantial," as distinguished from "nominal," damages.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 155, 156; vol. 8, p. 7564.]

Appeal from Superior Court, Hertford County; Carter, Judge.

Action by S. C. Blow against E. H. Joyner. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Civil action to recover damages for alleged forcible trespass, accompanied by assault on the person. Judgment by default and inquiry was entered. The cause having been placed on the calender for the purpose, the same came on for hearing on the issue as to damages. Verdict was rendered and damages assessed in plaintiff's favor for \$300.

D. C. Barnes, for appellant. Winborne & Winborne, for appellee.

HOKE, J. The gravamen of plaintiff's cause of action is stated in the complaint as follows: "That, while plaintiff and his family were in such occupancy of said buildings and premises, the defendant, on Friday, the 27th day of August, 1906, unlawfully and wrongfully and with a strong hand entered and forcibly trespassed on said premises, and in the lot and yard on said premises, where the plaintiff and his family were living, armed with a pistol, and in the presence of the

plaintiff and his wife, and threatened, cursed, abused, and assaulted plaintiff, and refused to leave said premises and said yard, after he was commanded by plaintiff and his wife to leave said yard and said premises, and remained thereon, using profane and vulgar language, to the great annoyance of plaintiff and his wife and to the great damage of plaintiff." And there was evidence on part of plaintiff tending to support the allegations as made, except there seems to be no reference to a pistol in the statement of the witnesses, a difference in no way affecting the questions presented.

[1] It was objected to the validity of the trial that his honor charged the jury that the "judgment by default and inquiry established the fact that the defendant was a trespasser, and by reason of that fact defendant was estopped from denying that he was a trespasser upon the possessions of the plaintiff," but the objection, in our opinion, is not well taken. The authorities are very generally to the effect that, where a complaint has been properly filed, showing a right of action for unliquidated damages, a judgment by default and inquiry establishes plaintiff's right of action and that he is entitled at least to nominal damages. *Osborne v. Leach*, 133 N. C. 428, 45 S. E. 783; 2 Black on Judgments, § 698; 23 Cyc. p. 752; 6 Enc. Pl. & Pr. p. 127. And in this state it is further held that such a judgment concludes on all issuable facts properly pleaded, and that evidence in bar of plaintiff's right of action is not admissible on the inquiry as to damages. *McLeod v. Nimocks*, 122 N. C. 438, 29 S. E. 577; *Lee v. Knapp*, 90 N. C. 171; *Parker & Gatling v. House*, 66 N. C. 374; *Parker & Gatling v. Smith*, 64 N. C. 291; *Garrard v. Dollar*, 49 N. C. 175, 67 Am. Dec. 271. In *McLeod v. Nimocks* it is said: "The judgment by default and inquiry, the defendant having said nothing in answer to plaintiff's complaint, was conclusive that the plaintiff had a cause of action against the defendant of the nature declared in the complaint, and would be entitled to nominal damages without any proof." The statement sometimes made, that a judgment of this kind "merely admits a cause of action, while the precise character of the cause of action and the extent of defendant's liability remains to be determined," simply means, as stated, that a judgment by default and inquiry established a right of action in plaintiff of the kind stated in the complaint, and entitling plaintiff to nominal damages, but that the facts and attendant circumstances giving character to the transactions and relevant as tending to fix the quantum of damages must be shown, and in this sense only is the statement in question approved in *Osborne v. Leach*, *supra*. His honor, therefore, properly held that the judgment by default operated as an estoppel to the extent stated.

[2, 3] Defendant excepted further that, under the charge and on the evidence, the

jury were allowed to consider the question of punitive damages and award the same in their discretion; the objection being, first, that no such damages are permissible in this character of action; second, that, if otherwise, the allowance of such damages on a given state of facts was a question of law for the court, and should not be submitted to the discretion of the jury, but authority with us is against defendant on both positions. In *Ammons v. Railroad*, 140 N. C. 200, 52 S. E. 731, on this question of punitive damages, it was said: "Exemplary or punitive damages are not given with a view to compensation, but are under certain circumstances awarded in addition to compensation, as a punishment to defendant, and as a warning to other wrongdoers. They are not allowed as a matter of course, but only when there are some features of aggravation, as when the wrong is done willfully and maliciously, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights." In *Brame v. Clark*, 148 N. C. 364, 62 S. E. 418, 19 L. R. A. (N. S.) 1033, and *Duncan v. Stalcup*, 18 N. C. 440, it has been expressly held that if a trespass has been committed under the circumstances stated punitive damages may be allowed. And in *Billings v. Observer Co.*, 150 N. C. 540, 64 S. E. 435, it was held that, "where on the facts a question of punitive damages is presented, the award of such damages and the amount thereof, under a proper charge, is for the jury." In such case the court will state the law applicable, and the jury in their discretion will determine whether punitive damages shall be allowed, and, if so, fix the amount of same.

[4] While we uphold the rulings of his honor in reference to exceptions thus far noted, we are of opinion that defendant is entitled to a new trial by reason of his charge, duly excepted to; that plaintiff is entitled to some actual damages in any view of the case. Recurring to the authorities heretofore cited, it will appear that a judgment by default and inquiry only concludes as to the existence of plaintiff's cause of action and his right to recover nominal damages. Any damages beyond that sum is left an open question, to be determined from the facts and attendant circumstances of the occurrence. While the evidence of plaintiff tended to show an injury under circumstances of insult, rudeness, and oppression, there was testimony on the part of defendant in full denial of plaintiff's position, and tending to show that as a matter of fact plaintiff himself was in great measure to blame.

[5] In this conflict of evidence, it was not within the province of the court to tell the jury that they should, in any event, allow the plaintiff some actual damages, which by correct interpretation must be taken to mean substantial, as distinguished from nominal,

damages. *Ammons v. Railroad*, 140 N. C. 199, 52 S. E. 731; *Chaffin v. Manufacturing Co.*, 135 N. C. 102, 47 S. E. 226; *Sutherland on Damages*, 9; *Black's Law Dictionary*, 29. The expression found in some of the opinions that on judgment by default the plaintiff is entitled to *some* damages, as in *Dougherty v. Stepp*, 18 N. C. 371, and *Parker v. House*, was used in reference to a claim set up that no right of action had been established, because no tortious entry had been shown and no actual damages proven, and was not made in reference to the quantum of damages, nor intended to displace or impair the position that a judgment by default and inquiry only concludes as to plaintiff's cause of action and the right to recover nominal damages.

For the error indicated, there must be a new trial, and it is so ordered.

New trial.

(156 N. C. 628)

STATE v. SMITH et al.

(Supreme Court of North Carolina. Oct 11, 1911.)

1. ANIMALS (§ 82\*)—INJURIES BY ANIMALS—RIGHT TO ACTION—SCIENTER.

To recover damages for injuries to property committed by a dog, plaintiff must show knowledge by the owner of his malicious propensities.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 288-292; Dec. Dig. § 82.\*]

2. ANIMALS (§ 45\*)—KILLING ANIMALS—CIVIL RESPONSIBILITY.

A dog may be killed in the actual and necessary defense of property attacked by it though the owner did not know of its vicious propensities, and there may have been another mode of defending the property attacked.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § § 45.\*]

3. ANIMALS (§ 45\*)—KILLING DOGS—CRIMINAL RESPONSIBILITY—DEFINITIONS—REPUTATION OF DOG—"ANIMAL"—"CRUELLY."

A dog is the subject of property, both in the absence of statute and under Revisal 1905, § 3299, making it a misdemeanor to willfully injure or cruelly kill any useful animal, and defining the word "animal" as including every living creature, and the word "cruelly" to include every act causing unjustifiable physical pain or death, so that accused was guilty of the offense of willfully killing a dog, where the dog, when killed, was in the street outside of his turkey yard, which was inclosed by an impassable fence and gate, and could have been driven away; the fact that the dog had been in the yard before, harrassing the turkeys, and his bad habits, being immaterial.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 123-140; Dec. Dig. § 45.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 397, 398; vol. 2, pp. 1777, 1778.]

4. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Error in an instruction, in a prosecution for willfully killing a dog, that the fact that the dog, when killed, was actually killing accused's turkeys was not justification was harmless, where there was no evidence that the tur-

keys were in imminent danger from the dog, when he was killed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3154-3162; Dec. Dig. § 1172.\*]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Ashton Smith and another were convicted of willfully killing a dog, and they appeal. Affirmed.

Rouse & Land, for appellants. Attorney General Bickett and G. L. Jones, for the State.

WALKER, J. The defendants were indicted in the court below for the crime of willfully killing a dog, the property of the prosecutor. It would be vain and unprofitable to discuss, for the purpose of deciding, that a dog is a living creature, within the meaning of Revisal 1905, § 3299, under which the indictment was drawn and presented by the grand jury. We have held that he is a subject of property, a domesticated animal, and not merely *feræ naturæ*, and that a civil action may be maintained for damages caused by an injury to him, though he may have been guilty of some "youthful indiscretion" or harmless transgression. A dog is like a man in one respect at least—that is, he will do wrong sometimes; but, if the wrong is slight or trivial, he does not thereby forfeit his life. The opinion of Judge Gaston, in *Dodson v. Mock*, 20 N. C. (Ann. Ed.) 282, 32 Am. Dec. 677, has been generally taken as a clear and accurate statement of the law in regard to the right of property in this much petted and sometimes useful animal. That was a civil action to recover damages for killing the plaintiff's dog; the defendant contending that a dog was not property, and therefore no action would lie for any injury to him. In view of this contention, Judge Gaston said: "It was not necessary for the maintenance of the action that the plaintiff's dog should be shown to have pecuniary value. Dogs belong to that class of domiciled animals which the law recognizes as objects of property, and whatever it recognizes as property it will protect from invasion by a civil action on the part of the owners. It is not denied that a dog may be of such ferocious disposition or predatory habits as to render him a nuisance to the community, and such a dog, if permitted to go at large, may be destroyed by any person. But it would be monstrous to require exemption from all fault as a condition of existence. That the plaintiff's dog on one occasion stole an egg, and afterwards snapped at the heel of the man who had hotly pursued him *flagrante delicto*, that on another occasion he barked at the doctor's horse, and that he was shrewdly suspected in early life to have worried a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sheep, make up a catalogue of offenses not very numerous, nor of a very heinous character. If such defections as these from strict propriety be sufficient to give a dog a bad name and kill him, the entire race of these faithful and useful animals might be rightly extirpated." It was next held in *State v. Latham*, 35 N. C. 33, that the owner has such property in a dog that an indictment for malicious mischief in killing him will lie. These cases were followed by others, deciding different questions, but all recognizing the general rule that a dog is property. *Perry v. Phipps*, 32 N. C. 259, 51 Am. Dec. 387; *Mowery v. Salisbury*, 82 N. C. 177 (right to tax them). In *State v. Latham*, supra, the indictment was for malicious mischief, and the judge, by his charge, let the guilt of the defendant turn altogether upon an affirmative answer to the question whether the defendant, in killing the dog, was acting in defense of his property, without regard to whether or not he did so from malice to the owner. This was held to be error, as the gist of the offense was malice to the owner, and the killing, from passion excited against the dog by the injury or threatened injury to property, was not any defense, provided the defendant was actuated by malice towards the owner. In that case, Judge Nash took occasion to say: "By the old authorities, a dog was not a subject of larceny, because it was without value. But, notwithstanding, it is a species of property, recognized as such by the law, and for an injury to which an action at law will be sustained. *Dodson v. Mock*, 20 N. C. 282, 32 Am. Dec. 677. Many actions have been brought in this state, and in England, for injuries to such property. 2 Bl. Com. 393, 394. If, then, dogs be personal property, they are protected by the law, and the owner has such an interest in them as that he can protect and defend them; and the destruction of them, from malice to the owner, is, in law, malicious mischief."

Although counsel did not so contend, we must say that the dog is not an animal of such base nature or low degree, whatever his pedigree may be, as not to be entitled to the consideration and full protection of the law, or as to subject him to outlawry, if he has a bad reputation, or at least a habit of killing fowls, so that if he lurks near where they are to be found, although they are protected by a sufficient fence or other barrier against his predatory and ferocious disposition, he may be killed, even if he is not engaged in the actual attempt to slay and devour his supposed prey, or the danger of his doing so is not so imminent or immediately threatening that a prudent and reasonable man would be led to believe that his property is in jeopardy. We cannot give our assent to this principle. Admit such a right, and the peace and good order of society would be seriously endangered and could not well be preserved, for the exercise of such a right would ex-

cite the most angry passions and resentment of the dog's owner and eventually result in personal violence, thus disrupting the peace and quiet of the community. So thought Judge Pearson, in *Morse v. Nixon*, 51 N. C. 293. But we think that the dog is not an animal of such low origin and of such a base nature as to be beyond the pale of the law. The right to slay him cannot be justified merely by the baseness of his nature, but it is founded upon the natural right to protect person or property. He has the good will of mankind because of his friendship and loyalty, which are such marked traits of his character that they have been touchingly portrayed, both in song and story. Why, then, should he be declared an outlaw and a nuisance, and forfeit his life without any sufficient cause? This was never the law. Neither at the common law, nor since the passage of our present statute, prohibiting cruelty to animals, can a dog be killed for the commission of any slight or trivial offense (*State v. Neal*, 120 N. C. 614, 27 S. E. 81, 68 Am. St. Rep. 810); nor to redress past grievances (*Morse v. Nixon*, supra). As said by Chief Justice Pearson in the last-cited case: "It may be the killing will be justified by proving that the danger was imminent, making it necessary 'then and there' to kill the hog in order to save the life of the chicken, or prevent great bodily harm."

[1] It was well said by the Chief Justice in that case that, in order to recover damages in a civil action for injuries to property committed by a hog (or dog), the plaintiff must prove, as we say, a scienter; that is, knowledge of his vicious propensities, as in the case of the deer in the *Saratoga Park* (*Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487), where it was held: "Certain animals *feræ naturæ* may doubtless be domesticated to such an extent as to be classed, in respect to the liability of the owner for injuries they commit, with the class known as tame or domestic animals; but, inasmuch as they are liable to relapse into their wild habits and to become mischievous, the rule is that if they do so, and the owner becomes notified of their vicious habit, they are included in the same rule as if they had never been domesticated; the gist of the action in such a case, as in the case of untamed wild animals, being not merely the negligent keeping of the animal, but the keeping of the same with knowledge of the vicious and mischievous propensity of the animal. *Wharton, Negligence*, § 922; *Decker v. Gammon*, 44 Me. 322 [69 Am. Dec. 99]. Three or more classes of cases exist, in which it is held that the owners of animals are liable for injuries done by the same to the persons or property of others; the required allegations and proofs varying in each case. 2 Bl. Com. per Cooley, 390. Owners of wild beasts, or beasts that are in their nature vicious, are liable under all or most all

circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge, from which it follows that he is guilty of negligence in permitting the same to be at large. Though the owner have no particular notice that the animal ever did any such mischief before, yet, if the animal be of the class that is *feræ naturæ*, the owner is liable to an action of damage, if it get loose and do harm. 1 Hale, P. C. 430; *Worth v. Gilling*, Law Rep. 2 C. P. 3. Owners are liable for the hurt done by the animal, even without notice of the propensity, if the animal is naturally mischievous; but if it is of a tame nature there must be notice of the vicious habit. *Mason v. Keeling*, 12 Mod. Rep. 332; *Rex v. Huggins*, 2 Ld. Raym. 1574. Damage may be done by a domestic animal kept for use or convenience, but the rule is that the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief. *Vrooman v. Lawyer*, 13 Johns. (N. Y.) 339; *Buxendin v. Sharp*, 2 Salk. 662; *Cockerham v. Nixon* [33 N. C.] 269. Domestic animals, such as oxen or horses, may injure the person or property of another, but courts of justice invariably hold that if they are rightfully in the place where the injury is inflicted the owner of the animal is not liable for such an injury, unless he knew that the animal was accustomed to be vicious; and in suits for such injuries such knowledge must be alleged and proved, as the cause of action arises from the keeping of the animal after the knowledge of its vicious propensity. *Jackson v. Smithson*, 15 Mée. & W. 563; *Van Leuven v. Lyke*, 1 N. Y. 515 [49 Am. Dec. 346]; *Card v. Case*, 5 C. B. 632; *Hudson v. Roberts*, 6 Exch. 697; *Dearth v. Baker*, 22 Wis. 73; *Cox v. Burbridge*, 13 C. B. (N. S.) 430." It would therefore, be strange if a person is privileged to take the law into his own hands, and redress supposed and past grievances by an extra-judicial method or remedy, under circumstances which may not entitle him to sue for and recover damages in a civil action. Such a view of the law was adopted in *Dodson v. Mock*, 20 N. C. 282, 32 Am. Dec. 677, but it has been said of that case by the court, in *Morse v. Nixon*, *supra* (opinion by Chief Justice Pearson), that Judge Gaston fell into error in his dictum that a dog may, by reason of his predatory habits, become a public nuisance, so that any person may kill him in order to abate the nuisance, although not specially injured or aggrieved. We think the law of this state is correctly stated by Judge Gaston (as far as he went) in *Parrott v. Hartsfield*, 20 N. C. (Ann. Ed.) 242, 32 Am. Dec. 673, as follows: "The law authorizes the act of killing a dog found on a man's premises in the act

of attempting to destroy his sheep, calves, conies in a warren, deer in a park, or other reclaimed animals used for human food, and unable to defend themselves. *Wadhurst v. Damme*, Cro. Jm. 45; *Barrington v. Summers*, 3 Lev. 28; *Leonard v. Wilkins*, 9 Johns. [N. Y.] 233."

[2] In the actual and necessary defense of property, it is not necessary to show that the owner of the dog knew of his vicious propensities, or that there was no other mode of defending the things assailed. Com. Dig. Pleader, 3 M. 331, § 336. "The law is different where the dog is chasing animals *feræ naturæ*, such as hares or deer in a wild state, or combating with another dog. In these cases a necessity for the act of killing must be made out, or the killing will not be justified. *Wright v. Ramscot*, 1 Saun. 82; *Vere v. Ld. Cawdor*, 11 East. 567. The object of the law in conferring this authority is not to punish past wrongs, but to prevent wrongs impending or menaced. It may therefore be exercised before the injury is begun, if, in truth, it be imminent, for otherwise the preventive remedy may be too late." *Parrott v. Hartsfield*, *supra*. This court (by Chief Justice Pearson), in *Morse v. Nixon*, approved the rule as thus stated by Judge Gaston. It is true that Judge Pearson added this qualification, or expressed this doubt: "But we are inclined to the opinion that, even under these circumstances, it is not justifiable to kill the hog. It should be impounded or driven away, and notice given to the owner, so that he may put it up; at all events, this course is dictated by the moral duty of good neighborhood." But we conclude that the better doctrine is the first one stated by the learned Chief Justice, and the one fully sustained by the opinion of the court in *Parrott v. Hartsfield*, *supra*. If the danger to the animal, whose injury or destruction is threatened, be imminent, or his safety presently menaced, in the sense that a man of ordinary prudence would be reasonably led to believe that it is necessary for him to kill, in order to protect his property, and to act at once, he may defend it, even unto the death of the dog, or other animal, which is about to attack it. We understand this to be the law as declared in a very brief opinion of the court (by Rodman, J.), in *Williams v. Dixon*, 65 N. C. 416, citing and approving what is said to that effect in *Parrott v. Hartsfield* and *Morse v. Nixon*. It is taken for granted, in *Runyan v. Patterson*, 87 N. C. 343, that if a hog or dog is caught in flagrante delicto, or "red-handed"—that is, while in the act of injuring property, such as turkeys or chickens—he may be shot on the spot by their owner, citing the above cases. Why not, if he is about to spring upon his prey, and when the necessity of protecting his property reasonably appears to its owner to be just as imperative? Our statute (Revisal, § 3299) makes

it criminal to willfully or cruelly kill or injure any useful animal, employing that word in the sense of any "living creature," and "cruelty" is defined in the same section to mean "any act, omission or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted." So far as this case is concerned, and the point raised by the defendant, we do not think the statute has materially changed the law as formerly declared. The defendant is guilty at common law, and surely under the statute, if he unjustifiably killed the dog, and what is an unwarranted or unjustifiable killing has already been fully stated.

[3, 4] Upon the facts of this case, we are of the opinion, and so decide, that the defendants were guilty, and that, while the judge erred when he charged that, if the dog was actually killing the turkeys, it would be no defense or justification for the killing, this error was harmless, as there was no evidence that the danger to the turkeys was imminent, and the necessity to kill was apparent. The fact that the dog had visited the premises before, if it had been proven, would not justify the defendant's act in slaying him. It is not the dog's predatory habits, nor his past transgressions, nor his reputation, however bad, but the doctrine of self-defense whether of person or property, that gives the right to kill. The dog was not in a position, with reference to the turkeys, to make the danger to them imminent; he being in the road or street outside the defendant's yard, with an impassable fence and closed gate between him and them. He could easily have been driven away without resorting to extreme punishment, for it was nothing but punishment inflicted upon him for his supposed past transgressions; that is, resentment and retaliation. It was an act unlawful at common law, and willful, within the meaning of the statute, even as construed in *State v. Clifton*, 152 N. C. 802, 67 S. E. 751, 28 L. R. A. (N. S.) 673.

No error.

(156 N. C. 177)

BURLINGHAM et al. v. CANADY et al.

(Supreme Court of North Carolina. Oct. 4, 1911.)

1. PROCESS (§ 148\*)—EVIDENCE AS TO SERVICE—PRESUMPTIONS.

A sheriff's return under oath as to service made imports truth, and cannot be overthrown or assumed to be false by the affidavits merely of the person upon whom the service is alleged to have been made.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 148.\*]

2. APPEAL AND ERROR (§ 566\*)—FAILURE TO MAKE CASE—AFFIRMANCE OF JUDGMENT.

Where appellant serves a case on appeal and a counter case is properly served by the appellee, and appellant does not immediately re-

quest the judge to appoint a time and place to settle the case, as provided by Revisal 1905, § 591, the case of the appellee becomes the case on appeal; and, if that case has not been certified as a part of the transcript and there is no error in the record proper, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 566.\*]

Appeal from Superior Court, Onslow County; Peebles, Judge.

Action by Charles C. Burlingham and others against H. C. Canady and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

T. C. Wooten, for appellants. E. K. Bryan and Frank Thompson, for appellees.

WALKER, J. The defendants in this case appealed to this court from a verdict and judgment rendered against them in the court below, and served their case on appeal upon the plaintiffs. The plaintiffs, disagreeing to this case, prepared a counter case and caused the same to be duly served upon the defendant's counsel by the sheriff, who made a return to that effect. Both cases were then filed in the clerk's office. Plaintiff's counsel moved in this court to affirm the judgment, as no case on appeal had been sent to this court, though the record proper is here, the motion being based upon the ground that counsel disagreed to the case, and the judge was not requested, as required by Revisal 1905, § 591, to settle the case, and that no case on appeal has actually been settled. Plaintiff's counsel filed an affidavit, in which he denied positively that any counter case or exceptions had been served upon him or the defendants, and that he inquired of the clerk, who told him that no such case or exceptions had been filed in his office. This is the only affidavit introduced in behalf of the defendants. Plaintiffs filed the affidavits of Mr. Frank Thompson, one of their attorneys, and the sheriff, E. W. Summerville, who state that the counter case was served upon the defendants' counsel on June 14, 1911, and the sheriff's return also shows that such service was made by him. M. M. Capps, the clerk, testifies that the counter case was filed in his office, and he thought that it was sent up with the record to this court, and that the statement to the contrary in his certificate is an error which he inadvertently committed, as the record for this court was prepared by the defendant's attorneys at their request, and was presented to him for his signature to the certificate, and he supposed, of course, that the record was in proper form and contained the counter case on appeal, and he so stated to Mr. Frank Thompson, defendant's attorney, afterwards. The record here does not contain the counter case, but only the case as tendered by the defendants to the plaintiffs. Under the circumstances, we must



grant the plaintiff's motion and affirm, as we discover no error in the record proper.

[1] The sheriff's return imports truth. It is made under oath and cannot be overthrown or shown to be false by the affidavit merely of the person upon whom the service is alleged to have been made. It has often been held that the return of a ministerial officer as to what he has done out of court is *prima facie* true, and cannot be contradicted by a single affidavit. *Hunter v. Kirk*, 11 N. C. 277; *Mason v. Miles*, 63 N. C. 564. It would be oath against oath, and we could not well say with whom was the truth. Besides, the service of process or other papers, and the return thereof, are very serious matters, and should not be lightly set aside. In this case, though, the sheriff's return is strongly corroborated by the affidavits of Mr. Thompson, the clerk, and the officer himself, and, if no technical force or weight is to be given to the return, we would be bound by the decided weight of the evidence to find against the defendants as to the fact of service.

[2] As the counterclaim was properly served, it was the duty of the defendants to immediately request the judge to appoint a time and place to settle the case under Revisal, § 591, and, upon his failure to comply with this requirement of the statute, the case of the appellee became the case on appeal. As that case has not been certified to this Court as part of the transcript, and therefore has not been printed, we affirm the judgment.

**Affirmed.**

(156 N. C. 222)

# HINES v. NORFOLK & S. R. CO.

(Supreme Court of North Carolina. Oct. 11, 1911.)

## 1. RAILROADS (§ 410\*)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE—INJURY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Where a railroad engineer, by keeping a lookout, could have seen, by ordinary care, that a collision with a horse and cart was imminent in time to stop his train and avoid it, it was his duty to do so, and, notwithstanding a failure to look and listen at the crossing, the plaintiff could recover for injuries caused by the collision.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 410.\*]

## 2. APPEAL AND ERROR (§ 927\*)—PRESUMPTION—NONSUIT—EVIDENCE.

On appeal from the granting of a motion for nonsuit, the evidence, and the facts that the jury could have found from it, will be construed most favorably to the plaintiff.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.\*]

## 3. RAILROADS (§ 443\*)—INJURIES AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Evidence, in an action for an injury to a horse and cart at a railroad crossing, *held* not

to show contributory negligence on the part of the driver of the horse.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.\*]

## 4. RAILROADS (§ 421\*)—CROSSING—CARE REQUIRED.

Where a horse attached to a wagon passes a railroad crossing in safety, and when a short distance away begins to back toward the track, the driver is only required to act as a man of ordinary prudence would do under similar circumstances, and not as a prudent man, in the light of subsequent events, might have done.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1503; Dec. Dig. § 421.\*]

## 5. RAILROADS (§ 421\*)—CROSSING—CONTRIBUTORY NEGLIGENCE.

Where a horse attached to a wagon passes a railroad crossing in safety, and when a short distance away begins to back toward the track, and the driver is negligent, and such negligence continues to the time of the collision with a train and contributes to it, there can be no recovery for injuries from the collision.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1503; Dec. Dig. § 421.\*]

## 6. RAILROADS (§ 446\*)—INJURIES AT CROSSING—QUESTION FOR JURY—LAST CLEAR CHANCE.

In an action against a railroad for injuries to a horse and wagon at a crossing, *held*, that the question of the engineer's last clear chance was for the jury, under the evidence.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 446.\*]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Action by Harvey C. Hines against the Norfolk & Southern Railroad Company. Judgment for defendant, and plaintiff appeals. New trial.

This action is to recover damages for injury to the horse and wagon of the plaintiff. The plaintiff alleges that the injury occurred on the 16th day of December, 1909, and was caused by the negligence of the defendant, which is denied. The wagon was loaded with apples, and the injury occurred about 8 o'clock a. m., at the first crossing after leaving the depot at Kinston. There is evidence that the driver did not look and listen before entering upon the track, and that he saw the train of the defendant as he reached the track. It is admitted that the horse and wagon crossed the track of the defendant in safety, and had reached a point 25 or 28 yards beyond the track, at the time the train of the defendant, about 75 yards distant, was approaching the crossing. The horse then began backing, and according to the evidence of the plaintiff did not stop until the wagon collided with the engine. There is some evidence of obstructions to the view near the track; but there is also evidence that the horse was in full view of the engine, and the engineer admitted that he saw the horse backing when he was within 40 or 50 feet of the crossing. There is also evidence that the train was running about 4 or 5 miles an hour, and could have been stopped in eight feet, and that the engineer called to

the driver of the wagon, and told him to stop backing his horse into the train.

The driver gives the following account of the occurrence: "Q. What took place when you came to the track? A. I done crossed the track; the train bell was ringing, and my horse looked up like he saw it, and stopped; and he commenced to back back. When he commenced to back back, I commenced tapping him, to keep him from backing. I saw he was going to stop, and I jumped off and ran to his head, so as to pull him around the corner. He kept backing. I ran to the end of the dray. When I got to the back, the train was very near. I slid out from behind the cart, and the train struck the back end of the dray, and knocked the horse down. The front part of the bumper struck the cart; the back end of the dray was struck by the cowcatcher. [It is admitted that the street crossing Gordon is Independence street.] Q. When you crossed the track going this way, did you see the train? A. Yes, sir; it was further down, about 75 steps, yards—something like that—from the street I was crossing. Q. When your horse stopped and was looking at the train, can you estimate how fast the train was going? A. About 4 or 5 miles an hour. Q. When the train was coming towards you, did you see anybody looking out of the windows of the train? A. There was a whole lot looking out. The engineer called to me, and said to stop backing my horse in the train. Q. Where was he? How far was the engineer when he was talking to you about not backing your horse? A. About 15 or 20 steps from me. Q. How long have you been driving a horse? A. I have been tending to him for about a year. I have been accustomed to horses for about 15 or 20 years. Q. What damage was done to the wagon after the mix-up? A. The right wheel was torn to pieces—the right wheel and shafts. Q. What injury did the horse receive? A. The right foot—I think it was the right one—broke in two. They had to kill him. He was smashed up. Q. What else was done besides breaking his leg? A. Just smashed him right down."

The defendant offered evidence to the contrary, and the engineer testified as follows: "Q. Were you the engineer on the train at that time? A. Yes, sir. Q. How long have you been in the service of the company? A. On this road 11 years. Q. State what you saw. A. I noticed when I approached this crossing—I was about as far from here to the door, the length of this building—this driver was sitting up in front of his cart when I noticed him. By my noticing him, the horse was backing; the driver jumped off. The horse was backing; that put him in this direction [indicating]. The lines were over the hames; the horse kept rearing. I began to slow up; the horse backed up more, less than the width of this stand, and stopped. I ran the engine, and when I was going by the horse reared up. That brought

him by the engine, and the crank pin on the driver struck the cart, and threw the horse under the tender, and broke his leg and bruised him up. Q. You say you were the length of this building when you first saw him? A. I might have been more. Q. How close were you when you first saw him? A. If he had kept on, he would have gone by; the horse stopped about 10 feet of the engine. I released her, and let her go by. Q. How far did you run after you struck the cart? A. I judge about eight feet; it didn't make a revolution. The crank pin came just near enough to slew the horse around; it struck the right wheel of the cart. The driver was on the opposite side of me. Q. William Hadley said you hollered to him? A. No, sir; I never said a word to him until I stopped. The horse was down. I said, 'Why did you want to back the horse in the train?' Q. When the horse began to back the last time, could you have stopped the train to prevent him from backing the cart into the train? A. No sir; it was so quick. He stood so a little time. I guess I moved the length of this room before he moved the second time—enough for me to go by him. Instead of the horse going forward, the driver had the reins on him; he backed back. Q. What part of the engine struck the horse? A. The front driver struck the cart; that is, middle of the engine."

Upon the conclusion of the evidence, his honor granted the motion of the defendant for judgment of nonsuit, and the plaintiff excepted and appealed.

Loftin & Dawson, for appellant. Rouse & Land, for appellee.

ALLEN, J. [1] The right of the plaintiff to maintain this action must be determined by the conduct of the parties after the time the horse began to back, and, if the evidence presents a phase from which the jury could find that the engineer, by keeping a lookout, could, by the exercise of ordinary care, have seen that a collision was imminent, in time to stop his train and avoid it, then it was his duty to do so, and if the jury should so find the plaintiff could recover, notwithstanding the failure of the driver to look and listen at the crossing. This is clearly stated by Justice Hoke, in *Snipes v. Manf. Co.*, 152 N. C. 46, 87 S. E. 29. After discussing the duty of the engineer to keep a lookout, and to stop and avoid injury when he can do so by the exercise of ordinary care, he says: "Ordinarily, cases calling for application of the doctrine indicated arise when the injured person was down on the track, apparently unconscious or helpless; but such extreme conditions are not at all essential, and the ruling should prevail whenever an engineer operating a railroad train does, or, in proper performance of his duty, should, observe that a collision is not improbable, and that a person is in such a position of peril that ordinary effort on his part will not

likely avail to save him from injury; and the authorities are also to the effect that an engineer in such circumstances should resolve doubts in favor of the safer course." The quotation speaks in terms of persons, but the principle also applies to injury to property.

[2] Under this rule, what is the evidence, and what facts could the jury find from it, giving it a construction most favorable to the plaintiff, which we must do on a motion for nonsuit? The evidence of the plaintiff, if believed, shows that the horse was 25 or 28 steps beyond the crossing, when he began to back; that he was backing towards the track; that he continued to back without stopping until there was a collision between the wagon and the train; that the driver was trying to stop the horse, and could not do so; that the horse and wagon and driver were in full view of the engineer; that the engineer called to the driver, and told him to stop backing into the train, when about 15 or 20 yards from him; that at the time the horse began to back the engine was 75 yards from the crossing, and that it could have been stopped in eight feet. If so, there was evidence that the engineer could, by the exercise of ordinary care, have seen that a collision was imminent in time to stop the engine and avoid the injury. There was evidence on the part of the defendant, which, if accepted by the jury, would exonerate it. The engineer testified that he saw the horse backing, and reduced the speed of his engine; that when near the horse and wagon the horse stopped, and appeared to be under control; that he then increased his speed, and as he was passing the crossing the horse suddenly reared and backed into the train. If the jury should find this evidence to be true, the defendant would not be liable. The case of *Kearns v. Railroad*, 139 N. C. 471, 52 S. E. 131, is not in conflict with these views. In that case the train had passed the crossing when the horse began to back, and there was no evidence, in the opinion of the court, of anything the engineer could have done to avoid the injury.

[3-5] There is some evidence of negligence on the part of the driver in charge of the horse and wagon at the time of the injury; but it is not of such character that we can declare, as matter of law, that it amounts to contributory negligence. It was his duty to look and listen as he approached the crossing, and ordinarily a failure to do so will bar a recovery for an injury on the crossing; but in this case the crossing was passed in safety, and there is no causal connection between this failure of duty and the injury. If, after the horse began to back, the driver was negligent, and this negligence continued to the time of the injury and contributed to it, the plaintiff could not recover; but in passing upon this question the jury would have the right to consider his surroundings,

and the law would require no more of him than to act as a man of ordinary prudence would have done under similar circumstances. The question is, not what a prudent man would do now, in the light of subsequent events, but what would a man of ordinary prudence have done in the situation the driver was placed.

[6] In our opinion, there was some evidence for the consideration of the jury, and a new trial is ordered.

New trial.

(156 N. C. 187)

# LIVERMAN v. CAHOON.

(Supreme Court of North Carolina. Oct. 11, 1911.)

## 1. LIMITATION OF ACTIONS (§ 25\*)—JOINT NOTE—DISCHARGE.

Where plaintiff, one of two joint makers of a note, paid it at maturity, the payee indorsing it to plaintiff without recourse, this payment discharged the note, and plaintiff's right to recover against his co-maker was upon the implied promise, and not upon the note, and hence the statute limiting the time for bringing an action against a written instrument does not apply to plaintiff's cause of action, which was barred in three years.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 25.\*]

## 2. LIMITATION OF ACTIONS (§ 138\*)—PROMISE NOT TO PLEAD THE STATUTE.

Where plaintiff, one of two joint makers of a note, paid it at maturity, and the defendant requested him to "hold up the note until he could pay his part," this request was not a promise not to plead limitations, and plaintiff could not excuse his delay to sue upon that ground.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 573; Dec. Dig. § 138.\*]

Walker and Brown, JJ., dissenting.

Appeal from Superior Court, Tyrrell County; O. H. Allen, Judge.

Action by W. E. Liverman against F. L. W. Cahoon. From a judgment for defendant, plaintiff appeals. Affirmed.

E. F. Aydlett and T. H. Woodley, for appellant. I. M. Meekins and M. H. Tillitt, for appellee.

CLARK, C. J. On June 21, 1904, the plaintiff and the defendant, Cahoon, executed a joint note under seal at 60 days to John W. Sykes for \$600, with interest from date. This bond was secured by chattel mortgage on certain logs. It fell due August 21, 1904, and was paid by the plaintiff by a check for \$606.90 dated September 27, 1904. This action for contribution was begun October 25, 1910, and the defendant pleaded the statute of limitations. The plaintiff testified that, when the bond fell due, the defendant said he was not prepared to pay it, and asked the plaintiff "to take up the note and hold the same until he could pay his part of it, which would be in a short time; that this was all that was said to him by Cahoon

about paying the note"; that he paid the note, and that it was then indorsed by the obligee as follow: "Pay the within note to W. E. Liverman, without recourse on me, 27 Sept. 1904. J. W. Sykes." The judge instructed the jury that, if they believed all the evidence, to answer the issue as to the statute of limitations "Yes." Plaintiff excepted. Verdict and judgment accordingly. Plaintiff appealed.

[1, 2] This presents the only point in the case. The chattel mortgage security cuts no figure as the logs were the joint property of the obligors, and have doubtless long since been used. In *Sherwood v. Collier*, 14 N. C. 381, 24 Am. Dec. 264, Chief Justice Ruffin said: "A payment by any one of two or more jointly or jointly and severally bound for the same debt is payment by all. \* \* \* It is true that, if payment be not intended by the purchaser, there is a difference, but that can only be by a stranger or by using the name of a stranger to whom an assignment can be made when jointly liable. This is upon the score of the intention, and because the plea of payment by a stranger is bad upon demurrer. If the assignment of a joint security be taken to the surety himself, there is an extinguishment, notwithstanding the intention, because an assignment to one of his own debt is an absurdity." This case has been often cited and approved. See *Anno. Ed.* Here the payment was made by one of the principals, and not even by a surety, and there is no security to be assigned. The evidence makes out simply a payment by one of the joint obligors and a request by the other to hold up the note "until he could pay his part of it, which would be in a short time." This request implies no more than a promise by the defendant to pay his half which the law raised from the fact of payment without any express promise. There was no promise not to plead the statute if delay was given, as is held necessary. *Hill v. Hilliard*, 103 N. C. 34, 9 S. E. 639. Nor, indeed, was there any promise to delay given by plaintiff. The indorsement of the note to the plaintiff, one of the obligors, by the creditor, in no wise altered the fact that it was a payment, and that the note was canceled thereby. The plaintiff could not hold the note and sue upon his own obligation which he had already paid. He was entitled to recover of the defendant one-half of the sum he had paid. Such action should have been brought within three years. The plaintiff, not having done so, is barred by the statute of limitations, which has been pleaded by the defendant. The instruction of his honor was correct.

No error.

**WALKER, J.** (dissenting). The bond in this case was executed by Liverman and Cahoon, as joint obligors, on June 21, 1904, and they promised to pay the sum of \$600 to John W. Sykes on August 21, 1904. When

Liverman gave his check to Sykes, the latter indorsed the note to Liverman without recourse. The plaintiff, W. E. Liverman, testified as follows: "When the note fell due, the said Cahoon came to me, and said that the note was due, and wanted to know if I would not arrange to take it up and pay it; said he was not prepared then to pay it, and asked me to take it up and hold the same until he could pay his part of it, which would be in a short time." This was all that was said to him by Cahoon about paying the note. He, the plaintiff, told J. W. Sykes, after the conversation with Cahoon, he would pay it if he, the said Sykes, would indorse the note to him. Cahoon knew he was going to pay the note and take it up. He got him to take it up and hold it until he could pay his part. All of this was known to Sykes. Witness paid the note by check to Sykes on September 27, 1904, in the sum of \$606.90, which covered the face value of the note and interest accrued. The defendant, Cahoon, has not paid any part of the note. The court instructed the jury that, if they believed the evidence, they should answer the issue as to the statute of limitations "Yes," which was done, and plaintiff appealed from the judgment upon the verdict. So that if, in any view of the evidence, the plaintiff was entitled to recover notwithstanding the plea of the statute, there was error, and the judgment should be reversed. I do not deny that, under the old system of pleading, practice, and procedure, this court held that, in order for a surety or person secondarily or equally and jointly liable with another to pay a debt to recover at law against the principal, cosurety, or co-obligor for the latter's ratable part of any sum paid by him to the creditor in satisfaction of the debt, he must have had the note or evidence of the debt assigned to a third party for his use and benefit, and I am aware that it was said in *Sherwood v. Collier*, 14 N. C. 381, 24 Am. Dec. 264, that this was put on the ground that a plea of payment by a stranger was bad on demurrer. This is a fiction, pure and simple—a refinement of the ancient law—for the fact remained that the person secondarily or jointly liable paid the whole of the debt to the creditor, and the latter was, therefore, fully paid and satisfied, and assignment to a "dummy" or "man of straw" did not alter the fact. It is almost retrogressive, and certainly not progressive, to apply such a rule at this late day, when even the doctrine as to the unity of husband and wife, which takes from her the right to contract, is about to disappear. Is this not one of the fossilized doctrines of the common law, which is not suited to this age and our present enlightened ideas? I regret to say that ours was among the very few courts in this country or in England that required such an assignment under any circumstances, and those courts elsewhere that did require it gave quite a

different reason from that stated by Judge Ruffin for so doing. It was said by them to be necessary because, by paying the debt, the surety or joint obligor did not acquire the legal title to the note, and therefore could not sue upon it at law, and either of two courses was open to him: He might have the note assigned—that is, the legal title—by the payee to a stranger, and then sue at law upon the note; or he could proceed in equity, when, if necessary, that court would require the payee to properly assign the note so as to enable the surety or joint obligor to recover at law, but most of the courts held that a court of equity did not consider an assignment as necessary, and therefore would proceed to administer justice according to the very right of the matter, as in equity the plaintiff could sue upon an equitable title, or, at least, as equity considers that as done which should be done, it would treat the note as assigned without any formal transfer thereof. It was also held that, if it had been necessary to sue in equity upon the legal title and to have a formal assignment for that purpose, or to make the payee a party, the court would compel the payee of the note to permit the use of his name in the suit, or to execute an assignment, with proper indemnity to him against costs. But, whatever the procedure under the system prevailing prior to 1868, it is very certain that in that year, by Constitution and statute, a fundamental change was effected in common-law methods, and all forms and useless fictions were abolished, and a new and more enlightened procedure was installed in its place. Many of the quaint, queer, and impractical notions of ancient times, which were found to be unsuited to our civilization, and which often defeated the right and sustained the wrong, perished with the demise of John Doe and Richard Roe, and the sometimes perplexing fiction of lease, entry, and ouster ceased to complicate the action of ejectment and confound the pleader, so that a good title can now be vindicated by a simple statement and proof of the facts. Those forms and fictions are even now of historical value, as evidences of the growth and development of the law, and as such deserve the greatest respect and reverence, but they no longer have any place in our present and more rational system of jurisprudence, which has simplified all methods of pleading, practice, and procedure. The spirit of reform, which was aroused in the early part of the last century and which brought to the leadership of the movement for a radical change in the technical and artificial system of the law and of special pleading some of the greatest statesmen, publicists, and lawyers of England and this country, has at last wrought such a reversal of those methods of procedure as to do away with the necessity of having both a judge and chancellor to try and decide one case separately and in sections, and a person aggrieved, or one seeking subrogation, may now assert his rights in one action, without

regard to forms or fictions, and may recover upon a simple statement of the facts and the merits of his claim (*Calvert v. Peebles*, 82 N. C. 334), if he is the real party in interest; that is, the party having the beneficial right. Even a court of equity, as formerly constituted, would not send a plaintiff to a court of law to prosecute his case there after giving him the legal title, but would proceed itself to award full relief. The rule is thus stated by the text-writers, and is supported by the authorities: "Equity jurisdiction, having rightfully attached to a controversy, will be made effective for the purpose of complete relief, though it may involve the adjudication of purely legal questions." *Fetter on Equity*, p. 13 (5); *Simmons v. Hendricks*, 43 N. C. 84, 55 Am. Dec. 439. Or, as put in the graphic language of Lord Nottingham: "Where this court can determine the matter, it shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere." The rule rests on the principle that equity prevents multiplicity of suits. *Jesus College v. Bloom*, 8 Atk. 262, 263; *Turner v. Pierce*, 34 Wls. 658; *Eastman v. Savings Bank*, 58 N. H. 421; *McGean v. Railroad Co.*, 133 N. Y. 16, 30 N. E. 647. It will give a money judgment, if necessary to full relief. "A court of equity adapts its relief to the exigencies of the case in hand. It may restrain or compel the defendant; it may appoint a receiver or order an accounting; it may decree specific performance, or order the delivery to the plaintiff of specific real or personal property; or it may order a sum of money to be paid to the plaintiff, and give him a personal judgment therefor." *Murtha v. Curley*, 90 N. Y. 378; *Sprinkle v. Wellborn*, 140 N. C. 177, 178, 52 S. E. 666, 671, 8 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827. In the case last cited it is said: "The administration of this relief is eminently proper under the reformed procedure, where the rights of parties are settled and determined in one action, the distinction between actions at law and suits in equity having been abolished. 1 Pom. Eq. Jur. § 242." This just and beneficent rule, which formerly prevailed in courts of equity, has now become the fundamental principle of our present system of pleading and procedure, so that one judge and one action are now sufficient for the adjudication of all rights—legal and equitable—cases being decided upon their merits, and not brought to the ordeal and test of vain and useless technicalities, so ancient as to be hoary with the age of centuries, the resultant rule, and the material one, being that a party may now recover upon an equitable title, as our courts administer both legal and equitable rights. *Farmer v. Daniel*, 82 N. C. 153; *Condry v. Cheshire*, 88 N. C. 375.

Shall we halt in the march of this progressive reform in pleading and procedure and allow a defendant to escape the payment of an honest and meritorious claim upon a flimsy technicality. But let us see what the law

of this case was formerly and is now. I will not consider here the express agreement of Cahoon to pay his share, and to permit the plaintiff, when he paid all, to succeed to the rights of every kind in the note possessed by the creditor at the very time of the payment, but will show by principle and the overwhelming weight of authority that under the righteous doctrine of subrogation Liverman is entitled to recover in this action, and Cahoon cannot take refuge behind the statute of limitations, and escape the payment of his just and equitable share of this debt. Sheldon, in his work on Subrogation, § 1, says that "it is a doctrine primarily of equity jurisprudence, although its principles are now often applied in courts of common law, especially in those states in which equitable remedies are administered through the forms of law. It is a substitution, ordinarily the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. More broadly, it is the substitution of one person in the place of another, whether as a creditor or as the possessor of any other rightful claim. The substitute is put in all respects in the place of the party to whose rights he is subrogated. It has been adopted from the civil law by courts of equity. In this country, under the initial guidance of Chancellor Kent, its principles have been more widely developed, and its doctrines more generally applied, than in England. It is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form, independently of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter." What more of authority do we need? Bispham says that "the equity of subrogation springs naturally out of the two equities, just considered, of contribution and exoneration, and is, in fact, one of the means by which those equities are enforced. \* \* \*

This equity of subrogation is one eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one, therefore, which is much encouraged and protected." Bispham, *Equity*, §§ 335, 336.

And, again, in Sheldon on Subrogation, § 2, it is said to be defined "as that process by which another person is put into the place of a creditor, so that the rights and securities of the creditor pass to the person who, by being subrogated to him, enters into his right. It is a legal conception, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, who is thus substituted to the rights, remedies, and securities of another. The party who is subrogated is regarded as entitled to the same

rights, and, indeed, as constituting one and the same person with the creditor whom he succeeds." This statement of the doctrine closely resembles our case, and fully embraces it within its terms. "Whenever, to protect his own rights, one not a volunteer pays or satisfies a debt for which another is primarily responsible, he is substituted in equity in place of the creditor, and may enforce against the person primarily liable all the securities, benefits, and advantages held by the creditor. Like contribution, subrogation rests on principles of equity and justice, and may be decreed, though no contract or privity of any kind exists between the parties." Fetter on Equity, p. 254, § 170. It applies as between co-obligors, says Sheldon, as well as between principal and surety and between sureties and others secondarily liable, and where a joint maker or surety of a note has paid the debt which ought, in whole or in part, to have been paid by another, he is entitled not only to the rights, but to all the remedies of the creditor by way of subrogation. Sheldon, § 3. "This right of subrogation among parties severally bound as principals has been denied; but the usual rule is that one of several joint debtors will as against his codebtors ordinarily be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his codebtors, by means thereof, their proportional share of the indebtedness which he has discharged; and this, as in other cases of subrogation, arises rather from natural justice than from contract. Each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as a surety for his co-debtors as to that part of the debt which ought to be discharged by them." Sheldon, § 169, and many cases cited in the notes. See especially *Sterling v. Stewart*, 74 Pa. 445, 15 Am. Rep. 559; *Moore v. State*, 49 Ind. 558; *Railroad v. Walker*, 45 Ohio St. 577, 16 N. E. 475; *Durbin v. Kuney*, 19 Or. 71, 23 Pac. 661; *Shropshire v. His Creditors*, 15 La. Ann. 705; *Boyd v. Boyd*, 3 Grat. (Va.) 113; *Martin v. Baldwin*, 7 Ala. 923; *Goodall v. Wentworth*, 20 Me. 322; *Sumner v. Rhodes*, 14 Conn. 135; *Chipman v. Morrill*, 20 Cal. 131; *Young v. Vough*, 23 N. J. Eq. 325. Those cases decide that joint debtors or coprincipals, as between themselves and their creditor, are each liable for the whole debt, but, as between themselves, each is liable only for his proportion thereof, and, as to the rest, each is surety for the others, or, to express it a little differently and more exactly, where several parties execute a joint note for a debt owing by them, each is, as to his own proportion, a principal, and as to the share of each of the other makers a cosurety, a concrete example, they say, being this: Where a note is signed by three persons, each is principal for one-third, and a cosurety for the other two-thirds, and all of the said cases agree that, if any one of the coprincipals performs the

whole duty and pays the entire amount, he is at once subrogated to all the rights and remedies of the principal, and is clothed with the same, without impairment or prejudice, and in the sense that he takes the creditor's place as between himself and the principal who is in default, so that he can sue, just as the creditor could have done, if the debt had not been paid, and this is so whether the obligation arose out of contract or by operation of law. *Dobyns v. Rawley*, 76 Va. 537. The doctrine is so clearly and strongly stated by Chief Justice Brickell in *Owen v. McGehee*, 61 Ala. 440, that a review of the authorities would not be near complete without the addition of his words: "It is a principle of equity, having its foundation in natural justice, that, when one discharges more than his just portion of a common burden, another who received the benefit ought to refund to him a ratable proportion. The principle applies, not only to the relation of principal and surety, but to that of original co-contractors, and whenever parties stand in a relation in which equality of burthen is equity between them, when one ought not to bear the burthen in case of the others, 'as all are equally bound and are equally released,' says Judge Story, 'it seems but just that in such a case all should contribute in proportion toward a benefit obtained by all upon the maxim, "Qui sentit commodum sentire debet et onus," and the doctrine has an equal foundation in morals, since no one ought to profit by another's loss when he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim, and upon motives of mere caprice or favoritism to make a common burden a most gross and grievous personal oppression.' 1 Story's Eq. § 493." Some of the above-cited cases also hold that a suit in equity to enforce contribution by way of subrogation is far different from the action of assumpsit at law, founded upon the implied promise of the defaulting coprincipal to refund what has been paid to his use and for his ease and benefit, and that the two actions are governed by different principles, and that, as the one who pays is completely substituted to all the rights and remedies of the creditor, without any assignment, which, if necessary at all, is only required at law, the statute does not bar unless the note itself, which has been paid, is barred, or in those states, which have a statute similar to ours (Revisal 1905, § 399) providing for a special limitation of 10 years as to all actions for relief not otherwise provided for in the statute, that the equitable action is governed by the latter section, and not by the three-year statute relating to express or implied contracts. *Chipman v. Webster*, and other cases, *supra*. In *Batchellor v. Lawrence*, 99 E. C. L. (C. B. N. S.) 543, Justice Byles, who wrote the English treatise on Bills, when commenting upon and construing the mercantile law amendment act (19 & 20

Vict. c. 97, § 5), which gave the creditor paying a debt the right at law to an assignment of the note to himself or a trustee, and the right "to stand in the place of the creditor and to use all his remedies, and, if need be, his name, upon proper indemnity," in any action or proceeding brought for the purpose of obtaining indemnification from any co-obligor or codebtor, for any advances made by him beyond his share of the liability, said: "It must be remembered that one who is liable jointly with others stands in the position of surety for their proportion of the debt, and, if he pays the whole, is entitled to call upon them for contribution. In all rational systems of law, where a surety pays the debt, he is entitled to the benefit of all securities and remedies which the creditor held. Such is the law of France, where law and equity are blended. \* \* \* In England, prior to the passing of this act, a surety or codebtor, who had been compelled to pay the debt for which he was liable, could not obtain the benefit of any securities held by the creditor without having recourse to a court of equity, and not always then. The section in question, I think, meant to afford the party at least the same remedy at law as he would have had in equity. This it does in two modes: First, by enacting that he shall be entitled to have the securities assigned to him; secondly, by taking away the technical difficulty that before existed to his making the security available at law, viz., that the remedy was taken away by payment. As to the first, it is clear that the provision applies not only to persons who stand in the position of sureties, but also to joint debtors. \* \* \* I think a 'codebtor' who pays the entire debt is a surety in the sense in which that word is used here." But the doctrine for which I contend as having existed in courts of equity before the change in our system and even extended by many illusrious courts to cases at law to avoid circuity of action is most admirably stated by Judge Johnson for the court in *Lidderdale v. Robinson*, 12 Wheat. 594, 6 L. Ed. 740: "That a surety who discharges the debt of the principal shall in general succeed to the rights of the creditor, as well direct as incidental, is strongly exemplified in those cases in which the surety is permitted to succeed to those rights, even against bail, who are themselves in many respects regarded as sureties. 2 Vern. 603. 11 Vesey, 22. That such would be the effect of an actual assignment made by the creditor to the surety, or to some third person for his benefit, no one can doubt. But in the cases last cited we find the court of equity lending its aid to compel the creditor to assign the cause of action, and thus to make an actual substitution of the sureties, so as to perfect their claim at law. This fully affirms the right to succeed to the legal standing of their principal; and, after establishing that principle, it is going but one step further to consider

that as done which the surety has a right to have done in his favor, and thus to sustain the substitution without an actual assignment. And accordingly we find the dictum expressed in *Robinson v. Wilson*, 2 Madd. Rep. 434, in pretty general terms, 'that a surety who pays off a specialty debt shall be considered as a creditor by specialty of his principal.' If the parties in this cause be considered as claiming under assignment from the holder of the bill, and each as assignee of the claim against his coindorsee, according to the actual state of their respective interests, there can be no doubt of the priority here claimed. This subject has undergone a very serious examination in the courts of the United States, and in cases in which, as in this, satisfaction had been made by the surety without taking an actual assignment of the debt." Is this not conclusive as authority?

The same rule is declared and supported by irresistible logic and unanswerable argument in *Tyrrell v. Ward*, 102 Ill. 29. Justice Walker, for the court, said: "There is not the slightest question under the evidence in the case that at the time Worthington recovered his judgment the property in controversy was incumbered by legal, valid, and just liens to nearly, if not quite, the sum of \$40,000, and it is fully as clear that they were discharged and satisfied by Smith with the money of Bayard advanced for the purpose, and as a part of the loan of \$50,500, which Hayes had effected for this very purpose. It is equally certain that it was the intention of Bayard, Smith, and Hayes to pay and discharge these liens, to render the trust deeds to Smith effective, and to make them a prior lien to all others in favor of Bayard. This was their clear and unmistakable purpose. All pretense that it was done for any other purpose is excluded by the testimony. Then what effect did such a payment thus made have on the rights of the parties? Manifestly it subrogated Bayard to all rights of the prior lienholders, precisely as they were held by them. When paid by Smith for Bayard, they were transferred to him, and equity must treat the transaction as an assignment to Bayard as fully so as had a formal assignment been made and indorsed on the papers evidencing these debts and liens. This every consideration of justice and good conscience demands. It would be highly inequitable and unjust to defeat the intention of the parties, and visit so heavy a loss on Bayard, when he advanced the money expressly to remove these prior liens and perfect his own. Justice and authority not only sanction, but demand, that Bayard should be subrogated to all of their rights." In *Parsons v. Briddock*, 2 Vernon, 608, cited with approval in *Lidderdale v. Robinson*, supra, the chancellor thus stated the law: "The principal in a bond being arrested gave bail, and judgment is had against the bail. On a bill by the sureties, who had been

sued on the original bond and paid the money, the court decreed the judgment against the bail to be assigned to them, in order to reimburse them what they had paid with interest and costs." And in *Cottrell's Case*, 23 Pa. 294, it was held that "subrogation, being founded in principles of equity, may be enforced where there is no contract for a transfer of the security." And the court in its opinion states this equitable principle with great force and conciseness: "Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract or privity of any kind exists between the parties. Wherever one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor. Actual payment discharges a judgment or other incumbrance at law, but, where justice requires it, we keep it afoot in equity for the safety of the paying surety. These principles, settled in numerous cases, which will be found collected in 2 Wharton's Digest, 612, are decisive against this appellant." This covers our case in every aspect of it, and shows conclusively that a court of equity in such matters disregards forms and seeks to enforce the rights of the parties according to their substance and real merits, which is but a foreshadowing, many years ago, of the spirit and purpose of our present liberal system of pleading and procedure. The case of *Robinson v. Wilson*, 2 Maddock's Ch. 569 (approved in *Lidderdale's Case*), was decided without regard to any statute, but upon a well-recognized doctrine of equity, that a surety who pays off a specialty debt of the principal shall be considered as a specialty creditor of the principal. It was also held in *Wright v. Morley*, 11 Vesey, Ch. Rep. 42, that the surety or coprincipal who have the same right, as we have seen, may proceed in equity against his codebtor, when he has paid the whole debt, for the payment of his share or part of the liability, without any assignment from the creditor or as if an assignment had been made, and he will have precisely all of the rights and remedies of the creditor that he would have had if the formal assignment had been made. If the specialty is not barred, he is not barred.

I will now refer to two cases, which are much alike, one decided in an English court, *Parsons v. Briddock*, which has already been cited, but which is more fully reported in 11 Vesey, Ch. Rep. p. 22, and the other decided by this court (*Carter v. Jones*, 40 N. C. 196, 49 Am. Dec. 425), which is a very strong instance of the application of this equity. It is said that "the principal had given bail in an action. Judgment was recovered against the bail. Afterwards the surety was called upon and paid, and it was held that he was entitled to an assignment of the judgment against the bail; so that, though the bail were themselves but sureties, as between them and the principal debt-



or, yet, coming in the room of the principal debtor as to the creditor, it was held that they likewise came into the room of the principal debtor as to the surety. Consequently that decision established that the surety had precisely the same right that the creditor had, and was to stand in his place. The surety had no direct contract or engagement by which the bail were bound to him, but only a claim against them through the medium of the creditor, and was entitled only to all his rights. There are other cases establishing the same principle." In *Carter v. Jones*, supra, it was held that, where a guarantor had paid the entire debt, "he was fully subrogated in equity to the rights and remedies of the creditor to whom he had paid it as against the debtor and his sureties, and that a court of equity, if not a court of law, would regard the transaction as a sale and assignment of the note to the paying guarantor. This is a strong and irresistible statement of the law in favor of the paying debtor. He is considered as a purchaser of the note, and entitled to sue upon it, for equity, as it is said, disregards forms, and seeks to do justice, according to the very right of the matter. It is suggested in *Sherwood v. Collier*, 14 N. C. 381, 24 Am. Dec. 264, the sheet anchor of the majority, because Judge Ruffin said it involved an absurdity for the debtor to sue himself, that the debt was paid and he could only sue on the promise, implied from his payment, that he should be reimbursed. But the plaintiff does not sue himself, at least under our present system. He simply sues his debtor, who has failed to comply with his promise to pay his ratable part, the plaintiff having already paid his, and having satisfied the debt as between debtor and creditor, all left due being that which, in equity and good conscience, comes to him by the default of his co-obligor. The obligation of the paying debtor has been satisfied, and there is nothing due save what his defaulting fellow owes to him, and for this he must sue the latter, being under no obligation, as between them, to pay any part of it, but his co-debtor being under the duty in law and equity to pay to his faithful coprincipal that part of the debt he promised to pay. Equity then steps in, and compels the defaulter to do justice without regard to the mere forms of law, or the legal title.

It is not to be denied that courts generally have held at common law and under the statute that a surety or co-obligor, which is the same thing, who pays off a specialty debt, is to be considered in equity at least and in all respects as a specialty creditor of his principal. This was so held in *Robinson v. Wilson*, 2 Maddock's Ch. 569. There is an implied contract between the principal and the surety or between coprincipals that, if one of them shall pay more than his share, the other shall be entitled to an assignment of the bond or other security, or shall have

in law and equity precisely the same remedies as the creditor would have, if the debt had not been paid to him. *Robinson v. Wilson*, supra; *Burrows v. McWhann*, 1 Desaus. (S. C.) 409, 1 Am. Dec. 677. In the last-cited case, which is very much in point, the court held that, in order to preserve and protect the right, legal and equitable, of the paying co-obligor, an assignment would be decreed, or the court would proceed as if it had been made, and that the limitation of seven years, as to the implied promise, did not apply, but that in regard to equitable actions, and it was further held that in order to enforce this clear equity, the court would order any payment or satisfaction of the debt entered upon the record to be canceled, and would decree that the obligor, who has paid his part and also the share of his co-obligor, should stand literally in the shoes of the creditor, as to his legal and equitable rights and with the priority and full privilege of a specialty creditor, in every regard, if the debt which he paid was evidenced by an instrument under seal. *Drake v. Coltrane*, 44 N. C. 300. This was more distinctly and sharply decided in *Stokes v. Hodges*, 11 Rich. Eq. (S. C.) 135, it having been ruled that the paying debtor should be considered as a specialty creditor as to rights and remedies in all respects; and is this not in accordance with a just and perfectly fair consideration of the rights of him who has borne, not only his own share, but the share of others equally liable? In the case of *Howell v. Reams*, 73 N. C. marg. p. 393, Judge Bynum says: "The cosurety who pays the bond debt for which the other is equally bound shall be deemed a bond creditor in the administration of the estate of the deceased cosurety. The same bond which makes them the bond debtors of the obligee by force of the statute binds them mutually to contribution. In carrying out the beneficial purposes of the statute, there can be no reason why they should not occupy the same relation to each other that they do to the principal, instead of becoming by the same act of payment the bond creditors of the principal and only the simple contract creditors of each other." But, however the law may have been before the adoption of our Code system, it cannot be successfully contended that now there is any reason for adding to or upholding the old and technical rule prevailing in courts of common-law jurisdiction. We have jurisdiction both in law and equity and can decree according to the equitable merits of the case without resorting to two courts. This doctrine is well settled in *Dunlop v. James*, 174 N. Y. 411, 87 N. E. 60, as follows: "In modern times courts of law have dealt with subrogation as they would with assignments, and, when the right of action to which the plaintiff asks to be subrogated is a legal right of action, a court of law may treat a plaintiff who is entitled in equity to subrogation as an assignee, and allow him to

maintain an action of a legal nature upon the right to which he claims to be subrogated." In *Bledsoe v. Nixon*, 68 N. C. 521 (cited in the opinion of the court), Judge Rodman strongly intimates that the harsh rule by which a surety or co-obligor, who pays off a bond, must bring his action within three years on the implied promise, is confined solely to courts of law, and does not apply to the equitable remedy. This was so held because the right of the obligor who pays the entire debt to recover from his co-obligor, equally bound for the debt, depends at law, without an assignment, upon the implied promise, which, being a matter arising out of contract, is barred in three years, but not so where the obligor elects to sue in equity, for in that case the 10-year statute applies, as the right is not based upon contract, but arises out of equitable principles, and it has been so expressly held in states having statutes like ours. *Zuellig v. Hemerlie*, 60 Ohio St. 27, 53 N. E. 447, 71 Am. St. Rep. 707; *Neal v. Nash*, 23 Ohio St. 483. And so it was held in *McAlden v. Palmer*, 140 N. C. 258, 52 S. E. 1034, that section 399 of the Revisal, providing that actions for equitable relief or in cases where the cause of action is equitable in its nature shall be brought within ten years after the cause of action accrues, applies to all actions of an equitable nature, and the very next section of the Code (Revisal, § 400) not only permits, but requires, that all actions shall be brought by the real party in interest, whereby abolishing forever the necessity for suing in the name of a nominal plaintiff to his use.

But the express agreement of the parties in this case is to be considered. Can any one doubt that what they meant was that the plaintiff should pay the whole debt, and rely, not upon the defendant's implied promise to reimburse him, but upon the note itself and the latter's obligation thereunder to pay. In other words, that by the express contract the plaintiff should take the place of the creditor in the note as to the defendant's share of the obligation, and be entitled to all of the creditor's rights and remedies. In a case exactly similar, it was held that the obligor who paid all of the debt was entitled in law and equity to the rights of the creditor in the note to the extent of the defaulting obligor's part, and, with reference to this, the court said: "Whatever may formerly have been held as to the effect of the transaction as above stated, the recent decisions of this court, paying more regard than formerly to the intention of the parties and to the equities of the case, have determined that the payment, or, as it may rather be called, the advance to the creditor by one of two joint obligors of a sum equal to the entire demand, under such an agreement as is above stated, does not extinguish the entire obligation, but may leave it in force as furnishing a remedy for doing justice to the obligor who has made the ad-

vance. In other words, one co-obligor is allowed to purchase the remedy of the obligee against the other obligor, and to enforce it at law in the name of the obligee for procuring contribution or full payment, as he may be entitled to the one or the other." *Smith v. Latimer*, 54 Ky. 75, 79. Is not this case directly in point, and is it not in consonance with justice and right? If it has never received the sanction of the law in this state, and I think it has, is it not quite time that we were accepting it as the true and only just doctrine? I again quote from that case as it so clearly and strongly states the only true principle and with direct application to the facts of this case: "As it is an obvious principle of equity long recognized and enforced as such that the payment of an obligation by one who is a mere surety, whether so originally or made so by subsequent facts, entitles him to subrogation to the rights of the obligee for his own indemnity, though there be no agreement to that effect, we do not see why an express agreement to the same effect, made at the time of payment, and therefore entering into and qualifying that fact, may not be regarded and enforced by a court of law. The case of assignments of choses of action, which, though once considered by courts of law as wholly inoperative against the assignor, have, under the influence of equitable principles, come to be respected and enforced by those courts in actions in the name of the obligee, affords an example, and, by analogy, a precedent for the advances towards equity, made by this court in giving effect to agreements between the holder of a note or bond and one of the obligors, with respect to the consequences of a payment made by him."

We must consider that the obligor or surety who pays the debt has three remedies against his co-obligor: (1) He may sue in assumpsit on the implied promise, or in this case, on the express promise, when three-year inaction will be a bar. (2) He may sue on the speciality when 10 years is the limit. (3) He may sue upon his equitable cause of action, his right being founded solely upon the equity, when 10 years will bar under Revisal, § 399. It is true Judge Ruffin says, in *Sherwood v. Collier*, the idea that a man can sue himself or receive an assignment of his own debt involves an absurdity, but it does not apply to this case. He is not suing himself, as the cases I have cited clearly show, but is proceeding by action on the speciality, or by the equitable action to recover from the defendant his fair proportion of the joint liability, that which he promised to pay, and which he should be made to pay. It is something this plaintiff does not owe, but which is owing to him by the defendant. We should not be subtle or astute to apply the statute in this case and bar the action, for, if there ever was a just claim, this is one, and we cannot deny the-

relief the plaintiff seeks, even if we should proceed under the hoary principles of the ancient law, which existed in the days of the "learned Mr. Tidd," when a litigant's success depended more upon the comparative wits of the opposing special pleaders than upon the real merits of the case. It cannot be doubted that the request of the defendant to the plaintiff that the latter pay the money to the creditor and hold the note until he could pay his share and the indorsement without recourse meant but one thing, that the plaintiff should be substituted, not only to all the rights in, but to all the remedies upon, the note which belonged to the creditor—that he should step into his shoes. It was not intended that the note should be satisfied as between the co-obligors, but kept alive for the plaintiff's benefit. Why indorse without recourse, if the note was not to be kept afoot? We must not forget that *Sherwood v. Collier* was an action at law—"debt upon a bond"—and Judge Ruffin, a great chancellor, was not deciding what would have been the right of the plaintiff in equity.

It may be said that Sykes was not a party to the express agreement, but this makes no difference. Equity will compel him to assign or to become a party for the purpose of protecting the obligor who has paid him, giving him, of course, adequate indemnity against costs. How is he hurt by this course, and, under the former practice, it was quite a usual one. But Sykes did know of the arrangement and assented to it, as the testimony of *Liverman* shows. It must be taken as true, as the judge charged peremptorily that the claim was barred. In *Davison v. Gregory*, 132 N. C. 389, 43 S. E. 916, Justice Connor, speaking for the court, observes the distinction we have made, and says that, while at law the paying obligor must have the legal title to the specialty in order to sue, in equity this rule is very different, for there he is considered as having acceded by subrogation to all the rights of every kind that the creditor had before the payment and to all his securities, "without a formal assignment," citing and approving *Carter v. Jones*, supra, *York v. Landis*, 65 N. C. 535, *Holden v. Strickland*, 116 N. C. 185, 21 S. E. 684, to which may be added *Wilson v. Bank of Lexington*, 72 N. C. 621, and *Neely v. Jones*, 16 W. Va. 640, 37 Am. Rep. 794, both citing and approving *Carter v. Jones*, supra. Commenting upon the last-named case in *Neely v. Jones*, supra, the court says that the headnote is not justified by the decision actually rendered, and, moreover, is not supported by the authorities (and I fully concur in that criticism), but the court further says that this court was right in holding that the surety or co-obligor should in equity, if not at law, be regarded as a purchaser of the note, or so much thereof as was not his just share of the liability, as against the other and defaulting obligor. The case is a

valuable one, and decides, after unanswerable reasoning, all that is necessary to support my position. It holds that, if there is an express or implied agreement for an assignment of the specialty to be gathered from the nature of the transaction, it would amount to an equitable assignment, though no formal assignment was ever executed. The creditor in the transaction simply retires and the paying obligor steps into his shoes, fully clothed and panoplied with all his rights, remedies, and powers of every kind and description. He becomes himself the creditor pro tanto of his defaulting obligor. This is the modern, if not the ancient, doctrine, backed by an immense weight of authority. *Cuyler v. Ensworth*, 6 Paige (N. Y.) 32; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286; *Lumpkin v. Mills*, 4 Ga. 343; *Townsend v. Whitney*, 75 N. Y. 425; *McDaniel v. Lee*, 37 Mo. 204; *N. B. I. v. Hathaway*, 134 Mass. 69, 45 Am. Rep. 289. In *Mason v. Pierron*, 63 Wis. 239, 23 N. W. 119, it was said: "The courts of this country, however, have very generally adhered to the ancient rule, and hold that, although the lien or obligation be extinguished at law by the payment of the debt, yet, for the benefit of the surety, it continues in equity in full force. The cases which illustrate the above propositions are very numerous in both countries. A great many of them will be found cited in *Story's Equity Jurisprudence*, in the notes to sections 492, 493, 495, 496, 499, 'a,' 'b,' 'c'; 3 Pom. Eq. Jur. §§ 1418, 1419, and notes." The same statement of the law will be found in *Cuyler v. Ensworth*, supra: "According to the modern doctrine on this subject, the surety by the mere payment of the debt and without any actual assignment from the creditor is, in equity, subrogated to all the rights and remedies of the creditor for the recovery of his debt against the principal debtor or his property, or against the cosureties or their property, to the extent of what they are equitably bound to contribute." So in *N. B. I. v. Hathaway*, supra, the court held that the paying obligor "should be allowed to use the creditor's name, or the security the creditor has obtained, to enforce the right which he has against the cosurety by reason of the payment which he has made on his account." And finally, in *McDaniel v. Lee*, supra, the court said: "It is a well-settled principle in courts of equity that, when they once acquire jurisdiction over the subject-matter, they will retain it until full justice has been done between the parties. When a party is forced to come to them for relief, they will not grant a part of his remedy, and drive him to a court of law for the balance; but they will retain jurisdiction of the cause until full and ample justice has been done." We could cite cases almost without number to the same effect, and, when the question is properly considered, there is no discordant note. The case of *Neal v. Nash*,

23 Ohio St. 483, expressly holds that where it is understood that the payment shall not operate as a satisfaction, but the note shall be kept alive for the benefit of the paying debtor, or, if necessary, that an assignment shall be made of it, the debtor may sue directly upon the note or in equity, and under a Code like ours, though prescribing six instead of three years, on express or implied contracts, as the limitation, it was held that the six-year statute did not apply, but the ten-year, the action being for equitable relief.

There is no conflict whatever between the views herein expressed and the case of *Tripp v. Harris*, 154 N. C. 296, 70 S. E. 470. The authorities cited in that case related to actions at law, and in *Tripp v. Harris* it was simply held that the paying debtor was subrogated to all rights of the creditor in the mortgage or collateral security, which was sufficient for the decision in the case. If there are any expressions in the cases cited which seem to be the other way, they may be accounted for upon the ground that the distinction between the rights of the paying debtor in a court of law and in a court of equity has not been kept in mind, and, besides, they were mere dicta. Every case in which it is said that the law requires a formal assignment to be made was an action at law, and not a suit in equity. The same reason for holding the note to be paid applies equally to the collateral security, for it was given to secure the note, or debt represented by it, and not the new debt, arising out of the implied promise of the surety or co-obligor to reimburse the party, who paid the money for him. The principal debt must be kept on foot, in order to save the security for the benefit of him who paid the money, and he must be subrogated to the same rights and the same debt the original creditor had. It is far better and more logical to hold that an equitable right in the note passes to the paying debtor by virtue of the payment, which the law will make effectual by treating the assignment as having been made, or compelling the creditor to assign to a person designated by the debtor, who paid the money for his use and benefit. Any other doctrine will work great injustice, which the law seeks to avoid. There are two decisions which bear directly and strongly upon the facts of this case: (1) *Fleming v. Beaver*, 2 Rawle (Pa.) 128, 19 Am. Dec. 629. The headnote states the point, and is as follows: "H. and M. were sureties for P., and M. paid half the debt, and joined H. in confessing a judgment to a creditor of P. for the other half, it being agreed H. should pay this judgment. M., however, was compelled to pay it. Held that, H.'s land being sold by execution, M. had a right to come on the fund in the sheriff's hands in preference to a subsequent judgment creditor of H. Actual payment

discharges a judgment at law; but in equity it may still subsist if the justice of the case requires it. An equitable right to such judgment may exist without any actual assignment of it." (2) *Furnold v. Bank*, 44 Mo. 336, in which the syllabus also contains a clear and full statement of the facts: "Judgment was recovered against a number of cosureties, who subsequently thereto sold sundry lands owned by them, respectively, while the same were subject to the lien of the judgment. The purchaser of one parcel, to prevent its sale under the judgment, paid the amount due thereon, and afterward brought suit in equity, praying that the land disposed of by the cosureties, while subject to the same lien, might be subjected to a ratable proportion of the debt paid by him. Held that, while at law plaintiff's payment of the amount of the judgment operated as an extinguishment of the lien, yet equity, in furtherance of justice, would subrogate plaintiff to the rights of his grantor, and charge the lands bound by the lien in the hands of the other sureties or their grantees who purchased with notice. And the payment of the debt by plaintiff operated in equity as an immediate assignment to him of all the securities held by the judgment creditor. In such case it was the duty of the latter to make the transfer instant.".

My conclusion is that the judgment should be set aside and a new trial awarded for the error of the judge in his charge, as to the statute of limitations.

BROWN, J., concurs in the dissenting opinion of WALKER, J.

(9 Ga. App. 851)

CITY OF ABBEVILLE v. McMILLAN.  
(No. 3,194.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

LIMITATION OF SCHOOL TAX.

This case is controlled by *Appling v. City of Abbeville*, 72 S. E. 31.

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by T. A. McMillan against the City of Abbeville. Judgment for plaintiff, and defendant brings error. Reversed.

Haygood & Cutts, for plaintiff in error. Hal Lawson, for defendant in error.

RUSSELL, J. McMillan sued the city of Abbeville to recover rent of a building owned by him, and which had been rented from him by the board of education of the city and used as a dormitory in connection with the school system. The rent sought to be recovered was for the use of the building during portions of the years 1907 and 1908. The case was tried by the judge, without a jury, on an agreed statement of facts, in which it is admitted that the city had levied and col-

lected for school purposes, during 1907 and 1908, a tax of one-half of 1 per cent. each year on all taxable property, and had turned the fund over to the board of education, which had expended all of said fund for school purposes before the present suit was filed.

Many nice questions of law are presented for decision, but it appears, from the facts stated above and from the decision of the Supreme Court in the case of *Appling v. City of Abbeville*, 72 S. E. 81, that no recovery can be had against the city.

Judgment reversed.

(136 Ga. 335)

JONES v. NORTON et al.

(Supreme Court of Georgia. Sept. 25, 1911.)

(Syllabus by the Court.)

**1. CHATTEL MORTGAGES (§ 251\*)—FORECLOSURE—RIGHT TO FORECLOSE.**

On August 6, 1909, J., as principal, and N., as indorser, gave to a bank 18 promissory notes aggregating \$3,500, maturing at the rate of one note on the 6th day of each succeeding month after their execution. J. gave to N. at the time of making the notes to the bank 18 notes for \$50 each, which, respectively, matured on the same dates as the notes given to the bank. The notes given by J. to N. were in consideration of the indorsement of the notes to the bank, which indorsement was necessary to enable J. to obtain the loan from the bank for which the notes to it were given. At the time the notes were made, J. executed to N. a mortgage on described personalty. There was a recital in the mortgage that it was given for the purpose of securing N. "from any and all loss and expenses they may incur by reason of such indorsements," as well as to secure the payment of the series of \$50 notes given by J. to N. The mortgage contained the stipulation that "it is hereby covenanted and agreed, in further consideration of the premises, that \* \* \* upon default in the payment of any taxes or other assessments, or default in the payment of any debt or obligation which may become a lien upon the said property hereby mortgaged, that from thenceforth it shall and may be lawful for the parties of the second part \* \* \* at their option to declare the whole remaining indebtedness then unpaid to be due and payable at once," giving to the mortgagees the right to sell the mortgaged property and the equity of redemption of the mortgagor therein for the purpose of paying the principal and interest on the debt and the costs of sale, together with attorney's fees and commissions, the surplus, if any, to be paid to the mortgagor. The mortgage also provided that the mortgagees upon such default might take such other legal proceedings as they might deem necessary and proper. *Held:* (a) Upon the happening of such default, the mortgagees could not, under the statutory proceeding for the foreclosure of chattel mortgages, foreclose the mortgage given them by Jones for the amount of the notes given to the bank and remaining unpaid, which it then held, the bank being no party to the mortgage, and the fact that the mortgagees executed and the trial judge approved a bond given by the mortgagees to the mortgagor to indemnify him against loss as to the notes given to the bank did not change the rule. (b) The mortgagees could, however, foreclose the mortgage, under the statutory proceedings, upon the default of the

mortgagor as stated, for the indebtedness represented by so many of the series of \$50 notes given by the mortgagor to the mortgagee and remaining unpaid at the time of such default. (c) And the right to the last-mentioned foreclosure was not affected by the facts that no levy had been made to collect the unpaid taxes due by the mortgagor, and that the same were paid after default and prior to the trial, and that judgments against the mortgagor were obtained subsequently to the record of the mortgage, and that no execution had been issued for a city license due by the mortgagor.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 251.\*]

**2. APPEAL AND ERROR (§ 518\*)—RECORD—SCOPE AND CONTENTS—AFFIDAVITS OF ILLEGALITY.**

A proffered amendment to the affidavit of illegality, which was disallowed by the court, could not properly be brought up as a part of the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 518.\*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Proceedings by J. V. and J. H. Norton to foreclose a mortgage against N. N. Jones. From a judgment of foreclosure, the mortgagors bring error. Reversed.

See, also, 71 S. E. 687.

On August 6, 1909, N. N. Jones, as principal, and J. V. and J. H. Norton, as indorsers, gave to the Citizens' & Southern Bank 18 promissory notes aggregating \$3,500, maturing at the rate of one note on the 6th day of each succeeding month after their execution. Jones gave to the Nortons at the time of making the notes to the bank his 18 notes for \$50 each, which, respectively, matured on the same dates as the notes given to the bank. The notes given by Jones to the Nortons were in consideration of their indorsements of the notes to the bank, which indorsements were necessary to enable Jones to obtain a loan from the bank for which the notes to it were given. At the time the notes were made, Jones executed to the Nortons a mortgage on his stock of goods and other personalty. There was a recital in the mortgage that it was given for the purpose of securing the Nortons "from any and all loss and expenses they may incur by reason of said indorsements," as well as to secure the payment of the series of \$50 notes given by Jones to the Nortons. The mortgage also contained the following clause: "And it is hereby covenanted and agreed, in further consideration of the premises, that \* \* \* upon default in the payment of any taxes or other assessments, or default in the payment of any debt or obligation which may become a lien upon the said property hereby mortgaged, that from thenceforth it shall and may be lawful for the parties of the second part [the Nortons], \* \* \* at their option, to declare the whole remaining indebtedness then unpaid to be due and payable at once, and to grant, bargain, sell, and dis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pose of said before-mentioned property and all benefit and equity of redemption of said party of the first part, according to the laws of Georgia, paying to the said party of the first part [Jones] the overplus of the purchase money to be obtained therefor after the satisfaction of the principal and interest due on said debt aforesaid, the costs of advertising and sale, and costs of foreclosing, with attorney's fees and commissions to be due on said foreclosure and the collection of said debt." A further provision of the mortgage was that "the parties of the second part \* \* \* shall have the right either to sell said property in the manner hereinbefore stated, or they may take such other legal proceedings hereunder as they may deem necessary and proper in the premises; but whatever proceedings may be taken to collect the debt hereby secured, or to sell the said property, the proceeds of the sale of said property shall be applied as hereinbefore set forth." On February 17, 1910, an affidavit was made by one of the Nortons for the statutory foreclosure of the mortgage. It was stated in the affidavit that Jones, the mortgagor, was indebted to the mortgagees "in the sum of \$2,850 principal, with interest as stipulated in said mortgage, and that the amount of said several sums is now due; that the same is due by reason of the following provisions in said mortgage, to wit." Then follows a quotation of the clause in the mortgage making the whole indebtedness due at the option of the mortgagees upon the default of the mortgagor in the payment of any taxes or other assessments, or default in the payment of any debt or obligation which may become a lien upon the mortgaged property. It was averred in the affidavit that the mortgagor had defaulted in the payment of taxes due on the property covered by the mortgage in a given amount for state and county taxes for the year 1909, a city license for a given amount for the year 1910, two judgments against the mortgagor for stated amounts rendered in a justice's court on October 13, 1909, two judgments rendered against him for stated amounts in the same court on December 8, 1909, two judgments against him in stated amounts rendered in the same court on January 12, 1910, and another for a given amount rendered in the same court on February 9, 1910, and that, before the making of the affidavit, the amount sworn to be due the mortgagees had been declared to be due under the terms of the mortgage and demand for its payment made, which was refused. The mortgagor filed an affidavit of illegality upon the grounds, in substance, among others, (a) that none of the notes were due, and no default had been made in the payment of any of them; (b) that the mortgagor still owed to the bank the notes given to it which were not due, and the bank had not declared the entire debt due, and that no part of that indebted-

ness was owing and due to the mortgagees; (c) that no judgment had been rendered against the mortgagees upon their contract of suretyship; (d) that state and county taxes alleged in the affidavit of foreclosure to have been due have been paid, that no execution had been issued for the license tax or any demand made for its payment, and that the judgments referred to in the affidavit of foreclosure constituted no lien upon the property mortgaged that could in any way defeat the lien of the mortgage; (e) "that the plaintiffs have no right to demand payment of all of the \$50 notes, for the reason that it affirmatively appears in and by the mortgage that the defendant by paying the principal to the Citizens' & Southern Bank would be relieved from the payment of the \$50.00 notes, and that none of said \$50.00 notes are now due;" and (f) that the mortgagor had paid all the notes given to the bank which had matured. An application was made by the mortgagees to the judge of the superior court to sell the property levied on in the mortgage *fi. fa.* in accordance with the statute providing for the speedy sale of goods under levy and which are expensive to keep. The mortgagor filed objections to the granting of such an order; the grounds of objection being the same as those set out in the affidavit of illegality. By consent of the parties, the judge of the superior court, without the intervention of a jury, tried and passed on all issues made by the affidavit of illegality and objections to the sale. After hearing evidence and argument, he adjudged that the mortgagees were entitled to proceed with the mortgage execution for the sum of \$2,850 principal, with interest at 8 per cent. on \$2,300 (the sum of the unpaid notes given to the bank) from August 6, 1909, and all costs of foreclosure. The judgment contains the following recital: "Said J. V. Norton and J. H. Norton having tendered a bond to indemnify the said N. N. Jones against any loss by reason of the notes held by the Citizens' & Southern Bank, the said bond is hereby approved and ordered filed as a part of the record." A sale of the property was ordered after 10 days' advertisement. Jones, the mortgagor, excepted to the judgment rendered and the order granted, assigning error therein upon substantially the same grounds as contained in his affidavit of illegality.

Robt. L. Colding and Jas. F. Evans, for plaintiffs in error. Wm. M. Farr and E. S. Elliott, for defendant in error.

FISH, C. J. (after stating the facts as above). [1] 1. Some courts have sought to establish a distinction between a contract of a principal to indemnify his surety against damage merely and nothing more and a contract by which a principal undertakes to indemnify his surety against any liability for the failure of the principal to do a certain act or pay a certain sum of money at a stat-

ed time, and have held that in instances of the first character damage must be shown before the surety is entitled to recover, but in cases of the latter kind the surety upon the default of his principal has a right of action though he has not been damnified. This distinction, however, has not been recognized by all courts, and, even where it has been adopted, the different courts have not agreed as to the measure of damages the surety is entitled to recover in cases falling within the latter classification. In the view we take of the case now before us, it is unnecessary to commit ourselves as for or against the doctrine above stated. The mortgagees in the present case adopted the statutory proceeding for the foreclosure of a chattel mortgage, which is that "any person holding a mortgage on personal property and wishing to foreclose the same, shall, either in person, or by his agent, or attorney in fact or at law, go before some officer of this state who is authorized by law to administer oaths, \* \* \* and make affidavit to the amount of principal and interest due on such mortgage, \* \* \* and when such mortgage, or sworn copy, with such affidavit annexed thereto, shall be filed in the office of the clerk of the superior court of the county wherein the mortgagor resides at the date of the foreclosure, \* \* \* it shall be the duty of the clerk to issue an execution \* \* \* commanding the sale of the mortgaged property to satisfy the principal and interest, together with the cost of the proceedings to foreclose the said mortgage." Civ. Code 1910, § 3286. This section clearly contemplates that the affidavit shall be made as to the amount of principal and interest due to the holder of the mortgage; and it follows, of course, that a chattel mortgage cannot be foreclosed under the statutory proceeding for a debt owing to any one other than the holder of the mortgage. In the case under review there was no covenant that Jones, the mortgagor, should pay to the Nortons, the mortgagees, any of the indebtedness evidenced by the notes which Jones as principal and the Nortons as his sureties had given the bank. Jones owed such indebtedness to the bank, and there was no contingency in the mortgage upon the happening of which he would owe it to the Nortons, except their payment of it to the bank. The mere fact that Jones covenanted in the mortgage that all of the notes remaining unpaid should become due upon his default as to the payment of taxes, etc., did not, upon such default, make him indebted to the Nortons for what he owed the bank, especially as the bank was not a party to such covenant. If Jones, in order to secure the Nortons, had given them a note for the sum of the notes given to the bank, or had entered into a covenant with them to pay such sum, then a different question would be presented. Even in such a case there is a difference of judicial opinion as to whether the mortgagees

could recover before judgment had been rendered against them, or they had been damaged. Nor are the courts which hold that the mortgagees in such circumstances may recover unanimous as to the method by which the mortgagor should be protected from the possibility of having subsequently to pay the same debt to the creditor. In the case under consideration, the Nortons tendered, and the trial judge approved, a bond given by the Nortons, the mortgagees, to Jones, the mortgagor, to indemnify Jones against any loss by reason of the notes held by the bank against Jones as principal and the Nortons as sureties; but our statute does not recognize or provide for such a bond. The ordinary rule stated in our Code is: "If the principal executes any mortgage or gives other security to the surety or indorser to indemnify him against loss by reason of his suretyship, the surety or indorser may proceed to foreclose such mortgage, or enforce such other lien or security as soon as judgment shall be rendered against him on his contract." Civ. Code 1910, § 3555. Under this section no foreclosure can be had ordinarily until after judgment against the mortgagee. *Importers' & Traders' Bank v. McGhees*, 88 Ga. 703, 16 S. E. 27. Our conclusion is that the Nortons did not have the right under the statutory proceedings to foreclose chattel mortgages to foreclose the mortgage held by them for the amount of the notes given by Jones as principal and themselves as sureties, which notes the bank held.

2. The mortgagees, however, did have the right to foreclose the mortgage under the statutory proceedings upon the default of the mortgagor to pay taxes due on the mortgaged property, or failure to discharge the judgments rendered against him, or for the indebtedness represented by so many of the series of \$50 notes given by the mortgagor to the mortgagees and remaining unpaid at the time of such default, and which were given by the mortgagor to the mortgagees in consideration of their suretyship on the notes given by the mortgagor to the bank. This series of notes represented an indebtedness of the mortgagor to the mortgagees, the payment of which was secured by the mortgage; and their maturity was accelerated, in accordance with the covenant in the mortgage, upon the default of the mortgagee as above stated. The facts that no levy had been made to collect the unpaid taxes and that the same were paid prior to the trial, and that the judgments against the mortgagor were obtained subsequently to the record of the mortgage, and that no execution had been issued for the city license, were not valid reasons why the mortgage should not be foreclosed for the indebtedness due to the mortgagees under the mortgage and the covenant contained therein. There is no merit in any of the other assignments of error, nor do they require special consideration.

[2] 3. The mortgagor offered an amendment to his affidavit of illegality, which was disallowed by the court. Error is assigned upon this ruling in the bill of exceptions. However, the proffered amendment is not set out therein, nor attached thereto as an exhibit, but is sought to be brought up only as a part of the record. As has been frequently decided, such assignment of error presents no question for review. *Williford v. Denby*, 127 Ga. 786, 56 S. E. 1010.

It follows from what has been said that the judgment in so far as it authorized the defendants in error to proceed to collect in the foreclosure proceeding the sum of \$2,300, the indebtedness represented by the notes given to the bank with interest thereon, must be reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 859)

BOWEN et al. v. NEAL et al.

(Supreme Court of Georgia. Sept. 26, 1911.)

(*Syllabus by the Court.*)

1. WILLS (§ 303\*)—PROBATE IN SOLEMN FORM—WITNESSES.

Where a will is offered for probate in solemn form, all of the attesting witnesses who are in life and within the jurisdiction of the court are necessary witnesses.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 715; Dec. Dig. § 303.\*]

2. APPEAL AND ERROR (§ 518\*)—REVIEW—RECORD.

Where an amendment to a caveat was offered and rejected by the court, it did not become a part of the record, and this court will not review the ruling of the court below in rejecting the amendment; it appearing that the same is not set out in the bill of exceptions or attached to the same as an exhibit properly authenticated.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 518.\*]

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Application of Linton Neal, administrator, and others, for the probate of a will. W. H. Bowen and others filed a caveat. From an order admitting the will to probate, the caveators bring error. Reversed.

H. B. Strange and Anderson & Speer, for plaintiffs in error. Brannen & Booth, for defendants in error.

BECK, J. This was an application for the probate in solemn form of the will of James M. Bowen. A caveat was filed, and the case was appealed by consent from the court of ordinary to the superior court. Upon the hearing, at the conclusion of the evidence offered by the propounder, counsel for the caveators made a motion to direct a verdict setting aside the will, on the ground that the propounder had failed to make out a prima

facie case and to establish the will; and further stated that the caveators would introduce no testimony. The court overruled this motion. Counsel for the propounder then moved the court to direct a verdict for the propounder, which the court did. To both rulings of the court the caveators excepted.

[1] 1. The propounders were not entitled to a verdict setting up the instrument offered as the last will and testament of James M. Bowen. One of the attesting witnesses was dead, and, of course, under the statute, the testimony of any one familiar with his handwriting could properly be adduced to prove the signature of this witness. But the other two attesting witnesses, who were in life and within the jurisdiction of the court, should have been called to prove the will and their signatures thereto. Section 3856 of the Code of 1910 provides: "Probate by the witnesses, or in solemn form, is where, after due notice to all the heirs at law, the will is proven by all the witnesses in existence and within the jurisdiction of the court, or by proof of their signatures and that of the testator, the witnesses being dead, and ordered to record; such probate is conclusive upon all the parties notified, and all the legatees under the will who are represented in the executor." One of the two attesting witnesses who were in life at the time the will was offered for probate was called and examined, but the other was not examined. If the latter had been without the jurisdiction of the court, testimony of one who was familiar with the signature and the handwriting of the absent witness would have been competent to prove the signature, just as in the case of a dead witness. But the living attesting witness who was not examined was not shown to have been beyond the jurisdiction of the court. True, it appears that he was temporarily absent from the state, but his home was in Bryan county, and he was a resident of that county; and, while his presence in court might not have been compelled by subpoena, interrogatories might have been sued out with the will attached thereto, and questions in regard to the execution of the will propounded by commissioners to the attesting witness. This is the proper course to pursue where a witness not residing in the county in which the will is offered for probate will not voluntarily attend the court. *Deupree v. Deupree*, 45 Ga. 417. The named executor who offers a will for probate in solemn form must not only prove the instrument which it is sought to prove, but also that the testator was of sound and disposing mind and memory. The burden of proof as to these essential facts rests upon the propounder; and, where the attesting witnesses are in life and within the jurisdiction of the court, the propounder can only successfully carry

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



the burden of proof and make out a prima facie case by introducing testimony of all the attesting witnesses in life and within the jurisdiction of the court. They must be introduced by him, even though he knows that their testimony will be unfavorable; and in case their evidence, when introduced, tends to support a caveat to the will rather than support and establish it, their hostility is not necessarily fatal to the will. If their evidence tends to the destruction of the will, other witnesses who know their signatures, in case they deny the fact of their attestation, or other witnesses who can testify as to the testamentary capacity and mental condition of the testator, may be called to show all the essential facts and prerequisites to the valid execution of the will. *Gillis v. Gillis*, 96 Ga. 15, 23 S. E. 107, 30 L. R. A. 143, 51 Am. St. Rep. 121.

[2] 2. An amendment to the caveat was offered and refused by the court. The order refusing to allow the amendment was accepted to, but the question raised by that exception will not be reviewed here, because the amendment which was rejected by the court is not set out in the bill of exceptions or attached thereto as an exhibit. *Barnett v. Railway Co.*, 87 Ga. 766, 13 S. E. 904; *Jones v. Norton*, 72 S. E. 337.

Judgment reversed. All the Justices concur.

(136 Ga. 828)

#### JACKSON v. EDWARDS.

(Supreme Court of Georgia. Sept. 26, 1911.)

##### (Syllabus by the Court.)

#### 1. BANKRUPTCY (§ 399\*)—EFFECT OF PROCEEDINGS—EXEMPTIONS.

A bankrupt applied to have an exemption to the amount of \$300 set apart to him in the court of bankruptcy. Certain articles of personalty were set apart and delivered to him. The difference between their value and \$300 was set apart in money as an exemption, in lieu of an equivalent amount of household and kitchen furniture and provisions. The holder of certain promissory notes containing a waiver of homestead and exemption filed a petition in the state court, and a receiver was appointed to apply for and obtain possession of the sum of money so set apart, and it was sought to have such sum applied to the waiver notes, which were for a greater amount. *Held*:

1. That the setting apart in the court of bankruptcy of a sum of money, in lieu of household and kitchen furniture and provisions, did not make such sum exempt from the operation of the waiver contained in the notes, as being a nonwaivable exemption, under article 9, § 3, par. 1, of the Constitution of 1877.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 399.\*]

#### 2. BANKRUPTCY (§ 400\*)—EFFECT OF PROCEEDINGS—EXEMPTIONS.

The holder of such waiver notes was not compelled to withhold his claim and make no proof of it in the bankrupt court, on account of the possibility that the bankrupt might apply for an exemption. If he were compelled to elect in advance, and not file any claim in the

court of bankruptcy, because of the existence of such waiver in his notes, and the bankrupt should make no such application, he would be left with neither a claim in bankruptcy nor an exemption which he might enforce. He is not compelled in advance to elect between claiming as a creditor, and the possibility that the bankrupt may subsequently claim an exemption, which will be treated as not administered in bankruptcy, and which may be subjected under his waiver.

(a) Proof that the holder of such waiver notes filed in the court of bankruptcy his claim represented by such notes, and "had participated in all the proceedings in said court, was represented by counsel throughout the entire proceedings, had notice of the setting apart of said homestead in specifics and cash, and had interposed no objection thereto," did not destroy the right of the holder of the notes containing the waiver to subject a sum of money set apart as an exemption in bankruptcy.

(b) It did not appear that the holder of such waiver notes received any dividend in the court of bankruptcy, or the amount thereof, or that his claim had been reduced from its original amount. Nor is the effect of such facts, if existing, determined.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.\*]

Error from Superior Court, Catoosa County; A. W. Fite, Judge.

Action by G. W. Edwards against Thomas G. Jackson. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Rudolph and Sam. P. Maddox, for plaintiff in error. W. E. Mann, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(137 Ga. 39)

#### WILLIAMS et al. v. MERCER et al.

(Supreme Court of Georgia. Oct. 12, 1911.)

##### (Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 877\*)—REVIEW—PARTIES ENTITLED TO ASSERT ERROR.

Where an equitable proceeding was brought for the partition of land, and some of the defendants appeared and defended, but, after a verdict was directed in favor of the plaintiff, they did not move for a new trial or except, a defendant who made no appearance or defense could not, by bill of exceptions, assign error on and obtain a decision in regard to interlocutory rulings, such as the admission or rejection of evidence, made upon the tender of, or objection to, evidence by the other defendants. Such defendants could except to the direction of the verdict as not authorized by the petition, or to the decree entered as not authorized by the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 877.\*]

#### 2. SUFFICIENCY OF PLEADING—VERDICT AND DECREE.

Treating the allegations of the plaintiff's petition as true against the excepting defendant, as against such defendant, they authorized the direction of the verdict and the decree which was entered.

Error from Superior Court, Colquitt County; J. H. Merrill, Judge.

Action by C. M. Mercer and others against Polly Williams and others. Judgment for plaintiffs, and defendants Polly Williams and others bring error. Affirmed.

W. A. Covington and Pope & Bennet, for plaintiffs in error. J. A. Wilkes, Shipp & Kline, and E. L. Bryan, for defendants in error.

**LUMPKIN, J.** Judgment affirmed. All the Justices concur, except BECK, J., absent.

(136 Ga. 868)

**BRADEN v. MARTIN.**

(Supreme Court of Georgia. Sept. 26, 1911.)

*(Syllabus by the Court.)*

**1. BOUNDARIES (§ 52\*)—ESTABLISHMENT—APPOINTMENT OF PROCESSIONERS.**

While the protest filed by the defendant in error to the return of the processioners contained several grounds, only two of them were passed upon by the court below, and the judgment of the court sustaining the protest was based upon those two grounds only: First, "that notice was not served upon protestant ten days before the alleged procession," as required by law; second, upon the ground that the processioners had not been appointed by the ordinary of the county. The truth of both of these grounds was admitted in an agreed statement of facts. *Held:*

(a) Where the record did not contain a copy of the application for processioning, but the return of the processioners recited that ten days' notice, as required by law, had been given to all of the owners of adjoining lands (naming them), and a person not so named filed a protest to such return, but no evidence was introduced that he was in fact an owner of adjoining land, it was error to sustain the protest on the ground that such protestant had not been notified.

(b) Under the provisions of the act approved December 13, 1871 (Acts 1871-72, p. 225), creating a board of commissioners of roads and revenue for the county of Floyd and other counties, the said board, and not the ordinary of the county, had authority to appoint processioners. (Fish, C. J., and Holden, J., dissent from the ruling made in this headnote.)

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 253-263; Dec. Dig. § 52.\*]

**2. BOUNDARIES (§ 52\*)—ESTABLISHMENT—PROTEST TO RETURN OF PROCESSIONERS—TRAVELERSE.**

No traverse of the protest was necessary to put in issue the allegations of the various grounds thereof.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 253-263; Dec. Dig. § 52.\*]

Error from Superior Court, Floyd County; G. W. Maddox, Judge.

Application by G. H. Braden to procession his land. To the return of the processioners, C. W. Martin files his protest. To an order sustaining the protest, Braden excepts. Reversed.

G. H. Braden made application to two of the processioners appointed in and for the 859th district, G. M. Floyd county, by the board of commissioners of roads and revenue,

to procession his lands. The two processioners, with the county surveyor, proceeded to mark out the lines of his land, and, upon completion of their work, made their return to the ordinary of the county. Attached to their return was a plat of the lands of Braden, made by the surveyor. It was stated in the return of the processioners that service of the ten days' written notice, as required by law, had been made upon all of the adjoining landowners (naming them). C. W. Martin filed his protest to this return, alleging that he was an adjoining landowner and had not been served with the notice required by law; that the application of Braden was made to only two of the alleged processioners of the district, and not to three, as required by law; that neither of the persons presuming to act as processioners were in fact such, being appointed by the board of commissioners of roads and revenue, and not by the ordinary, as the law requires; that no notice was given to protestant, as required by the statute, and he pointed out certain alleged errors and defects in the return, and that the plat was void because too vague and indefinite to be intelligible. Upon the hearing it was admitted by counsel for Braden that the processioners were appointed by the board of commissioners, and not by the ordinary; and it was further admitted that C. W. Martin, who filed the protest, did not have any written notice of the processioning proceeding, though he was not named as an adjoining landowner in the return of the processioners. No evidence was introduced, but the court, on the showing made by the protest and the admissions of counsel for Braden, passed an order sustaining Martin's objections, and Braden excepted.

W. M. Henry and F. W. Copeland, for plaintiff in error. M. B. Eubanks, for defendant in error.

**BECK, J.** Judgment reversed. All the Justices concur, except FISH, C. J., and HOLDEN, J., dissenting.

(136 Ga. 906)

**HARDIN v. CONEY, LOVEJOY & CO.**

(Supreme Court of Georgia. Sept. 30, 1911.)

*(Syllabus by the Court.)*

**WITNESSES (§ 21\*) — REFUSAL TO ANSWER QUESTIONS—CONTEMPT.**

The court did not abuse his discretion in adjudging the plaintiff in error to be in contempt for refusing to answer proper questions pertinent to the issue in a pending case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 37-41; Dec. Dig. § 21.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Coney, Lovejoy & Co. against R. S. Hardin. From an order adjudging de-

defendant incompetent, he brings error. Affirmed.

Payne, Little & Jones, for plaintiff in error. Anderson, Felder, Rountree & Wilson, for defendant in error.

PER CURIAM. Judgment affirmed.

BECK and ATKINSON, JJ., absent.

(186 Ga. 353)

PURVIS v. ATLANTA NORTHERN RY. CO.  
(Supreme Court of Georgia. Sept. 26, 1911.)

*(Syllabus by the Court.)*

1. TRIAL (§ 253\*)—INSTRUCTIONS—APPLICABILITY TO CASE—IGNORING ISSUES.

The plaintiff's suit being for the recovery of damages for injuries alleged to have been sustained in consequence of being ejected from a car of the defendant company at a point other than his destination, and at a place which, according to the allegations of the petition, was unsafe and dangerous, and there being evidence tending to support such allegation, the court erred in giving to the jury a charge which excluded from their consideration the alleged negligence of the defendant in carrying plaintiff beyond the street which he alleged was his intended destination.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

2. TRIAL (§ 236\*)—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

The court charged the jury as follows: "If a witness has been impeached by proof of contradictory statements, the contradictory statements ought to be rejected—that is, the statements delivered by the witness on the stand which are in conflict with any statement heretofore made—you would reject that, and the balance of the testimony of that witness is to receive such credit as you think it is entitled to." The instruction contained in this portion of the charge was confusing; and if it be construed, as it very probably was construed by the jury, as requiring them to find that as between sworn testimony and previous contradictory statements the sworn testimony was false and therefore to be rejected, the rule submitted for the guidance of the jury was not sound.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531-533; Dec. Dig. § 236.\*]

3. CARRIERS (§ 315\*)—INJURY TO PASSENGER—ACTION—ISSUES AND PROOF.

Where the plaintiff in his petition alleged that he was a passenger who had paid his fare, and predicated his right to recover on the violation by the company of the extraordinary care due to passengers, he could not recover if it was shown by the evidence that he was a mere trespasser, and it was not error for the court to give the jury instructions embodying this rule.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 315.\*]

4. CARRIERS (§ 384\*)—EJECTION OF PASSENGER—ACTION—INSTRUCTION.

Where a plaintiff alleges that he was a passenger on a car and was carried beyond the point where he had informed the conductor that he intended to alight, and was then ejected from the car in the dark, and, as he started to leave the place where he was put off, he fell over an embankment of the railway company and was hurt, and where the plaintiff's evidence tended to substantiate these allegations, and the de-

fendant introduced in evidence the petition in a former suit which had been brought by the plaintiff and dismissed, in which it was alleged that he was pushed from the car by the conductor and fell over the embankment, this did not authorize the following charge, which was excepted to: "If you believe from the testimony that the conductor pushed the plaintiff off the car, and that this push of the conductor caused him to fall down the bank against the bank, and that he got hurt, he cannot recover in this case."

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.\*]

5. CARRIERS (§ 384\*)—EJECTION OF PASSENGER—ACTION—INSTRUCTION.

Exception was taken to the following charge: "If you believe that the plaintiff was hurt at substantially the place he says he was hurt, he can recover, but, if he was hurt at substantially another place, substantially a different location from that claimed by him, he cannot recover in this case." The word "claimed," as here used, is ambiguous, as the court may have had reference to the allegations of the petition or simply to the testimony of the plaintiff. Besides, to warrant the charge, there should be evidence tending to show such a substantial difference in location as to make a different transaction, or to substantially vary the law or the defense applicable to the particular place at which the injury occurred from that which would have been applicable to the place alleged.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.\*]

6. CARRIERS (§ 384\*)—EJECTION OF PASSENGER—ACTION—INSTRUCTION.

Exception is also taken to the following charge of the court: "The plaintiff claims that he was hurt by being ejected from the right-hand side of the car, and that he fell on the right-hand side of the embankment, going towards Marietta, and if you believe from the testimony that his injury did not occur in that way, but that he left the car on the left-hand side of the embankment, and that he fell down the left-hand side of the embankment, and not the right-hand side, he cannot recover in this case." The criticism upon the charge set forth in the preceding headnote is applicable also to the extract from the charge last quoted.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by H. A. Purvis against the Atlanta Northern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff in error brought suit against the Atlanta Northern Railway Company, and alleged that on the night of May 16, 1906, between 11 and 12 o'clock, he boarded one of the defendant's cars in Atlanta; that, when he got on, he paid the conductor a five-cent fare, and told him he wanted to get off at Ponder's avenue; that the conductor "accepted his fare and information as to the stopping place desired, without demur, and the car moved on"; that the conductor failed to stop the car at Ponder's avenue, or to give warning of the approach of the car to said street; that it was dark, and the plaintiff could not observe when the car

reached or passed Ponder's avenue; that the conductor then came to plaintiff and demanded another fare, which the plaintiff refused to pay, and the conductor stopped the car, took the plaintiff to the rear platform, and compelled him to get off, against his will and protest; that the place at which he was put off was at a point beyond Howell station; that the night was dark, and there was no light at the place except that which came from the car, and the car immediately proceeded on its way, leaving plaintiff in total darkness; that, when plaintiff undertook to turn around and walk back to the city, at his first step, he fell over an embankment about 15 or 20 feet high, and sustained serious injuries; that the defendant was negligent in not having the car stop at Ponder's avenue, in putting plaintiff off the car at all after carrying him beyond said street, and especially negligent in putting him off in a strange and dangerous place at night, when there was no light, without giving him any notice or warning of the dangerous position in which he was thus placed. Upon the trial the jury returned a verdict for the defendant. The plaintiff made a motion for a new trial, which was overruled by the court below, and he excepted.

A. H. Davis, for plaintiff in error. Colquitt & Conyers, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

(136 Ga. 803)

**J. W. HUGHES & SON v. IOWA STATE BANK.**

(Supreme Court of Georgia. Sept. 26, 1911.)

*(Syllabus by the Court.)*

**REVIEW ON APPEAL.**

Under the evidence in this case, no other verdict than one in favor of the plaintiff could properly have been rendered, and the court did not err in so directing.

Error from Superior Court, Liberty County; P. E. Seabrook, Judge.

Action by the Iowa State Bank against J. W. Hughes & Son. Judgment for plaintiff, and defendant brings error. Affirmed.

Donald Fraser and Ben A. Way, for plaintiff in error. S. B. Brewton, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 880)

**EDENFIELD v. LAMB et al.**

(Supreme Court of Georgia. Sept. 28, 1911.)

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action between Mary Edenfield and Rebecca Lamb and others. From the judgment, Edenfield brings error. Affirmed by divided court.

Saffold & Larson, for plaintiff in error. Williams & Bradley, for defendants in error.

**PER CURIAM.** This case came before this court upon a writ of error from the superior court of Emanuel county; and the same being for decision by a full bench of six justices, who are evenly divided in opinion (Justices Lumpkin, Beck, and Atkinson being in favor of a reversal, and Chief Justice Fish, Presiding Justice Evans, and Justice Holden being in favor of an affirmance), the judgment of the court below stands affirmed by operation of law.

(136 Ga. 843)

**PHARES v. STOVER.**

(Supreme Court of Georgia. Sept. 25, 1911.)

*(Syllabus by the Court.)*

**1. CONTRACTS (§ 10\*)—VALIDITY—MUTUALITY—CONSIDERATION.**

The plaintiff in error brought suit against the defendant in error, for damages for the violation of a contract having, among others, substantially the following provisions: The plaintiff has appointed the defendant his exclusive agent or distributor for named states, to sell specified articles. The defendant agrees to make sales of them in these states during five years from the date of the contract, and to perform specified acts in making such sales. The plaintiff grants to the defendant the exclusive right to sell the articles in the states named, at specified prices; and defendant agrees to pay the plaintiff named prices for each of the articles; "all deliveries" of the articles to be made to the defendant, or his order, "f. o. b. cars Lexington, Ky." The defendant agrees to accept and pay for a stated number of the articles each month, and his failure in any month to purchase as many as the specified number gives the plaintiff the option to terminate the contract upon 10 days' notice. All payments for the articles shipped to the defendant shall be made by him to the plaintiff at specified prices within 20 days from the date of shipment. The plaintiff agrees to furnish the defendant as many samples of the articles as he may desire for canvassing, at a specified price, with privilege of returning them under named conditions; and, when thus returned, the plaintiff agrees to substitute new articles for the same purpose. The orders taken by the defendant from purchasers shall be on blanks furnished by the plaintiff, and orders given by the defendant to the plaintiff for shipment of articles for himself, or customers, shall be on blanks furnished by the plaintiff. The defendant shall have the right, in such states, to sell certain other articles at specified prices, on commission, and such sales shall be reported to the plaintiff "and same shall be filled with all reasonable diligence; all of said deliveries to be made f. o. b. cars, Lexington, Ky." The defendant agrees to solicit orders and procure sales of said articles only in the territory named. All orders secured by the plaintiff by mail in the states named shall be credited to the defendant as if he had made same. The contract was signed by both parties. **Held:**

The contract was not wanting in mutuality, and there was a consideration to support the promises made therein by each of the parties thereto. *Happ Bros. Co. v. Hunter Mfg. Co.*, 136 Ga. 671, 71 S. E. 1099.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 10.\*]

**2. ASSIGNMENTS (§ 31\*)—REQUISITES.**

The contract was not an assignment or transfer of the contract between the plaintiff and another party from whom he expected to secure the articles to be furnished by him to

the defendant, though the two contracts were in many respects identical in their provisions.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 31.\*]

**3. PRINCIPAL AND AGENT (§ 78\*)—ACTION—PLEADING—PETITION.**

The petition was not demurrable because the contract of the plaintiff with the party from whom he expected to secure the articles provided that such party should furnish the articles to the plaintiff for a less period of time than that provided for in the contract between the plaintiff and the defendant.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 78.\*]

**4. PRINCIPAL AND AGENT (§ 78\*)—ACTION—PLEADING—PETITION.**

The petition was not subject to general demurrer, or to any of the grounds of special demurrer, after being amended.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 78.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Frederick Phares against F. G. Stover. Judgment for defendant, and plaintiff brings error. Reversed.

Anderson, Felder, Rountree & Wilson, for plaintiff in error. Jas. L. Key, for defendant in error.

HOLDEN, J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 309)

**JAS. SMITH & SON v. HINKLE.**

(Supreme Court of Georgia. Sept. 22, 1911.)

(*Syllabus by the Court.*)

**FRAUDULENT CONVEYANCES (§ 308\*)—VENDOR AND PURCHASER (§ 245\*)—REMEDIES OF CREDITORS—QUESTION FOR JURY.**

The evidence was sufficient to authorize the jury to find that the deed from the debtor to his wife was void as to the plaintiffs in *fi. fa.*, who were creditors of the grantor when the deed was executed, and that the claimant, who was the grantee of the wife, was not a purchaser for value and without notice of the invalidity of the deed; and the court erred in dismissing the levy at the conclusion of the evidence offered in behalf of the plaintiffs in *fi. fa.*

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 923-940; Dec. Dig. § 308.\* Vendor and Purchaser, Cent. Dig. § 612; Dec. Dig. § 245.\*]

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Mrs. Nita O. Hinkle filed a claim to land levied on under execution by Jas. Smith & Son. To an order nonsuiting the case and dismissing the levy, the plaintiff in *fi. fa.* brings error. Reversed.

An execution in favor of the plaintiffs in error against A. B. Hinkle, administrator of J. B. Hinkle, deceased, was levied upon a tract of land, and the defendant in error, Mrs. Nita O. Hinkle, filed a claim thereto. Upon the trial the court granted an order,

nonsuiting the case and dismissing the levy, and to this order the plaintiffs in *fi. fa.* excepted.

The following documentary evidence was introduced: A deed from J. B. Hinkle to his wife, dated December 22, 1892, to "the residence of J. B. Hinkle in Americus," the vacant lot of five acres, more or less, "attached thereto," and several other lots of land in Americus besides the lot on which the office of J. B. and A. B. Hinkle was located, also a tract of land containing 875 acres, more or less, and "also all my personal property consisting of household and kitchen furniture, horses, mules, carriages, buggy, harness, corn, fodder, plantation tools, and in fact all the personal property that I now own; all my book accounts, together with all the rights and privileges thereunto belonging." The deed recited a consideration of \$5 and love and affection, and was recorded March 21, 1894. Deed from Mrs. L. E. Hinkle to Mrs. Nita O. Hinkle, dated January 15, 1896, to the real estate conveyed to the former by the deed hereinbefore referred to, and to "all my personal property consisting of household and kitchen furniture, one cow, one horse, carriage, buggy, wagon, harness, and corn; also the office furniture, medical library, and surgical instruments." This deed recited a consideration of \$9,000, "\$3,000 of which sum is paid by Nita O. Hinkle assuming liens and mortgages now on the property hereinafter described, and \$6,000 to her, the said L. E. Hinkle, in hand paid, the receipt of which is hereby acknowledged." The petition in a suit of the plaintiffs in error, filed September 29, 1896, against A. B. Hinkle, as administrator of J. B. Hinkle, on an account against J. B. Hinkle, made in 1891 and in 1892, prior to December 21, 1892. A plea filed by the defendant in that suit, and a verdict and judgment, dated June 5, 1905, in favor of the plaintiff in error for the amount sued for, \$308, principal, and \$257.72, interest. The execution issued upon the judgment referred to, in favor of the plaintiff in error against A. B. Hinkle, administrator of J. B. Hinkle, deceased, dated June 13, 1905, and the entry of levy thereon, dated December 10, 1907, upon one of the lots of land referred to in the deed above mentioned.

A. B. Hinkle made no return as administrator of J. B. Hinkle. A. B. Hinkle made no return for J. B. Hinkle of any property for taxation in 1893. In 1892 A. B. Hinkle returned for taxation property valued at \$575, and J. B. Hinkle returned property of the value of \$21,203, and J. B. and A. B. Hinkle returned property of the value of \$1,000. Neither Mrs. L. E. Hinkle nor Nita O. Hinkle returned any property for taxation in 1892. In 1893 Mrs. L. E. Hinkle returned for taxation property valued at \$15,703, and Mrs. Nita O. Hinkle returned property valued at \$440. In 1894 Mrs. L. E. Hinkle returned for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

taxation property valued at \$14,623, and Mrs. Nita Hinkle returned property valued at \$300. In 1895 Mrs. L. E. Hinkle returned for taxation property valued at \$15,190, and A. B. Hinkle, agent for wife, returned property valued at \$440. In 1896 Mrs. Nita Hinkle returned for taxation property valued at \$14,485. A. B. Hinkle, as administrator of J. B. Hinkle, gave bond in the sum of \$15,000.

The following oral testimony was also introduced: The account involved in the suit hereinbefore referred to was contracted and was due before December 21, 1892. Dr. J. B. Hinkle was the husband of Mrs. L. E. Hinkle and the father of Dr. A. B. Hinkle, the husband of Mrs. Nita O. Hinkle, the claimant. On the night of December 21, 1892, J. B. and A. B. Hinkle were arrested on the charge of having that night murdered Dr. Worsham. They were placed in jail an hour after the homicide of Dr. Worsham, who left a widow surviving him. They were confined in jail "a year or more." They remained in jail from the time of their arrest until the death of Dr. J. B. Hinkle and the trial of Dr. A. B. Hinkle. "From December, 1892, on through 1893, Drs. J. B. and A. B. Hinkle saw their wives almost every day, and they continued seeing their wives until the old doctor died, and Dr. A. B. Hinkle was acquitted. Mrs. L. E. Hinkle is the mother-in-law of Mrs. N. O. Hinkle, and Mrs. N. O. Hinkle is the wife of A. B. Hinkle. The Hinkles lived on Felder street, and they all lived together." One witness testified: "I went into the real estate business in 1895 or '96 and have been familiar with the value of property in the city of Americus from that time to the present. In my opinion, the market value of the property conveyed in the deed from Mrs. L. E. Hinkle to Mrs. Nita O. Hinkle in 1896 was about \$12,000."

Allen Fort & Son and Shipp & Kline, for plaintiff in error. Miller & Jones, for defendant in error.

HOLDEN, J. Judgment reversed.

BECK, J., absent. The other Justices concur.

(136 Ga. 863)

**ALABAMA GREAT SOUTHERN R. CO. v. HUNT.**

(Supreme Court of Georgia. Sept. 26, 1911.)

*(Syllabus by the Court.)*

1. **NEW TRIAL (§ 128\*)—GROUNDS OF MOTION.** Grounds of a motion for a new trial, alleging that the verdict was contrary to specified portions of the charge of the court, are, in essence, merely complaints that the verdict was contrary to law. *Atlanta Ry., etc., Co. v. Walker*, 112 Ga. 725, 38 S. E. 107.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 128.\*]

2. **RULINGS ON EVIDENCE.**

After careful examination of the grounds of the motion for a new trial, complaining of the admission of evidence, and of the entire record in the case, it does not appear that the judge erred in refusing to exclude the evidence, the admission of which is complained of in those grounds.

3. **INSTRUCTIONS—EVIDENCE.**

There were no exceptions to any of the court's instructions to the jury, and there was sufficient evidence to support the verdict.

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by Claud Hunt against the Alabama Great Southern Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Maddox, McCamy & Shumate, for plaintiff in error. Foust, Payne & Tatum, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(136 Ga. 835)

**WHITLEY v. KELLEY.**

(Supreme Court of Georgia. Sept. 23, 1911.)

*(Syllabus by the Court.)*

**EXCEPTIONS, BILL OF (§ 59\*)—AMENDMENT—DISMISSAL—DELAY IN SIGNING.**

In the certificate to the bill of exceptions, dated January 10, 1911, appears the following: "I certify that the original bill of exceptions in this case was tendered to me on October 22, 1909; that I sent it to plaintiff's counsel by mail November 9, 1909, when it was returned to me by plaintiff's counsel on November 10, 1909, with a statement of their objections to it, and that counsel disagreeing as to what changes should be made in the bill of exceptions, I informed them that a date would be fixed for a meeting with them, for the purpose of going over their bill. For one cause and another, this meeting was not held until the 14th of December last, when a corrected bill of exceptions was agreed upon by counsel for each side, and by consent of plaintiff's counsel defendant's counsel took the corrections to be incorporated in a corrected bill of exceptions, and to be submitted to counsel for the plaintiff after this was done. On January 3d I was informed by plaintiff's counsel that this had been done, and on the 4th I received from defendant's counsel the corrected bill. The delay in signing the bill was due to my purpose and desire to get counsel of the parties together and agree to the contents of the bill of exceptions." *Held*, under the facts stated, the motion to dismiss the writ of error must be sustained, in view of the fact that the bill of exceptions of 20 pages was not returned to the presiding judge within a reasonable time after the meeting referred to in the certificate, when the corrections proper to be made in the bill of exceptions were agreed upon by counsel for plaintiff and defendant, and counsel for plaintiff in error "took the corrections to be incorporated in a corrected bill of exceptions, and to be submitted to counsel for the plaintiff after this was done"; it not appearing from the certificate that the delay was occasioned by providential cause or imperative necessity. *Sutton v. Valdosta Guano Co.*, 115 Ga. 794, 42 S. E. 94.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 59.\*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by W. P. Kelley against T. R. Whitley. Judgment for plaintiff, and defendant brings error. Writ of error dismissed.

J. S. James, for plaintiff in error. Anderson, Felder, Rountree & Wilson and Geo. P. Whitman, for defendant in error.

HOLDEN, J. Writ of error dismissed.

BECK, J., absent. The other Justices concur.

(136 Ga. 862)

TRUST CO. OF GEORGIA et al. v. SESSIONS et al.

(Supreme Court of Georgia. Sept. 26, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 327\*)—PARTIES—NECESSARY PARTIES.

Where a mortgagee proceeded by a rule nisi to foreclose the mortgage, and certain persons filed equitable interventions, claiming that property belonging to them had been improperly used, and that they were entitled to recover sums to be paid from the assets of the mortgagor, and making such mortgagor and the interveners' guardian defendants to the intervention, upon exception to the overruling of the demurrer filed by the mortgagee to such intervention, and a refusal to allow the mortgagee to dismiss its foreclosure proceeding, the mortgagor and the guardian of the interveners were not interested with such interveners in seeking to sustain the judgment of the trial court, and therefore were not necessary parties defendant in error to the bill of exceptions.

(a) In view of the entire record, M. M. Sessions, as guardian, is not a necessary party plaintiff in error to the case in this court. The motion to make the mortgagor a party plaintiff in error is granted.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 327.\*]

2. EXCEPTIONS, BILL OF (§ 58\*)—SERVICE OF BILL—ACKNOWLEDGMENT.

Where the plaintiff in proceedings to foreclose the mortgage demurred to the interventions which were filed by three parties, and also sought to dismiss the foreclosure proceedings, and to the overruling of the demurrer and the refusal to allow the case to be dismissed a bill of exceptions was filed, assigning error on such ruling, and counsel who appeared of record as representing all of the interveners signed an acknowledgment of "due and legal service of the within bill of exceptions," and following their names were the words, "Attorneys for defendant in error," this was a sufficient acknowledgment of service to bind all of the interveners, although the singular "defendant" in error was used, instead of the plural word "defendants."

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 104; Dec. Dig. § 58.\*]

3. MORTGAGES (§ 436\*)—FORECLOSURE—INTERVENTION.

In a statutory proceeding by rule nisi to foreclose a mortgage, it is not competent for parties who claim that property belonging to them has been misappropriated, and that they have an interest in the property of the mortgage, to intervene as defendants to the foreclosure of the mortgage, and seek equitable decrees in their favor in such proceeding. If

they have any equitable rights, they cannot be thus asserted. Civil Code 1910, § 3280.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1280; Dec. Dig. § 436.\*]

4. MORTGAGES (§ 475\*)—FORECLOSURE—DISMISSAL.

It was error to refuse to allow the mortgagee to dismiss the foreclosure proceedings.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 475.\*]

Error from Superior Court, Cobb County; W. R. Power, Judge.

Proceedings by rule nisi by the Trust Company of Georgia and others against William M. Sessions, by next friend, and others, to foreclose a mortgage. To the overruling of a demurrer to an intervention, and the refusal to allow the mortgagee to dismiss the proceedings, the mortgagee brings error. Reversed.

Anderson, Felder, Rountree & Wilson, for plaintiffs in error. Geo. F. Gohar, Mozley & Moss, and Clay & Morris, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

(137 Ga. 53)

RAWLINGS v. BROWN et al.

(Supreme Court of Georgia. Oct. 12, 1911.)

(Syllabus by the Court.)

REFUSAL OF INJUNCTION.

Under the pleadings and the evidence, there was no abuse of discretion in refusing an interlocutory injunction.

Error from Superior Court, Johnson County; B. F. Walker, Judge.

Action by C. G. Rawlings against T. F. Brown and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hines & Jordan, A. R. Wright, and E. L. Stephens, for plaintiff in error. A. L. Hatcher, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 21)

MORGAN v. STATE.

(Supreme Court of Georgia. Oct. 11, 1911.)

(Syllabus by the Court.)

1. REFUSAL OF CONTINUANCE.

The court did not abuse his discretion in refusing to continue the case.

2. MUTUAL COMBAT.

The evidence authorized a charge on self-defense in case of mutual combat, predicated on Penal Code 1910, § 73.

3. SELF-DEFENSE.

The court did not confuse the defense of one's person, as defined in Penal Code 1910, §§ 70, 71, with the law of self-defense in case of mutual combat, as contained in Penal Code, 1910, § 73.

4. SUFFICIENCY OF EVIDENCE.

The evidence is sufficient to support the verdict.

Error from Superior Court, Laurens County; J. H. Martin, Judge.

P. I. Morgan has been convicted of crime, and brings error. Affirmed.

Adams & Flynt and Jno. R. Cooper, for plaintiff in error. E. D. Graham, Sol. Gen., and H. A. Hall, Atty. Gen., for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(136 Ga. 385)

STRICKLAND et al. v. JOLLY.

(Supreme Court of Georgia. Sept. 26, 1911.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 620\*)—DISSOLUTION—PROCEEDINGS.

The general demurrer to the petition was properly overruled.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 620.\*]

2. CORPORATIONS (§ 620\*)—OFFICERS—ELECTION—HOLDING OVER.

The special demurrers to so much of the petition as sought to restrain the directors of the defendant corporation from holding a meeting for the purpose of electing a successor to the plaintiff, who was holding over beyond the term for which he had been elected, should have been sustained.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 620.\*]

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by H. J. Jolly against E. Strickland and others. Judgment for plaintiff, and defendants bring error. Affirmed, with directions.

The defendant in error filed an equitable petition, alleging that he owns one-fifth of the capital stock of the Cartersville Grocery Company, and the defendants E. Strickland, Sr., E. Strickland, Jr., and A. Strickland own the other four-fifths; that, owing to the existence of friction between himself and E. Strickland, Sr., it became impossible for the business of the corporation to be conducted to its best interests, and petitioner consented to sever his connection with the company by a sale of his entire interest to E. Strickland, Sr., on terms proposed by the latter, but said Strickland refused to comply with his proposition, and to consummate the purchase; that later "it was agreed between all the parties hereto, representing all of the said stock of said company, that said corporation would convert all its assets into cash as soon as possible, pay the debts of said corporation, dissolve the corporation, and divide up the net balance between the stockholders thereof in proportion to the amount of stock held by each;" that sale was consummated by the

parties, and it was on the faith of this verbal agreement that petitioner signed the contract which was made with the purchasers, H. J. Smith and S. J. Hall, whom he induced to come to Cartersville for this purpose, selling to them all of the stock of goods of the Cartersville Grocery Company, except such as was damaged, and on which a price could not be agreed between the parties, together with other holdings of the company, and more than half of the company's accounts receivable; that at the instance of E. Strickland, Sr., the plaintiff made a contract with such purchasers to enter their employment, but that this should not interfere with the discharge of his duties as secretary and treasurer, so long as necessary for the winding up of the Cartersville Grocery Company; that petitioner has sought by every means to induce E. Strickland, Sr., to consent to some practicable method of collection of such of the accounts as were not included in the sale to Smith and Hall, and to a disposition of the small amount of stock which was withheld from the operation of said sale, and a distribution among the stockholders of the net sum remaining after the payment of all debts, but said Strickland has refused to give his consent to any agreement with reference thereto. Petitioner is informed and believes that E. Strickland, Sr., and E. Strickland, Jr., have very recently ordered goods shipped to the Cartersville Grocery Company, in defiance of and in violation of the verbal contract between petitioner and the other stockholders, as above stated. He alleges that he is secretary and treasurer of the defendant corporation, his term of office, by common consent of all the stockholders, continuing since the date provided by the by-laws for the last annual meeting of the stockholders; there having been no meeting at that time for the election of officers. He prays that E. Strickland, Sr., and E. Strickland, Jr., be restrained and enjoined from making any contracts or obligations in the name of or on the part of the Cartersville Grocery Company; that defendants be restrained from holding any stockholders' or directors' meetings, or from attempting to elect any individual or party as director, or as secretary and treasurer, of the corporation, in lieu of petitioner; that all of said parties be enjoined from paying out any of the funds of said corporation, except by check signed by E. Strickland, Jr., manager, and by petitioner, as secretary and treasurer; that provision be made for the collection of the accounts and the sale of the stock of goods excepted from the sale made to Smith and Hall; and that the agreement heretofore entered into by and between the stockholders be required to be strictly performed. The defendants filed their demurrer, on grounds



general and special, which was overruled, and they excepted.

Neel & Neel, for plaintiffs in error. J. T. Norris, for defendant in error.

BECK, J. (after stating the facts as above). [1] 1. The court below did not err in refusing to sustain a general demurrer to the plaintiff's petition. While the directors of the corporation, at the time of acting upon the proposition of selling and closing out the business in which they were engaged at a time when it appeared that the differences and internal troubles of the corporation were such as to render the further carrying on of the business unprofitable, were not assembled in a regular meeting, or in a special meeting formally called, still all the directors and the stockholders were conferring together, and the action taken was by the consent of every one of the stockholders and directors. And having, under these circumstances, agreed and consented to wind up and close out the business of the corporation, where subsequently, in pursuance of this action of the directors, a sale of all the stock of goods, except such as was damaged and on which a price could not be agreed between the parties, was made to a party who became the purchaser thereof, the corporation could not, over the objection of the plaintiff, he being a stockholder and director in the corporation, continue the business with the remnant of the stock of goods not included in the sale because of the damaged and unsalable character of the remnants, and should not be permitted to do so, or to make other purchases, thereby adding to the remnant so reserved; but in good faith the agreement made among the entire body of directors and stockholders should be carried out to its final completion by the entire disposal of the remnant of the stock of goods reserved for the reasons stated above, when the business was practically closed by the sale of the bulk of the goods. This is in the main what the plaintiff seeks by his petition, and these main principles of the suit can be accomplished without any order dissolving the corporation, and the petition, by the overruling of the general demurrer, was properly retained. See, in this connection, 3 Clark & Marshall on Private Corporations, § 644; 21 Am. & Eng. Enc. L. 865, 866.

[2] 2. While we have held that the grounds of demurrer which were general in their character were properly overruled, we are of the opinion that the court should have sustained the special demurrer to so much of the petition and the prayers thereof as sought to prevent the corporation from holding a meeting for the purpose of electing a secretary and treasurer, as it appears that the plaintiff was holding over beyond his term as the incumbent of that office, and no

reason appears why he should continue in the office beyond the expiration of his regular term. Direction is given that such special demurrer be sustained, and so much of the petition as seeks to prevent a meeting of the directors for the purpose just stated be stricken.

The other special demurrers were without merit, and the court did not err in overruling them. The extent of the interlocutory injunction granted is not brought under review by this bill of exceptions. Neither does this case involve any question of the rights of creditors. No creditor is proceeding, and a proper decree can be entered as to corporate debts. The question raised is between the plaintiff, the corporation, and the other individuals constituting all the stockholders and directors thereof.

Judgment affirmed, with direction. All the Justices concur.

(126 Ga. 377)

SEAGRAVES et al. v. W. E. POWELL CO.  
(Supreme Court of Georgia. Sept. 26, 1911.)

*(Syllabus by the Court.)*

1. CONTINUANCE (§§ 23, 51\*)—GROUND—ABSENCE OF PARTIES—ABSENCE OF WITNESSES.  
The court did not err in overruling the motion for a continuance.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 68-118; Dec. Dig. §§ 23, 51.\*]

2. INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.  
The court correctly instructed the jury as to all the material issues involved in the case, and the exceptions to the charge are without merit. The evidence amply supported, if it did not demand, a verdict for the plaintiff.

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action by the W. E. Powell Company against S. E. Seagraves and another. Judgment for plaintiff, and defendants bring error. Affirmed.

E. C. Armistead, for plaintiffs in error.  
Cleveland & Goodrich, for defendant in error.

BECK, J. W. E. Powell Company brought suit upon a promissory note against S. E. Seagraves and Mrs. J. P. Seagraves. It was recited in the note that the same was given for the purchase money of a certain described horse. The defendants filed their joint plea, setting up that the horse was never delivered to the defendants, or either of them, although the note was executed by them upon the express understanding that the horse would be delivered to S. E. Seagraves the next day; hence the consideration for the note has totally failed. Mrs. J. P. Seagraves did not execute the note as principal, but as security only, and this fact was well known to the plaintiff before and at the time it took the note; that her contract of suretyship was that the note was given for the horse;

that the note was a mortgage on the horse, and that she should only be liable for any balance that might be due on the note after the horse had been subjected to the payment of the note; that S. E. Seagraves (who was her son), in procuring her signature to the note, was acting as the agent of the plaintiff, and this was well known to the plaintiff, and the plaintiff, in thus directing S. E. Seagraves to procure her signature, and in placing the horse beyond the jurisdiction of the courts, intended to cheat, swindle, and defraud her. It was pleaded by S. E. Seagraves that, after he had executed the note, he procured the signature of Mrs. Seagraves thereon and delivered the note to the plaintiff upon the promise that the horse would be delivered to him the next day; that he called the next day for the horse, and the plaintiff handed him a note which the defendants had formerly executed in favor of one Hollingsworth, stating to defendant at the time that the horse had been delivered to Hollingsworth, and would not be delivered to Seagraves. Seagraves denied that the Hollingsworth note so returned to him was accepted by him in lieu of the horse, and made tender of the same to plaintiff. Defendant further pleaded that the Hollingsworth note was a nullity, being without consideration and set forth the circumstances under which the same was given. Upon the trial the jury returned a verdict in favor of the plaintiff for the principal of the note sued on, with interest and 10 per cent. attorney's fees. The defendants made a motion for a new trial. This the court overruled, and they excepted.

[1] 1. Complaint that the court erred in overruling the motion for a continuance in this case is based upon two grounds: First, it is alleged that a continuance should have been granted upon the ground of the sickness of Mrs. Seagraves, one of the parties. To support the motion for a continuance, it was shown that "Mrs. Seagraves was sick and unable to attend court at that time; that her attorney could not safely go to trial in her absence; that he could prove by her that she was only a security on the note sued on; that she signed the note as security for S. E. Seagraves on his statement that he had bought a horse from W. E. Powell Company, who had taken a mortgage on it, and wanted her to sign the note as additional security; that she knew nothing of any arrangements between Powell and S. E. Seagraves and Hollingsworth about the horse and washing machine note, never was present, nor was anything ever said to her about it." It appears from the evidence in reference to Mrs. Seagraves that the condition of her health for two weeks or more prior to the trial was such as to suggest that her appearance at the court would probably be prevented by her physical condition. During the two weeks immediately preceding the trial, she was not entirely well, but she could be out

of bed, and could go where she wished to go most of the time. It was not intimated that she was not sufficiently strong to answer interrogatories duly propounded to her. In view of the fact that the case had, at a previous term of the court, been continued on account of her absence and sickness, the court did not err in refusing to grant another continuance on account of the indisposition of this party, especially in view of the fact that it did not appear that she suffered from an attack of sickness so sudden as to prevent herself and her counsel from anticipating that she might not be able to be present when the trial of her cause came on.

The other ground of the motion was based upon the absence of two witnesses. Their absence was not hurtful to the plaintiffs in error; the facts which the plaintiffs in error, according to the showing made on the motion for a continuance, expected to establish by the absent witnesses were immaterial and irrelevant to the real issues in the case. The defendants' contention on the trial was that the note sued on was given for the purchase of a horse, and that the plaintiff, instead of delivering the horse, delivered to him a note, which the defendant Seagraves had formerly executed and delivered to a third party. He pleaded that when this note was handed to him he did not know what the paper so handed to him contained, and that immediately upon reading it and discovering that it was his promissory note, formerly executed to the third party just referred to, he tendered it back. But upon the trial of the case he testified that, while the note sued on was for the purchase money of a horse, he accepted and retained the note so handed to him in lieu of the horse, and directed that the horse which he had purchased be turned over to the third party, the payee in the note which was handed to him, and which he accepted. The court on the trial of the case distinctly and clearly submitted to the jury the question as to whether or not there had been a constructive delivery to Seagraves of the horse, which constituted the consideration of the note sued on; and there was sufficient evidence to authorize the finding of the jury that there was a constructive delivery of the animal to Seagraves, and that it was by his direction, and with his consent, that the horse was actually delivered to Hollingsworth, instead of to himself, and that, instead of taking actual possession of the horse himself, he received and accepted his note, which he had formerly executed to Hollingsworth. The witnesses of whose absence he complained, and by whose testimony he insists he could have shown that the note to Hollingsworth was without consideration, and void on the ground of fraud, had they been present in court, could not have availed him in the face of his admissions that he had accepted the Hollingsworth note, knowing for what purpose it was turned over to him, and that he retained pos-

session of the same. Nor could their testimony have availed Mrs. Seagraves, the absent party, who pleaded that she was merely surety on the note, which was for the purchase money of a horse, inasmuch as she was absolutely bound upon the note, and the consideration of the same was actually or constructively delivered to the defendant, S. E. Seagraves.

[3] 2. The court in his charge clearly, fairly, and explicitly instructed the jury as to the material issues of the case, and the exceptions to the charge are without merit.

Judgment affirmed. All the Justices concur.

(186 Ga. 854)

# TOWN OF DECATUR v. JAUDON.

(Supreme Court of Georgia. Sept. 28, 1911.)

## (Syllabus by the Court.)

### 1. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACTS — CONSTRUCTION — COMPENSATION — EXTRA WORK.

Where, having reference to the contemplated construction of a system of waterworks, a civil engineer made to the municipal authorities of the town proposing to construct the waterworks a written proposition offering his services in the following language: "I will do all the work necessary to get up a complete set of plans and specifications for your proposed waterworks; said plans and specifications will be such that you will be able to invite bids on the same; and after the contract is awarded from the bids I will supervise the construction of the work and see that the same is carried out according to the plans and specifications adopted by you. I will make a proposition to do all the work for the lump sum of \$1,500, this amount to include all expenses of getting up the plans and specifications and the supervision of the work after the same has been contracted"—and this proposition was accepted without additional stipulation or qualification, the engineer could not recover against the municipality for additional services and expenses which were rendered and incurred by him after the time fixed in a contract between the municipality and the contractors who were to construct the waterworks had expired. His right of recovery was limited to the lump sum named in the proposal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

### 2. EVIDENCE (§ 398\*)—PAROL EVIDENCE AFFECTING WRITINGS—ADMISSIBILITY.

The contract was free from ambiguity. And the engineer could not, in a suit against the municipality, based upon this contract, open the way for the introduction of parol evidence which would alter or change the terms of the written instrument, by allegations as to his understanding of the terms and scope of the written contract, and that his understanding of it was known to the municipal authorities.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1766-1771; Dec. Dig. § 398.\*]

### 3. CONTRACTS (§ 186\*)—CONSTRUCTION—PAR-TIES.

Stipulations in the contract between the municipal authorities and the contractors who undertook the work of construction, providing for penalties in the event of failure on the part of the contractors to carry out the terms of

their contract with the municipality, could not be invoked by the plaintiff in this case, who was not a party to the contract last referred to.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 186.\*]

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by H. S. Jaudon against the Town of Decatur. Judgment for plaintiff, and defendant brings error. Reversed.

H. S. Jaudon, a civil engineer, made the following written proposition to the town of Decatur: "I will do all the work necessary to get up a complete set of plans and specifications for your proposed waterworks; said plans and specifications will be such that you will be able to invite bids on the same; and after the contract is awarded from the bids I will supervise the construction of the work and see that the same is carried out according to the plans and specifications adopted by you. I will make a proposition to do all the work for the lump sum of \$1,500, this amount to include all expenses of getting up the plans and specifications and the supervision of the work after the same has been contracted." The town of Decatur, acting through its mayor and council, accepted this proposition. Immediately Jaudon set about making surveys, maps, estimates, plans, and specifications for the construction of the system of waterworks, and submitted his work to the town for final disposition. The town adopted the plans and specifications and advertised for bids, which resulted in the making of a contract with Walton & Wagner, wherein it was stipulated that Walton & Wagner would, at their own cost and expense, do all the work, furnish all the material, equipment, and labor necessary for the construction of the waterworks in accordance with the plans and specifications so prepared by Jaudon, and accepted and adopted by the town of Decatur. In order to secure the faithful performance on their part, Walton & Wagner executed and delivered to the town a good and solvent bond.

So much of the contract entered into between the town of Decatur and Walton & Wagner as Jaudon claims to be material to the issues in his suit against the town of Decatur is as follows: Walton & Wagner guarantee to complete the contract on or before October 1, 1907. They have carefully examined the annexed specifications, contract, and plans on file in the office of the city clerk and engineer, and made all personal examination necessary to fully understand the meaning and intent of the same. Walton & Wagner further agree to do the work in strict accordance with the plans and specifications on file; said plans and specifications, in addition to the proposal herein before mentioned, being annexed and made

a part of this contract. It is mutually agreed that payments will be made by the town as set out in the specifications. The contract must be finished within the time named in the proposal, time being of the essence of this contract, and the work must be carried on continuously and diligently from the time of beginning. Should the contractors fail to complete the work as specified in his proposal, within the time named therein, they hereby agree to pay all expenses incurred by the engineer for engineering and inspection, due to said delay, which amounts shall be deducted from any moneys which may be due by the town. Should the town authorities see fit, they may extend the time for the completion of the work; in such case, the contractor agrees to pay all expenses, such as engineering and inspection, that the engineer may incur, due to said extension. At the end of each month, the town will have made an estimate of the work done during the month, and will pay to the contractors 80 per cent. on such estimate. At the completion of the contract, the town will have made a final estimate of the work done, and will cause to be paid to the contractors, within 30 days after such final estimate is made, the entire sum found to be due under the contract, after deducting therefrom all previous payments.

The entire work must be completed within the time set out in the proposal. The work of constructing the waterworks system was not completed until several months after October 1, 1907. Jaudon sues the town of Decatur for services and expenses incurred in connection with supervising the work of Walton & Wagner for the months of October, November, and December, 1907, aggregating the sum of \$872.35. He alleges that the intent and meaning of the contract between the town of Decatur and himself was that he would be paid by the town \$1,500 for services rendered by him between the time the contract was made and the 1st day of October, 1907, and that for all services rendered by him after October 1st he was to be paid by defendant, but defendant was to be reimbursed by Walton & Wagner; that this is a reasonable construction of the contract, and is the construction he put upon it at the time he entered into his contract with the defendant, and at all times since; and that this construction by him was known to the defendant all the while, and not disputed by the defendant until long after October 1, 1907. The defendant demurred gen-

erally to the petition. The demurrer was overruled, and the defendant excepted.

L. J. Steele and Nathan Harris, for plaintiff in error. J. D. Kilpatrick, for defendant in error.

BECK, J. (after stating the facts as above). The defendant in the court below by general demurrer challenged the right of the plaintiff to recover on the case as set forth in the petition. The court held that the petition set forth a cause of action, and overruled the demurrer.

[1-3] Under the contract in this case between the plaintiff and the defendant municipality, the former was entitled only to the sum of \$1,500, for which, in a proposal offering his services to the municipality, he had undertaken to supervise the construction of the contemplated work, and see that the same was carried out according to the plans and specifications to be adopted. Under the proposition submitted by the plaintiff himself, in writing, he was to "do all the work for the lump sum of \$1,500, this amount to include all expenses of getting up the plans and specifications and the supervision of the work after the same has been contracted." This proposition was accepted by the town of Decatur without additional stipulation or qualification. It would be difficult to conceive of a contract freer from ambiguity and more plainly revealing its meaning without the aid of construction or interpretation. As brief as the contract is, it iterates and reiterates the proposition to do the work of supervision, and to do and perform all the duties incumbent upon the engineer of such an enterprise, for a "lump sum" definitely fixed. Jaudon was not a party to the contract between the town and firm of contractors, Walton & Wagner, and he cannot invoke the terms of that instrument to change or alter the plain terms of the contract between himself and the defendant in this case. In this connection, see notes to the case of *Inman Mfg. Co. v. American Cereal Co.*, 133 Iowa, 71, 110 N. W. 287, 8 L. R. A. (N. S.) 1140, and cases there cited. If it were permitted by parol evidence to raise an ambiguity in a contract as free from that vice as the contract now under consideration is, then no written contract could be exempt from the danger of attack by parol evidence. The court erred in not sustaining the general demurrer.

Judgment reversed. All the Justices concur.

(156 N. C. 410)

**JONES v. HUNTLEY et al.**

(Supreme Court of North Carolina. Oct. 25, 1911.)

**1. WILLS (§ 832\*)—CONSTRUCTION—PAYMENT OF DEBTS—PROPERTY LIABLE.**

Testator gave a policy on his life to a beneficiary, and declared that she should have all the benefits accruing thereunder, and that his debts should be paid out of any other property of which he might die possessed, after which any residue should be divided between his legal heirs. *Held*, that the life policy was specifically devised to the beneficiary and was exonerated from the payment of debts, though his other personalty alone was not sufficient therefor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2139-2155; Dec. Dig. § 832.\*]

**2. WILLS (§ 7\*)—PROPERTY DEVISED—INTEREST IN REMAINDER.**

Under Revisal 1905, § 3140, defining what property passes by will, a testamentary gift of testator's property of which he died possessed after the payment of debts includes his interest in remainder in land.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 11; Dec. Dig. § 7.\*]

Appeal from Superior Court, Anson County; Justice, Judge.

Petition by William Jones, executor of Elijah D. Huntley, deceased, against Fanny Huntley and others, heirs at law, for the sale of land to make assets. From a judgment directing a sale, defendants appeal. **Affirmed.**

This was a petition to sell land to make assets filed by the executor of Elijah D. Huntley against his heirs at law. The sole question presented was the construction of the will as set out upon the following facts agreed:

"Elijah D. Huntley died on December 13, 1902, leaving a will, two of the items of which are as follows:

"First, I hereby give and bequeath to Miss Hattie Hasty, of the said county and state, my insurance policy of one thousand (\$1,000) dollars in the Phoenix Mutual Life Insurance Company, of Hartford, Conn., bearing date November 17, 1902, and it is my will and desire that she, the said Miss Hattie Hasty, shall have all the benefits accruing thereunder, in the event of my death.

"Second, I desire that my debts (if any) and burial expenses be paid out of any other property of which I die possessed, after which the balance of my personal property and real estate shall be divided between my legal heirs as the law may direct."

The plaintiff qualified as his executor. The testator did not at his death have sufficient personal property other than the insurance policy referred to in item 1 to pay the debts and burial expenses. The plaintiff used \$400 of the proceeds of the insurance for the payment of debts. The testator at the time of his death was the owner of an interest in the remainder in some lands in Anson county. The plaintiff brought this

action to sell these lands for the purpose of reimbursing the legatee for the amount of the policy which had been used for the payment of debts.

Lockhart & Dunlap, for appellants. Russell & Weatherspoon and McLendon & Thomas, for appellee.

CLARK, C. J. [1] The judgment of his honor was correct, and so fully states his reasons that we reproduce it as the opinion of this court: "The court is of the opinion, and so adjudge, that the said policy of insurance or proceeds thereof is and was intended by the testator to be an absolute, specific legacy, and the land mentioned in the second clause not being specifically devised, and the intention of testator appearing in the will that the property so mentioned in item 2 should be subject to the payment of debts in exoneration of the said policy, it is ordered and adjudged that if it shall be found that there is not sufficient personal property, other than the proceeds of the policy, to pay the debts of the testator that the plaintiff as executor have license to sell the land to pay the debts, and that the policy or the proceeds of the same shall not be liable until all the property, real and personal, mentioned or referred to in the second clause of the will be exhausted."

Ordinarily the personalty must first be exhausted before recourse can be had for the payment of debts to the realty. But the testator can change this order. The prime consideration in the construction of a will is the intent. As to that, there can be no doubt upon the face of the will. The testator intended that the property in item 2 of the will should be charged with the payment of debts and burial expenses in exoneration of the property mentioned in item 1. By item 1 the testator bequeathed not "\$1,000," but his "insurance policy of \$1,000," using the words "one thousand dollars" as descriptive of the policy. His intention to make the policy a specific bequest is further manifested by his description of it giving the name and location of the company, the amount, and date. The further words that, "the said Miss Hattie Hasty shall have all the benefits accruing thereunder in the event of my death," show clearly that he intended it should be specifically exonerated from the payment of debts. This intent he further indicates by providing in section 2 that his debts and burial expenses should "be paid out of any other property of which I shall die possessed." He further adds to this by saying "after which" the balance of his personal and real property should be divided between his legal heirs as the law may direct.

[2] The words, "other property of which I shall die possessed, after which the balance of my personal property and real estate

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexer

shall be divided," etc., include the ownership of an interest in remainder of lands. Rev. 3140.

The intent of the will seems to us so plain that no citation of authorities could throw any additional light upon its construction.

The judgment of his honor is in all respects affirmed.

(156 N. C. 329)

BATTLE et al. v. CITY OF ROCKY MOUNT et al.

(Supreme Court of North Carolina. Oct. 18, 1911.)

1. COURTS (§ 187\*)—RECORDER'S COURT—DUTY TO ESTABLISH—"SHALL."

Acts 1907, c. 209, § 24, provides that a special court for the trial of misdemeanors is established to be known as the "recorder's court of Rocky Mount." Section 25 provides that it shall be presided over by a recorder, who shall be a resident and qualified voter of the city, and "shall" be elected by the aldermen of the city at a certain meeting. *Held*, that such act was one concerning the public interest, and hence the word "shall" was not to be construed as equivalent to "may," but that the act was mandatory and imposed an absolute duty on the board to elect a recorder to preside over such court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 187.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6459-6469; vol. 8, p. 7799.]

2. COURTS (§ 187\*)—ELECTION OF RECORDER—CONTINUING DUTY.

Under Acts 1907, c. 209, § 25, requiring the board of aldermen of Rocky Mount to elect a qualified person to preside over the recorder's court biennially, the duty so to elect is a continuing one, the exercise of which the courts will compel when they have failed to hold the election at the appointed time.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 187.\*]

3. MANDAMUS (§ 76\*)—SCOPE OF REMEDY—PUBLIC OFFICERS—COERCING ACTION.

Where the board of aldermen of Rocky Mount failed and refused to elect a recorder to preside over the recorder's court established by Acts 1907, c. 209, as required by section 24, mandamus was the proper remedy to compel the board to take such action.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 158-160; Dec. Dig. § 76.\*]

Appeal from Superior Court, Edgecombe County; Cooke, Judge.

Mandamus by the State, on relation of T. H. Battle and others, against the City of Rocky Mount and others. Judgment for relators, and defendants appeal. Affirmed.

This is a suit for a writ of mandamus, brought by certain citizens of the city of Rocky Mount, to compel its board of aldermen to elect a recorder, as required to do by the Acts of 1907, ch. 209, §§ 24, 25, 26, and 27, in order that a recorder's court may be established and organized according to the terms of the said act, which sections provide as follows:

"Sec. 24. That a special court for the trial of misdemeanors is hereby established, and said court shall be known as the 'recorder's court of Rocky Mount.'

"Sec. 25. That said recorder's court shall be a court of record, and shall be presided over by a recorder, who shall be a bona fide resident and a duly qualified voter of said city, and shall be elected by the board of aldermen of said city at the meeting to be held on the Thursday next succeeding the election for mayor and aldermen, to be held on the first Monday in May, one thousand nine hundred and seven, and biennially thereafter; and such recorder shall hold his said office for a term of two years from the date of his said election and until his successor shall be duly elected and qualified. Pending such election and so long thereafter as the board of aldermen shall fail to fill said office by the election of a recorder, the mayor of said city shall be ex officio recorder, and as such shall exercise every power conferred upon and perform every duty imposed upon such recorder by this act.

"Sec. 26. That whenever the board of aldermen of said city shall, in accordance with the provisions of the preceding section, elect a recorder, said board shall likewise proceed to elect a vice recorder, who shall possess the same qualifications and hold office for the same term as the recorder; and said vice recorder shall enter upon and discharge the duties of the office of recorder whenever the recorder, on account of sickness, absence from the city or other good and sufficient cause, shall be unable to do so, and he shall for the time be clothed with every power conferred by law upon the recorder: Provided, that so long as the mayor of said city shall be ex officio recorder the mayor pro tempore shall be ex officio vice recorder, and as such shall be clothed with every power conferred by law upon such vice recorder.

"Sec. 27. That the recorder's court shall hold daily sessions in the court room of the municipal building in said city, and shall possess every power in the regulation and ordering thereof usually possessed by other courts of record in like cases."

The defendants have never complied with the requirements of this act, nor taken any steps to do so, contending that it was left entirely to their discretion whether to fill the office of recorder or permit the mayor to act as recorder, and the mayor pro tem. as vice recorder, and they thought it best for the interests of the community to continue the old régime. The judge of the superior court, Hon. Chas. M. Cooke, did not agree with defendant's counsel in this construction of the act, and adjudged that the writ of mandamus be issued. Defendants excepted and appealed.

F. S. Spruill, for appellants. L. V. Bassett, for appellees.

WALKER, J. [1] We concur with the learned judge in his conclusion of law and in his judgment. The act of 1907 is plainly mandatory. A recorder's court is established by the act, with detailed provisions for the exercise of the jurisdiction conferred upon it. It was clearly intended by the Legislature that the board of aldermen should, at their May meeting, next after the passage of the act, elect a recorder. There is not even the scintilla of a discretion given to the board so far. The Legislature had the power to pass the act, and it evidently knew precisely what it wanted to do, and expressed itself to that end in unambiguous words, and, being composed of fine grammarians, it conveyed its meaning to the board in the imperative mood, which is generally supposed to carry a mandate with it. In every section of the act the word "shall" is used to show that the Legislature intended that the board should execute its will and not its own. As an auxiliary, the word "shall" implies a duty or necessity, whose obligation is derived from the person speaking and is equivalent to an order or direction to do the particular thing, and excluding all idea of discretion or the exercise of the will of the person addressed, so that he may do it or not as seems to him best. He is simply commanded to do it, and his only duty, which, of course, is obligatory, is to obey. The mandate could not be more imperatively given than it was in this case, and why the intelligent gentlemen should have thought otherwise we are at a loss to know. Public duties are imposed to be performed and not to be neglected. It was not the purpose of the Legislature to decide who should be elected as recorder, for that was left to the choice of the board, but in all other respects they are left without any discretion in the matter. It has even been held that, when the word "may" is used in a statute, "it will be construed to mean 'shall' or 'must,' when public interests or rights are concerned, and when the public or third persons have a claim *de jure* that the power shall be exercised. And, conversely, the word 'shall' may be understood as equivalent to 'may' when no right or benefit to any one depends upon the imperative use of the term." Black Int. of Laws (1896) p. 338; Jones v. Commissioners, 137 N. C. 579, 50 S. E. 291; 36 Cyc. 1159; 2 Lewis' Sutherland, Stat. Con. (2d Ed.) §§ 637, 638, 640.

How could there be a recorder's court, under the terms of this act and in view of its evident intent, without a recorder? The provision for the mayor to fill any original vacancy was inserted for the purpose of keeping the office full until there could be an election, or to supply a vacancy occurring from any other cause until a recorder could be elected, as in case of death or resignation. It was not the purpose of that provision to enable the defendants to nullify the act of the Legislature, or to set at naught its de-

clared will. The meaning of the statute is clear, and, where there is no ambiguity, there is no room for construction, and the intention must be gathered from the words employed. U. S. v. Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; U. S. v. Hartwell, 6 Wall. 386, 18 L. Ed. 830; State v. Barco, 150 N. C. 792, 796, 63 S. E. 673; Fortune v. Commissioners, 140 N. C. 322, 52 S. E. 950; State v. Eaves, 106 N. C. 752, 11 S. E. 370, 8 L. R. A. 259; Adams v. Turrentine, 30 N. C. 147, 150. "The meaning and intention of the legislature (and its will) must be sought first of all in the language of the statute itself; for it must be presumed that the means employed are adequate to the purpose, and do express that will correctly." Black, Inter. of Laws (1896) § 25; U. S. v. Goldenberg, 168 U. S. 96, 18 Sup. Ct. 3, 42 L. Ed. 394; Hamilton v. Rathbone, 175 U. S. 421, 20 Sup. Ct. 155, 44 L. Ed. 219. As a corollary of the foregoing proposition, it follows that: "If the language of the statute is plain and free from ambiguity, and expresses a single definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey. In other words, the statute must be interpreted literally." Black, § 26. The purpose of this court always has been, as shown by its decisions, and ever will be, not to defeat the intention of the Legislature by a forced interpretation, but to construe its enactments so as to execute its will with punctilious regard for its sovereign right, delegated by the people, to make the law. We say what it is, but they say what it shall be, and, when the will of that body is declared, it becomes the duty of every citizen, and every official, to obey it. The defendants cannot escape the discharge of the duty enjoined upon them by the plea that, having failed to act at the day fixed in the act, they are discharged altogether from its performance, and thus, by their own willful wrong and neglect of duty, acquit themselves of responsibility.

[2] The duty is a continuing one, time not being of the essence of the obligation imposed upon them, and the courts will compel them to do, at any time, what they have failed to do at the proper or appointed day. Any other doctrine would put it in the power of a delinquent officer to defeat the legislative will and repeal a law, and would be nothing less than monstrous. Grady v. Commissioners, 74 N. C. 101; McCormac v. Commissioners, 90 N. C. 441; 2 Lewis' Sutherland, Stat. Construc. (2d Ed.) § 612—16; Black, Inter. of Laws (1896) 343; Julland v. Rathbone, 39 N. Y. 369.

[3] This much upon the preliminary matters. The other question in the case is whether mandamus will lie to compel obedience to the law. The rule as to this point is that: "Where the duty to be performed is judicial or involves the exercise of discretion upon the part of the tribunal or of-

ficer, mandamus will lie to compel such tribunal to take some action in the premises and exercise its judgment or discretion. But the function of the writ is merely to set in motion. It will not direct how the duty shall be performed or the discretion exercised. To do so would be to substitute the judgment and discretion of the court issuing the mandamus for that of the court or officer to whom it was committed by law. No particular act can be commanded, and, if the discretion is to act or not to act at all, mandamus will not lie. After the tribunal or officer has exercised the judgment or discretion vested in him, and has acted, mandamus will not lie for the purpose of reviewing the decision and compelling a change of judgment or any further action in the premises. The writ cannot be used for the correction of errors. If, however, such judgment or discretion is abused, and exercised in an arbitrary manner, mandamus will lie to compel a proper exercise thereof. So, where the law has limited the discretion of a board or officer, mandamus may be used to keep such board or officer within the limits of such discretion. If by reason of a mistaken view of the law or otherwise there has been in fact no actual and bona fide exercise of judgment and discretion, as for instance, where the discretion is made to turn upon matters which, under the law, should not be considered, mandamus will lie. So where the discretion is as to the existence of facts entitling the relator to the thing demanded, if the facts are admitted or clearly proved, mandamus will issue to compel action according to law. If the law involved is purely ministerial and not judicial or discretionary, and if the duty itself is imperative, specific, and well defined, mandamus will lie not only to compel performance, but in a particular and specific manner. But the duty must be clearly and unmistakably enjoined by law, so that its performance does not involve the exercise of any judgment or discretion." 19 Am. & Eng. Enc. of Law (2d Ed.) 732-741, and numerous cases cited in the notes.

This view of the law was adopted by us in *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737, where the subject is fully discussed, with a copious array of the authorities in this and other jurisdictions. We there said: "While it is proper by mandamus to set them (the commissioners) in motion and to require their action upon all matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion nor attempt by mandamus to control or dictate the judgment to be given." And again: "If the defendants had neglected or refused to execute the power intrusted to them, we certainly might call upon them to show cause why they had been so negligent, and upon insufficient return might have issued a peremptory mandamus. Here all we could do

would be to command them to select the site for the permanent seat of justice for the county, according to law"—citing and quoting from *State ex rel. Hill v. Bonner*, 44 N. C. 257. Advancing a little beyond this proposition and entering the domain of their discretion, for the purpose of ascertaining and marking the line beyond which the court will not go in ordering a mandamus, which may incidentally control discretion, we said: "It is sufficient for us now to hold, as we do, that the commissioners still have a discretion, and while this discretion must be exercised in a manner fair, candid, and unprejudiced, and not arbitrary, capricious, or biased, much less warped by resentment or personal dislike, it cannot (otherwise) be controlled by mandamus. The court can only insist on a conscientious judgment being used in the exercise of the power of choosing or rejecting, but cannot itself exercise the power nor substitute its own conscience for that of the board or its own sense of fitness for the approval or disapproval of that other tribunal, for to do so would be in direct violation of the statute. But this does not mean that they may use this discretion for the purpose of advancing or vindicating their own views or opinions upon the general policy of selling liquor. This policy has been settled by the decision of the Legislature and a vote of the people, to which they must yield a ready obedience, and the discretion must therefore be exercised by them in strict submission to this declared policy, and with scrupulous regard to the right of the applicant to have a fair and impartial hearing and a just decision, whether for him or against him, and, subject to those limitations, they are (virtually) a law unto themselves."

The rule may be thus briefly stated: Mandamus extends to all cases of neglect to perform an official duty clearly imposed by law, when there is no other adequate remedy. While the court may not control the official discretion of the board, it may compel the reluctant officers to exercise it, and, while it cannot direct them in what manner to decide, it may set them in motion and require them to act in obedience to law. *Atty. Gen. v. Newell*, 85 Me. 246, 27 Atl. 110. So, in the case at bar, the duty to proceed to this election, in the manner pointed out, is not a matter of discretion nor dependent upon the judgment of either branch of the government or of the members of either branch. If it were so, there could be no remedy by mandamus. The court does not attempt to control the judgment and discretion of the individual members when assembled in the choice then to be made. But it may properly, by mandamus, require the two branches to meet in convention, as a required preliminary step to the election of some one to this office. Otherwise the anomaly would arise of a minority of those who must constitute the convention being able to defeat an election if they are only a majority of either



branch. See, also, *Morse*, Petitioner, 18 Pick. (Mass.) 443; *Lamb v. Lynd*, 44 Pa. 336; *Strong*, Petitioner, 20 Pick. (Mass.) 484; *King v. Norwich*, 1 Barn. & Ad. 310; *Gibbs v. Hampden*, 19 Pick. (Mass.) 298; *Rex v. Cambridge*, 4 Burr. 2008.

The law will not countenance or condone any attempt to defy its mandate. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it. The truth is that, if he willfully neglects or omits to perform a public duty, he is liable to indictment at common law. *State v. Commissioners*, 4 N. C. 419, 6 Am. Dec. 567; *State v. Williams*, 34 N. C. 172; *State v. Commissioners*, 48 N. C. 399; *State v. Ferguson*, 76 N. C. 197. If the neglect, omission, or refusal to discharge any of his official duties is willful and corrupt, it is criminal misbehavior and subjects him to indictment for a misdemeanor and punishment by fine or imprisonment, and, as a part of the penalty, to removal from office. *Pell's Revisal*, § 3592, and note.

It is usual to issue an order to show cause or an alternative writ, *ex parte*, and in the first instance, in order that the respondent may explain his conduct; but where sufficient facts are admitted, and the special matters pleaded in defense are not a bar to the relief, there is no reason why a peremptory writ should not be sent out. There is no issue of fact to be tried, and the court acts at once and finally upon the admissions of the parties, if they entitle the plaintiff to the writ. This board should no longer be permitted to defy the Legislature and obstruct the due and orderly administration of justice. A peremptory writ commanding the recusant defendants to perform an official duty clearly defined by the law, and which should be well understood by them, is demanded by a just regard for the free will of the people and the regular and decorous conduct of the government, as well as by the dignity and majesty of the law and the peace and tranquility of society. *Atty. Gen. v. Newell*, 85 Me. 250, 27 Atl. 110. If this statute is undesirable or unsuited to the needs of that community, the board of aldermen are not, for that reason, authorized to disregard it, but an appeal to the Legislature is the only remedy. The members of the board must meet and comply with the mandate of the law; that is their plain duty, and, if they fail to perform it, the law will punish their disobedience and enforce obedience to the legislative will in some other effectual way. They must act, and we will compel them to do so, though we cannot dictate or control their choice. A peremptory writ of mandamus will issue, commanding the board to meet at once and proceed to comply with the requirements of the law.

As this is a matter in which the public has an interest, and as compliance with the law has been so long delayed, we will follow the well-defined precedents and enter judgment here, requiring the writ to issue from this court. But we are sure that, upon being informed of this opinion and the conclusion of the court upon this appeal, the defendants will at once comply with the law and elect a recorder. For this purpose, the execution of the judgment will be stayed until November 1, 1911, and, if there has been an election in the meantime, the clerk of the court will not issue the writ, but certify the judgment of this court, with a copy of this opinion, to the court below, as is usual in other appeals. If for any valid and sufficient reason a further stay is desired, or the usual certificate should be issued, without retention of the case here, an order to that effect, modifying this judgment, may be entered, upon application after notice to the opposing party. The practice of retaining the case here and issuing the writ from this court is well settled. *Corporation Commission v. Railway*, 137 N. C. 1, 49 S. E. 191, is directly in point, and the several cases of like import are cited therein. In *Caldwell v. Wilson*, 121 N. C. 473, 28 S. E. 562, the court said: "The judgment must therefore be affirmed; but, in view of the public interests involved, we deem it proper not to remand the case, but to enter final judgment in this court." See, also, *White v. Auditor*, 126 N. C. 584, 36 S. E. 132; *Revisal*, § 1542; *Rules* 49, 50, and 51 of this court (140 N. C. 670, 671, 66 S. E. xi).

No error,

(156 N. C. 340)

#### In re FOWLER'S WILL.

(Supreme Court of North Carolina. Oct. 18, 1911.)

#### EVIDENCE (§ 251\*)—ADMISSIONS—PERSONAL REPRESENTATIVES.

The declaration of an executor, made either before or after the will is probated and he has qualified, that he unduly influenced testator to make the will is not competent as evidence against the legatees and devisees, because not jointly interested with him.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 251.\*]

Appeal from Superior Court, Harnett County; Whedbee, Judge.

Proceedings by J. P. Jackson for the probate of the will of J. M. Fowler, deceased, in which G. R. Fowler and others appeared as caveators. From a judgment for the caveators, the propounder appeals. Reversed, and new trial ordered.

Douglass, Lyon & Douglass and J. C. Clifford, for appellant. E. F. Young and R. L. Godwin, for appellees.

**WALKER, J.** The question in this case can be briefly stated, and, while it is almost of first impression in this state, its novelty is not of that kind which awakens our surprise, rather than challenges our most respectful and careful consideration. Is the declaration of an executor, either before or after the will is probated and he has qualified, that he unduly influenced and compelled the testator to make the will competent as evidence against the legatees and devisees, for the purpose of invalidating the will? That is the point in the case. The question presented is thus stated in the brief of the propounder's counsel: "(1) The court erred in admitting the declarations of J. P. Jackson (who was named as executor in the will), after the death of the testator, to the effect that he forced the testator to change his will and make it as he wanted it. (2) The court admitted evidence of the declarations of the said J. P. Jackson, which were made prior to the execution of the will, to the effect that he was going to have the said testator change his will, so that it would be like he (the said Jackson) wanted it to be. (3) The court erred in admitting as evidence alleged declarations of the testator that the said J. P. Jackson (at some time not named) had threatened to turn him out of his home."

We are unable to see how the rejected evidence can be competent. There are decisions in other courts which seemingly give some color to the contention of the caveators, but when they are examined and considered with reference to their special facts, if they can be said to conflict with our views, the reasons given in favor of this kind of evidence are more apparent than real. In a certain, and sometimes in a qualified, sense, an executor may be considered as standing in the place of the testator and his creditors, and he may also be said to represent the devisees and legatees in some respects, but for the purpose of destroying or even impairing their interest in the estate the ordinary rule applies that they are not bound by what he says or does. He then occupies a position of antagonism to them, and his declarations should be no more binding upon them than if he had been an entire stranger. Where a man declares against his own interest, the law admits the declaration as against him, because "self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against himself, and the law, in this instance, substitutes for the sanction of a judicial oath the more powerful one arising out of the sacrifice of a man's own interests. This natural disposition to speak in favor of, rather than against, interest is so strong that when one has declared anything to his own prejudice his statement is so stamped with the image and superscription of truth that it is accepted by the law as proof of

the correctness and accuracy of what was said, and the fact that it was against interest is taken as a full guaranty of its truthfulness in place, not only of an oath, but of cross-examination as well; they being the usual tests of credibility." *Smith v. Moore*, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684. The law must take account of the strength (or the frailty, as some may think) of human nature, and decide that "he that sweareth to his own hurt and changeth not" is worthy of trust and confidence, and that, because it is against himself, what he says is entitled to our belief; self-interest and the motive not to swear falsely to his own injury supplying the ordinary tests of the law, by which the reliability of human testimony is assured—the oath and cross-examination, and, we add, the demeanor of the witness on the stand. *Ivat v. Finch*, 1 Taunton, 141; *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189; *Bowen v. Chase*, 98 U. S. 254, 25 L. Ed. 47; and the leading case of *Higham v. Ridgeway*, 10 East, 109 (3 *Smith's Lead. Cases* [9th Am. Ed.] 1). But the declaration must be against interest, and should be free from suspicion.

The executor, in this case, had no joint interest with the legatees or devisees; his interest consisting solely in his right to manage the estate and to receive the emoluments; that is, the commissions arising therefrom. In all other respects his interest was entirely distinct and separate from that of the legatees, and there is therefore no valid reason why he should be permitted to speak for them, or to bind their interests by what he may have declared. It seems that he had influence over the testator—a very potent one—and his declarations, if competent, are sufficient to warrant a finding by the jury of undue influence, as he had the power to subdue the will of the testator to his own; but the vital question is, Does the law authorize him to speak for and conclude those who have no joint interest with him? We think not, and the best-considered authorities we believe to be against the competency of such evidence. It is undoubtedly true that the declaration of the executor would be competent against him to show that he is unworthy of the trust reposed in him, and therefore should be removed from his office and deprived of its emoluments; but to permit him to prejudice the rights of others acquired independently of his, and several in their nature, might open the door to fraud, and would shock our sense of justice and right, and this court has virtually held that such declarations are not admissible to invalidate a will, where the interests of the declarant and the beneficiaries under the will are not joint, and there is no relation of privity between them. The court says, in *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709, quoting from *Shailer v. Bumstead*, 99 Mass. 112, that, "admitting, for the present, that any interest in a will

obtained by undue influence cannot be held by third persons, however innocent of the fraud of the person procuring it, still it by no means follows that the interest of the other innocent legatees should be liable to be divested by the subsequent statements of the parties procuring the will. Such a rule would violate all sense of right, and is not sustained by the decisions. The admissions of a legatee, made prior to the date of the execution of the will, are rejected for the reason that, if made before he becomes a legatee, they are not declarations against his interest"—citing 1 Underhill on Wills, 163. The very question was raised in *Shaller v. Bumstead*, supra, and the court held the declarations of the executors, Hayden and Shaller, to be incompetent for unanswerable reasons stated by Judge Colt in the opinion, which need not be repeated here. It was said by him that such declarations stand upon the same ground as those made by a legatee, which are surely not admissible against any other innocent legatee or devisee, thereby making our case of *Linebarger v. Linebarger*, supra, a direct authority against the ruling of the lower court in this case, by which the declarations were admitted.

The case of *In re Will of Mary Ames*, 51 Iowa, 596, 2 N. W. 408, is an interesting and instructive one, and, besides, very comprehensive in the scope of the decision actually made, as it embraced both classes of declarations, those of a legatee, as well as those of the executor, and they were held to be incompetent; the court saying: "The general rule of law consonant with reason is that one person is not to be prejudiced by the unauthorized declarations of another. The exceptions to this rule are found in those cases where there is a joint interest or privity or design between several. In such cases each is presumed to speak for the whole; but where there is neither joint interest nor combination, when each claims independently of the other, though under a common instrument, the words of one, no more than his acts, can bind the other. The interests of these devisees and legatees under the will are several, and not joint; and hence the three who would impeach it were bound, on principle, to produce evidence that was competent against all the rest. The evidence was not competent as to the three daughters named as legatees, and therefore was properly rejected. This conclusion is as clear on authority as on reason." Numerous authorities are cited in support of the ruling by which the declarations were excluded. Another expression of the court in that case is very pertinent to this discussion: "The reasoning of the authorities to which we have referred must, we think, work the exclusion of a declaration of an

executor who is a legatee and a party to the record, where other legatees may be adversely affected by the declaration. The circumstance of his being executor and a party will not authorize him to manufacture evidence against other devisees, or to affect them by his declaration."

In *Blakey v. Blakey*, 83 Ala. 611, it was said: "It is the settled law of this court that the declarations and acts of a proponent, who is not the sole legatee, are not admissible in evidence to defeat the probate of the will."

Underhill, in his work on Wills (vol. 1, § 163), thus states the result, after an examination of the authorities: "Upon the question whether a declaration of a legatee, made after the execution of a will, is admissible to show that it was procured by undue influence, there is a conflict of authority. The majority of the cases reject such evidence, reasoning on general principles that no one should be concluded by the unauthorized statements of others with whom he is in no way associated or identified in interest. The admission of a legatee is evidence against the will, where he is the sole beneficiary under it. But the interests of legatees under a will are several, not joint. Each claims independently of the others, and his interests should not be affected by the acts or declarations of the other legatees. The same reasoning will be applicable to bring about the rejection of the declarations of an executor, offered for the purpose of showing undue influence. No privity of interest or community of purpose exists between him and any legatee which will admit his declarations to impeach the will whence the legatee derives a benefit." The cases holding such declarations to be competent are not well sustained by the reasons given, and some of them may be explained by restricting the evidence to the declarant himself, or upon the ground that he and the other parties, legatees or devisees, had what was considered to be a joint interest, or had conspired to defeat the will.

Our conclusion is that the court erred in admitting the declarations of J. P. Jackson, the executor, and for this error a new trial is ordered.

New trial.

(156 N. C. 316)

BELL v. CAROLINA POWER & LIGHT CO.  
(Supreme Court of North Carolina. Oct. 18, 1911.)

MASTER AND SERVANT (§ 287\*)—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a servant by being knocked from the wall of a tank by the sudden movement of a derrick pole, which he had been sent to straighten, resulting from the foreman's direction to other employes to move

the pole, whether defendant was negligent *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 287.\*]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by R. H. Bell against the Carolina Power & Light Company. Judgment for defendant, and plaintiff appeals. Reversed.

This is an action to recover damages for personal injuries. The plaintiff alleges that he was an employé of the defendant, and that he was injured negligently, while performing a duty in obedience to an order of his superior. The defendant admitted that the plaintiff was in its employment, but denied negligence on its part, and alleged that the plaintiff was injured by his own negligence.

The defendant was engaged in building a large tank, and at the time of the injury was endeavoring to raise a derrick pole, which was to be used in hoisting material for the tank. The tank was about 42 feet long, 16 feet wide, and 10 feet deep, and was divided into three compartments, of equal size, by two walls 12 inches wide; the bottom being of concrete. The pole was about 58 feet long, and about 16 to 18 inches in diameter at the larger end. It was lying across the tank; the larger end projecting about 6 feet over the end of the tank next to the hole, where it was to be placed, and the smaller end about 15 feet over the other end of the tank. It was not parallel with the sides of the tank, the larger end being nearer one side of the tank, and the smaller nearer the other side.

The pole was what is known as a "derrick pole," and was to be placed in a hole outside of the tank, to be used in hoisting material. A rope was fastened around the pole about 10 or 12 feet from the larger end, and this rope extended to a snatch block, fastened to a pole, and then about 15 feet, where at the time of the injury it was in the hands of four or five employés of the defendant. A line dropped from the smaller end of the pole approximately locates the snatch block, and from that point the rope extends in a southeastern direction. The rope was to be used in raising the pole.

The plaintiff offered evidence tending to prove that he was ordered by the foreman of the defendant to go on one of the 12-inch division walls and straighten the pole; that in obedience to the order he took a scantling and went on the wall; that he had the scantling under the pole, pushing it straight, in full view of the foreman, when the foreman suddenly and without warning to him, directed the other employés to pull on the rope; that this order was obeyed, the pole was raised several feet, turned towards him, and knocked him off the wall; and that he

fell on the cement floor and was injured. At the conclusion of the evidence, his honor, on motion of the defendant, entered a judgment of nonsuit, and the plaintiff excepted and appealed.

Douglass, Lyon & Douglass, for appellant. J. H. Pou and R. H. Battle & Son, for appellee.

ALLEN, J. (after stating the facts as above). In our opinion there was evidence of the defendant's negligence for the consideration of the jury, and this is the only question before us. We express no opinion as to its weight, and forbear to discuss it further than is necessary to indicate upon what ground this decision rests, as the case is to be tried before a jury, whose verdict should be rendered uninfluenced by an expression of opinion on the facts by this or any other court.

The evidence on a judgment of nonsuit must be considered in the light most favorable to the plaintiff, and for the purposes of this appeal we must accept as proven the facts which the evidence reasonably sustains. There is no suggestion in the record that the plaintiff was injured by the negligence of a fellow servant, and the defendant admits that Stewart was in charge of the hands and the work.

The evidence tends to show that the defendant was handling a heavy pole 58 feet long, resting on the top of walls 10 feet from the ground; that it was the purpose of the defendant to raise the pole by means of a rope and place it in a hole; that the rope was fastened to the pole, and extended to a snatch block, and then extended some distance, where it was held by employés of the defendant; that the pole was not in the right position; that the foreman ordered the plaintiff to go on top of one of the division walls, 12 inches wide, and force the pole into position by using a scantling; that the plaintiff obeyed the order, and had the scantling under the pole, pushing it, when the foreman, who was in full view, suddenly and without notice to the plaintiff gave the signal which caused the employés of the defendant, who had hold of the rope, to pull it; and that this carried the pole towards the plaintiff, knocked him from the wall, and injured him.

If so, there was evidence that a man of ordinary prudence could have foreseen that injury would probably result to the plaintiff by obedience to the signal, and that giving the signal was the cause of the injury, and this would be evidence of negligence. The place where the rope was fastened to the pole, the direction of the snatch block, and the position of the men who pulled the rope were also circumstances which the jury could consider. The case falls within the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

principle declared in *Beal v. Fiber Co.*, 154 N. C. 157, 69 S. E. 834.

There was error in ordering a nonsuit, and there must be a new trial.

New trial.

(156 N. C. 259)

**SOUTHERN INV. CO. v. POSTAL TELEGRAPH-CABLE CO.**

(Supreme Court of North Carolina. Oct. 18, 1911.)

**1. CONTRACTS (§ 312\*)—BREACH—ACTS OF TORT-FEASOR.**

In the absence of specific stipulation, where one has entered into enjoyment of a right, conferred by contract, an interference by a tort-feasor with such enjoyment is not imputable to the grantor, so as to make him liable for breach of contract.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 312.\*]

**2. TENANCY IN COMMON (§ 50\*)—GRANT OF RIGHT BY ONE TENANT.**

A telegraph company and a railroad company having become tenants in common for a period of years of poles along the railroad right of way, for the purpose of a telegraph system, to serve both the public and the railroad, the telegraph company could not, in the absence of specific provision in their contract conferring the power, and without permission of its cotenant, the railroad company, give a telephone company right to place wires thereon for telephone purposes.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 124; Dec. Dig. § 50.\*]

**3. TENANCY IN COMMON (§ 50\*)—CONTRACT BY TENANT IN COMMON—BREACH—INTERFERENCE BY COTENANT.**

A telegraph company, tenant in common with a railroad company of telegraph poles, having by contract, for valuable consideration, undertaken, alone, to grant to a telephone company a revocable license to use the poles for telephone wires, and the delivery and enjoyment of the privilege being interfered with and prevented by the railroad company, having right to do so, there is a breach of the contract by the telegraph company, making it liable for damages.

[Ed. Note.—For other cases, see *Tenancy in Common*, Dec. Dig. § 50.\*]

**4. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.**

The court having been authorized to instruct that under the evidence there was a breach of the contract, any error in instructing that under certain conditions there was a breach was not prejudicial to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1066.\*]

**5. DAMAGES (§ 124\*)—MEASURE—BREACH OF CONTRACT.**

For breach of defendant's contract, granting plaintiff the privilege of putting telephone wires on a line of telegraph poles, the breach being after plaintiff had the materials ready to put on the poles, and preventing his doing so, the expenses of proper preparations to carry out the contract, including cost of survey and the freight charges for delivering the material along the route, and the loss incident to purchase and resale of material, where it could not be used to advantage or otherwise disposed of, being within the reasonable contemplation of the par-

ties and capable of ascertainment with a reasonable degree of certainty, are recoverable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 326-338; Dec. Dig. § 124.\*]

**6. DAMAGES (§ 124\*)—MEASURE—BREACH OF CONTRACT—NOMINAL DAMAGES.**

Though the contract by which defendant, one of the tenants in common of telegraph poles, granted to plaintiff the privilege to put telephone wires thereon, stipulated that it might be terminated by either party on 30 days notice, and such a notice was given by defendant, yet, the contract having been breached, before the giving of the notice, by defendant's tenant in common preventing, as was its right, the use by plaintiff, plaintiff is not restricted to nominal damages, but may recover the damages suffered before the giving of the notice, at least before it became effective.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 124.\*]

Appeal from Superior Court, Beaufort County; O. H. Allen, Judge.

Action by the Southern Investment Company against the Postal Telegraph-Cable Company, for breach of contract. From a judgment on a verdict for plaintiff for \$1,000, defendant appeals. Affirmed.

R. C. Strong and W. B. Rodman, for appellant. Small, MacLean & McMullan, for appellee.

HOKE, J. On the trial it appeared that, on or about February 1, 1909, plaintiff, a corporation "owning and operating a telephone line and system" into and out of New Bern, Washington, Farmville, and Greenville, N. C., being desirous of extending the same to Wilson and Raleigh, N. C., and intermediate points, entered into negotiations with defendant corporation, with a view of securing a right or license to use, for the purpose indicated, a line of poles to said points, placed along the right of way of the Raleigh & Pamlico Sound Railroad Company, and in which defendant had acquired an interest, by contract with the latter company, and, on May 1, 1909, a written contract, properly executed, was made between plaintiff and defendant, by which said defendant, in consideration of \$376 per annum, payable semiannually in advance, granted to plaintiff, termed in the contract "licensee," the right to attach to said poles along said route two wires, to be used only as telephone wires, and for no other purpose, together with necessary brackets, insulators, etc. This agreement contained a further stipulation to the effect that the same could be terminated by either party on giving to the other 30 days written notice of such intent, and in which case the licensee should have the privilege of removing said wires, fixtures, etc. It appeared, further, that the interest of defendant company, a corporation doing a telegraph business, was acquired and set forth in a written contract, duly executed, entered into between said defendant and the Raleigh & Pamlico Sound Rail-

road Company in August, 1905, by which the two contracting parties were to own said poles as tenants in common for 25 years, and on termination of the contract the telegraph company had the right to remove the wires and fixtures placed by that company, and the poles and such wires as the railroad company had placed to be and remain as the property of the railroad. This latter contract contained express provision for two wires, to be used in the telegraph business, with the right and privilege of either to place additional wires and fixtures thereon as the said business might require, and also made minute specifications as to user of said wires in doing telegraph work for railroad business and for the general public, and as to the different duties and burdens imposed upon the two contracting parties in the operation and maintenance of the line. It was further made to appear that the rights and interests of the defendant railroad company in the railroad, its franchise, the right of way, and the said poles thereon were subsequently acquired and held by the Norfolk & Southern Railroad, which last-mentioned road, by proceedings had, was, at the time of the alleged breach of contract between plaintiff and defendant, and at the time same was made, in the hands and control of receivers appointed by the federal court.

There was evidence on the part of plaintiff tending to show that, as soon as the contract between plaintiff and defendant had been duly made and executed, payment of the first installment of rent having been postponed by mutual consent of the parties, the plaintiff proceeded to purchase and distribute along the railroad line the necessary equipment and material to construct the plant and install the telephone system as contemplated and provided by the contract, and made an effort to affix the wires to the poles, when it was interfered with and the work stopped by the receivers, claiming the right to do so, and plaintiff was forced to give over its purpose and dispose of the material purchased at considerable loss. On this question, H. Susman, a witness for plaintiff, testified that the material and equipment purchased was fit for the line to Wilson and Raleigh, but could not be used on the portions of line already constructed, and he was forced to sell it at considerable loss, which, with the freight paid for its delivery along the route and preliminary work, reasonable and necessary in preparation, amounted to \$1,398. It appeared, further, that the receivers were resisting the right of defendant company to any other or further use of the poles, and had filed a petition in the cause, praying that the road be relieved of the stipulations of their contract with defendant; and, further, that when it was disclosed that the action of the receivers would operate to prevent plaintiff from exercising the rights and privileges

granted in the contract between plaintiff and defendant said defendant, on June 9, 1909, gave due notice in writing that it elected to terminate its contract in 30 days from said date, etc.

On these, the controlling facts relevant to the inquiry, the defendant assails the validity of plaintiff's recovery, contending (1) that no breach of contract has been shown; (2) that in any event, the damages should be only nominal; but, in our opinion, neither position can be sustained.

[1] Undoubtedly, as insisted on by defendant, it is a correct general proposition that, in the absence of specific stipulation, where one has entered into the enjoyment of a right conferred by contract, an interference with such enjoyment on the part of a tortfeasor is not imputable to the grantor. The authorities cited by defendant are apt in support of that position. *Hulest v. Marx*, 67 Mo. App. 418; *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708; *Underwood v. Birchard*, 47 Vt. 305; but no such case is presented here. On the contrary, it appears that the receivers of the railroad are contending that the road should no longer be bound in any way by the terms of the contract between the defendant and the railroad, and have filed a petition that the same be set aside.

[2] But, without reference to the ultimate determination of the questions involved in that proceeding, and assuming that the defendant's position is sustained, and that their contract with the railroad holds, we find nothing in it which confers upon defendant the right to make the contract upon which plaintiff has brought suit. A perusal of that agreement will disclose that under its provisions this defendant and the railroad, or its successors and assigns, became tenants in common of these poles for the term of 25 years, for the purpose of operating a telegraph system along this route, to serve both the general public and the railroad company. Specific stipulation is made for two wires, in the first instance, and the right and privilege of either of contracting parties to affix additional wires as its business might require; interchangeable duties and burdens are provided for between the contracting parties, in reference to the operation of the system and the maintenance and repair of the line, its wires, and fixtures, etc. In such case, and in the absence of specific provision conferring the power, and without permission given by its cotenant, the defendant had no right to grant to plaintiffs, in furtherance of a disconnected and separate business, the privilege of affixing two telephone wires to these poles, and of imposing this additional burden upon the owners. *Murray v. Haverty*, 70 Ill. 318; *Marshall v. Trumbull*, 28 Conn. 183, 73 Am. Dec. 687; *Hutchinson v. Chase*, 39 Me. 509, 63 Am. Dec. 645; 4 Kent's Commentaries, pp. 508-513. In *Hutchinson's Case*, supra,

Rice, J., delivering the opinion, said: "The general rule seems to be well settled that one tenant in common cannot, as against his cotenant, convey any part of the common property by metes and bounds, or even an undivided portion of such part. *Bartlet v. Harlow*, 12 Mass. 348 [7 Am. Dec. 76]; *Peabody v. Minot*, 24 Pick. [Mass.] 329; *Griswold v. Johnson*, 5 Conn. 366; *Smith v. Benson*, 9 Vt. [138, 31 Am. Dec. 614]. The reason is obvious. His title is to an undivided share of the whole, and he is not authorized to carve out his own part, nor to convey in such a manner, as to compel his cotenants to take their shares in several distinct parcels, such as he may please. *Great Falls Co. v. Worcester*, 15 N. H. 412. Even though his deed may bind him by way of estoppel, as against the cotenants, such deed is inoperative and void. 4 Kent's Commentaries, 368. Though tenants in common are, in legal contemplation, all seised of each and every part of the estate, still they are not permitted to do acts which are prejudicial to their cotenants." And further: "As one tenant in common cannot convey the entire estate, or the whole of any portion thereof, or give a valid release for injuries done thereto, so, too, and for the same reasons, he cannot subject the common property to particular servitudes, by which the rights of his cotenants will be affected. These servitudes, or easements, must be created by the owner, and one tenant in common cannot establish them, upon the common property, without the consent of his cotenant. 3 Kent's Com. 436; 2 Hillard's Abr. 118. Such, also, is the rule of the civil law. He who has the property of an estate only in common with others, without any division of the several shares, cannot subject any part of it to a service without the consent of all his copartners; and any one of them may hinder it, until, the estate being divided into shares, every one may impose a service on his own share, if he think fit. And likewise he who possesses in common, and undivided, a portion of the land or "tenement to which the service is so due, cannot by himself free the land or tenement which owes the service; but the service remains for the portions of others. For these services are for every part of the land or tenement to which they are due, and every one of the proprietors has an interest in the service for his own portion."

[3] This, we think, being the correct principle, whether the right which defendant undertook to grant plaintiff be considered a lease, as argued, an easement, or revocable license (and we think it clear that it was the latter), there has been a breach of contract on the part of defendant. For valuable consideration, defendant has made a binding agreement, granting to plaintiff a license which he had no right to make; the delivery and the enjoyment of the privilege has been interfered with and prevented, not

by a tort-feasor. but by one having right, and on authority plaintiff should be allowed to recover. *Kerrison v. Smith*, L. R. Q. B. Div. 1897, p. 445; *Smart v. Lewis*, 109 E. O. L. p. 717; *Despeaux v. De Lano*, 71 N. J. Law, 280, 59 Atl. 10. And in our own reports the case of *Sloan v. Hart*, 150 N. O. 269, 63 S. E. 1037, 21 L. R. A. (N. S.) 239, 134 Am. St. Rep. 911, is in recognition of the same general principle.

[4] The court, therefore, committed no error to defendant's prejudice in charging the jury, on the question of breach of contract, as he did, in effect, that defendant was responsible if plaintiff was interrupted in the enjoyment of the rights bargained, by reason of litigation and difficulties arising between the railroad and defendant, and of which defendant had knowledge at the time it made the contract. In our view, he might well have told the jury, if they believed the evidence, there had been a breach of contract.

[5] On the question of damages, his honor, in general terms, charged the jury that if a breach of contract was established the plaintiff was entitled to recover the damages incident to the wrong, which were in the reasonable contemplation of the parties, and more specifically, and to the extent they were in such contemplation, they could allow the reasonable costs and expenses incurred by plaintiff in making proper preparation to carry out the contract, including cost of survey, the freight charges paid in delivering the material along the route, and the loss incident to purchase and resale of material, where the same could not be used to advantage or otherwise disposed of, etc. Subject to the well-recognized rule stated by the court that damages must be such as were in the reasonable contemplation of the parties, and capable of ascertainment with a reasonable degree of certainty, a recovery for breach of contract is allowed as compensation for the loss sustained (*Hassard-Short v. Hardison*, 114 N. C. 485, 19 S. E. 728; *Hale, Damages*, pp. 38, 39), and plaintiff, having been induced by defendant's wrong to make this outlay, the amount should be made good to him.

[6] And we may not approve the position earnestly insisted on by defendant that plaintiff should be restricted to nominal damages, by reason of notice given that defendant elected to terminate the contract in 30 days; the argument being that, as plaintiff would, in any event, have had to take down and remove the material in that time, he suffered no actual loss. This position rests upon the theory that the contract had been carried out and the notice duly given according to its terms, the resultant damage in such case being necessarily and entirely speculative; whereas, in fact and truth, the contract had been broken when the notice was given, and the damages claimed had been already suffered, certainly so before

the notice ever became effective. This, too, is the correct view to take of *Kivett v. McKeithan*, 90 N. C. 106, in its application to the facts, an authority much relied on by defendant. In that case it was held "that a parol license, relating to land, either voluntary or supported by valuable consideration, may be revoked by the owner, without incurring liability in damages, when notice is given and reasonable opportunity afforded to remove the improvements put up thereunder." It will be noted that the decision proceeds upon the theory that no actionable wrong had been committed, and on that ground no damages were allowed. In our case a breach of contract has been established, and under correct rulings damages therefor have been properly awarded. There is no error, and the judgment for plaintiff is affirmed.

No error.

(156 N. C. 375)

**L. HARVEY & SON v. PETTAWAY.**

(Supreme Court of North Carolina. Oct. 18, 1911.)

**1. GAMING (§ 50\*)—FUTURES—CONTRACT.**

Plaintiffs, who were dealers in spot cotton, bought 25,000 pounds of lint cotton, to be delivered to them by defendant at a certain depot in J., on or before December 31, 1909, at a specified price. The contract provided that, if defendant failed to deliver any or all of the cotton, he agreed to pay plaintiffs the difference between the price specified and the price of middling cotton in K. at noon on December 31, 1909, on the amount not delivered, and that plaintiffs might purchase such cotton at such time and place, and charge defendant with the difference between the agreed price and the price paid. *Held*, that such provision did not necessarily indicate that it was the intention of both parties that the cotton should not be delivered and that the contract should be discharged by payment of differences, so that it was not a gambling contract as a matter of law.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 103; Dec. Dig. § 50.\*]

**2. SALES (§ 418\*)—DAMAGES—DIFFERENCE IN VALUE.**

While the legal rule for computing damages in case of breach of a contract for the sale of a commodity is the difference between the contract price and the market price at the place of delivery on the date provided therefor, it is competent for the parties to agree on the market price at another place as the governing market price, if done in good faith.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 418.\*]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Action by L. Harvey & Son against C. A. Pettaway. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

Rouse & Land, McLean, Varser & McLean, and Loftin & Dawson, for appellants. Duffy & Koonce and G. V. Cowper, for appellee.

**BROWN, J.** The action is brought to recover damages for failure to deliver 25,000 pounds of cotton according to the terms of a written contract. The plaintiffs allege that for many years they have been and still are dealers in spot cotton. They then set up and make a part of their complaint a contract, which contains the usual provisions for the sale of 25,000 pounds of lint cotton, to be delivered to plaintiffs at "A. C. L. depot, Jacksonville, N. C.," on or before December 31, 1909, at a price therein mentioned. Then follows the following clause upon which arises the vital question in this appeal: "Should the party of the second part fail to deliver any or all of said 25,000 pounds of cotton, then he hereby agrees to pay said L. Harvey & Son the difference between the price herein agreed upon and the price of middling cotton in Kinston at noon on December 31, 1909, on the quality said party of the second part fails to deliver, and that L. Harvey & Son may purchase such cotton at said time and place, and charge said party with the difference between the herein agreed price and the price so paid." There are two grounds of demurrer, but only one is relied upon in defendant's brief.

[1] It is contended by the learned counsel for defendant that the clause quoted is conclusive evidence that the contract is a gambling contract on its face and therefore void. We cannot concur with them. There is nothing on the face of this contract which necessarily indicates that it was the intention of both parties that the cotton should not be delivered, and that the contract should be discharged only by payment of the difference between the contract and the market price. The language of the opinion in *Rankin v. Mitchem*, 141 N. C. 277, 53 S. E. 854, is applicable to this contract: "The insertion of the last clause cannot be said to be conclusive evidence of the intention of both parties that the contract should be discharged only by a payment of the difference between the contract price and the market price of the cotton on the day fixed for delivery. That being so, the matter is to be settled by ascertaining the real underlying intention of the parties to the contract. Was it the intention of both parties to the contract that the cotton should not be delivered? Was it their purpose to conceal in the terms of a fair contract a gambling, in which the parties contemplated no real transaction as to the article to be delivered? This purpose and underlying intent his honor properly left to the jury, the contract not being a gambling one on its face."

This case is cited and approved in *Edgerton v. Edgerton*, 153 N. C. 169, 69 S. E. 54, where it is said that "the form of the contract is not conclusive in determining its validity, when it is a sale, as being founded upon an illegal consideration, and as having



been made in contravention of public policy. \* \* \* The true test of the validity of a contract for future delivery is whether it can be settled only in money, and in no other way, or whether the party selling can tender and compel acceptance of the particular commodity sold, or the party buying can compel the delivery of the commodity purchased. The essential inquiry in every case is as to the necessary effect of the real contract and the real intention of the parties." *Edgerton v. Edgerton*, 153 N. C. 168, 69 S. E. 53; 20 Cyc. 980; *Williams v. Carr*, 80 N. C. 295; *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50; *State v. Clayton*, 138 N. C. 732, 50 S. E. 866; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Sampson v. Camperdown Mills (C. C.)* 82 Fed. 836; *Dillaway v. Alden*, 88 Me. 236, 33 Atl. 981; *Cleage v. Laidley*, 149 Fed. 352, 79 C. C. A. 284; *Berry v. Chase*, 146 Fed. 630, 77 C. C. A. 161; *Thompson v. Williamson*, 67 N. J. Eq. 219, 58 Atl. 602; *Kingsbury v. Kirwan*, 77 N. Y. 612.

[2] The provision in this contract to pay damages in case of failure to perform it is nothing more than the law would award upon its breach without any specific agreement. It is true the legal rule would be the difference between the contract price and the market price at Jacksonville on December 31, 1909, the date fixed for delivery, while the contract fixes the price at Kinston. The parties had the right to agree upon Kinston as the place at which the market price is to be fixed, if done in good faith. Certainly this slight difference between the measure of damages allowed by law and that stipulated in the contract is not alone sufficient to stamp it as a gambling contract.

The defendant will be allowed to answer.

Reversed.

(156 N. C. 347)

EDGERTON et al. v. KIRBY et al.

(Supreme Court of North Carolina. Oct. 18, 1911.)

**1. MANDAMUS (§ 174\*)—ISSUES OF FACTS—TRIAL.**

Under Revisal, § 824, requiring mandamus to be continued until jury trial of any issues of fact, suit to compel township road commissioners to meet to fill a vacancy was properly transferred for jury trial, where an issue of fact was raised as to the existence of a vacancy.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 386, 387; Dec. Dig. § 174.\*]

**2. MANDAMUS (§ 72\*)—SUBJECTS OF RELIEF—PUBLIC OFFICIAL DUTY.**

Generally, mandamus lies to compel a public officer to do a mandatory duty, but not to control exercise of discretion given him.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 134; Dec. Dig. § 72.\*]

**3. MANDAMUS (§ 1\*)—WHEN PROPER REMEDY.**

Mandamus is an extraordinary remedy and lies only in cases of necessity.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

**4. MANDAMUS (§ 7\*)—NATURE OF REMEDY—DISCRETION.**

Mandamus is so far a prerogative writ that it may be granted or withheld according to a judge's sound judgment, but the discretion is judicial and not arbitrary, and where there is a right and no adequate remedy, should not be denied.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 5; Dec. Dig. § 7.\*]

Appeal from Superior Court, Johnston County; Peebles, Judge.

Action by N. E. Edgerton and others against Charles F. Kirby and others. From an order transferring the cause for jury trial, defendants appeal. Affirmed.

This is a suit for mandamus to require the defendants, except defendant Green, to meet with the plaintiffs and to elect the seventh member of the board of road commissioners of Selma township. The complaint alleges that after M. C. Winston, the seventh member of said board, resigned, the six remaining members met, and, there being a tie vote (three voting for defendant Green and three voting for H. E. Earp), the chairman, N. E. Edgerton, being doubtful as to his power to break the tie, the meeting was adjourned. It is further alleged that the three defendant commissioners thereafter met with the defendant W. A. Green, and undertook to perform the duties of road commissioners of Selma township, and that the defendant Green has no right or title to said office, being a usurper thereof in palpable disregard of the law, that his holding the same is merely colorable, and that he should be removed from the office so unlawfully usurped by him. The complaint further demands that the other defendants shall be required by the court to meet at the call of the chairman and elect and induct the seventh commissioner into office, and a prayer accordingly is inserted in the complaint. The defendants answered the complaint and alleged that the defendant W. A. Green is holding the office of road commissioner of Selma township, that he was elected at the first meeting of the board, when M. C. Winston resigned, by a vote of three in favor of Green and two in favor of Earp. The matter came up for hearing before Hon. R. B. Peebles, judge, upon motion of the plaintiffs, under section 824 of the Revisal, to transfer the case to the superior court at term for trial of the issues thus joined between the parties, whereupon the following order was entered: "The court being of the opinion that the whole matter depends upon whether W. A. Green got three votes and his adversary got two votes in the meeting of the board of road commissioners of Selma township held on May 6, 1911, the motion of the defendants is denied, and defendants except and appeal to the Supreme Court. Plaintiffs move and request that the issue raised by the pleadings as to the number of votes received by said Green and Earp

be submitted to a jury at the next term of the superior court of Johnston county, which convenes on the 11th day of September, 1911, upon the pleadings herein filed. This motion is granted, and it is ordered that this action be and the same is hereby transferred to the superior court of Johnston county for trial by jury at the September term, 1911, of said court." Defendant excepted and appealed.

Abell & Ward, for appellants. Aycock & Winston, for appellees.

WALKER, J. [1] The order of Judge Peebles was correct. There was nothing else for him to do, except what he did, in view of the express provision of the statute (Revisal, § 824) requiring the judge, when an issue of fact is raised by the pleadings, to continue the action until it can be tried by a jury upon the issue thus joined between the parties. Such an issue was plainly and directly raised by the pleadings. Plaintiffs alleged that W. A. Green was never legally elected a member of the board of road commissioners, but is an usurper of that office without the shadow of right or title to it, and they ask that he be so declared, and that the three defendant commissioners be required to meet in joint session with plaintiffs and elect the seventh commissioner to fill the vacancy created by the resignation of M. C. Winston, in order that the business of the board may be transacted. Defendant squarely denies the allegation and, on the contrary, avers the truth to be that W. A. Green was duly elected a commissioner by a majority vote and is entitled to hold the office and exercise its functions. This presents a preliminary issue to be determined before we reach the question whether the plaintiffs are entitled to a mandamus for the purpose of compelling the three defendant commissioners to meet with them to elect the seventh commissioner and complete the personnel of the board. If the jury find that W. A. Green was duly and lawfully elected, then there is no necessity for a mandamus, unless he and his codefendants should refuse to meet with the plaintiffs and discharge the duties imposed upon the board by law. We will discuss and decide that question when we come to it, and not prematurely and perhaps unnecessarily. The case of *Rhodes v. Love*, 153 N. C. 468, 69 S. E. 436, so much relied on by the appellant, does not, we think, have any present bearing upon the case. Whether it will or not, if the jury find that W. A. Green was not duly elected a member of the board, is a matter upon which we prefer not to express an opinion, at this time, for it may become a moot question.

[2] It may be said, generally, that, if a public officer fails to perform his legal duty to the public, mandamus will lie to compel him to do so, if it is a mandatory one, but not to control the exercise of a discretion given to him, for it is the nature of a discretion in certain persons that they are to judge for themselves, and therefore no court can

require them to decide in a particular way or review their judgment by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the persons, to whom the discretion is confided by law, would not then be their own, but that of the court under whose mandate or compulsion they gave it. *Attorney General v. Justices of Guilford*, 27 N. C. 815; *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737. If W. A. Green was not elected, the six members of the board must meet and elect a successor to W. A. Green, and, in other respects, proceed with the business of the board.

[3] "A mandamus lies only for one who has a specific legal right, and who is without any other adequate legal remedy." 1 Chett. Gen. Pr. 790; *State v. Justices*, 24 N. C. 430. It is an extraordinary remedy, and the court will not grant it unless in a case of necessity. Why should we issue the writ in this case, where the necessity for it may never arise? But how can we determine that the necessity exists, until we hear from the jury and are informed as to the facts? The point as to when the writ will lie where there is discretion is sharply accentuated by Tapping in his work on Mandamus, star p. 15, where he says: "The writ does not lie to command the justices to license a victualer to sell ale, notwithstanding it was suggested that the refusal proceeded from a mistaken view of their jurisdiction, and also notwithstanding a very strong case of partiality was made out, for it is a matter entirely within their discretion. The proper course in such a case is to move for a criminal information; nor does it lie to rehear an application for license which they have refused because of a mistaken notion as to the law." As to the power of a court of general jurisdiction to issue a mandamus for the purpose of controlling the discretion of a public officer, the cases of *U. S. v. Seaman*, 17 How. 225, 15 L. Ed. 226, and *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62, may well be consulted, for they state the doctrine with clearness and accuracy. They deny the power where there is a discretion left to the officer as to how he will perform the duty, and so we have held.

[4] It has been said that, in this country, the writ of mandamus has not been regarded as a prerogative one, as in England, according to Blackstone, their great commentator, and yet, even here, it so far partakes of the nature of a prerogative writ that the court has the power to issue or withhold it, according to its sound judgment, and if the writ, in its consequences, would manifestly be attended with hardship and difficulties, the court may, and even should, refuse it, but this discretion lodged in the court is not an arbitrary one; it is a judicial discretion, and when there is a right, and the law has established no adequate and specific remedy, this writ should not be denied. *Prop. of St. Luke's Church v. Slack*, 7 Cush. (Mass.) 226; Tapping on Mandamus, p. 18. This author

says that in no case does the writ lie "to compel a tribunal, judicial or administrative, to render any particular judgment or decision, or to set aside one already rendered, but only to enforce the performance of a ministerial or mandatory duty. The writ is appropriate to compel subordinate courts or bodies (or even individuals, in a restricted class of cases) to proceed and determine matters pending before them and properly within their cognizance or jurisdiction; but it cannot compel them to do that which the law leaves them to decide according to their best judgment and discretion. Tapping, pp. 35, 36. The plaintiff must try other ordinary remedies before he resorts to this unusual writ of compulsion. *Reg. v. Hull & Selby Railway*, 6 Q. B. R. 70 (Patterson, J., one of the greatest of the judges of the King's Bench, delivering the opinion of the court, in the absence of the Chief Justice). It seems that the duty which is asked to be performed must be mandatory, before the court will send out so drastic a writ. It cannot be said, in this case, that every sufficient remedy of the law has been exhausted. In fact, the plaintiff is not even on the threshold of obeying that principle which requires that every other remedy should be tried, and that all preliminary questions of fact should be decided, before the court will listen to his prayer for this extraordinary writ. It is seldom needed and rarely granted. The citizen must perform his duty to the public, both as a simple member of society and as a public officer; and, if he falls in the latter capacity to do what the law requires of him, he cannot only be compelled by mandamus to do his duty, but he is criminally liable for not performing it. Where the law reposes discretion, it excludes the writ of mandamus as a means of controlling it, and leaves it to be exercised freely and untrammelled, save by the injunction that the officer must perform the duty required of him, honestly and fairly.

No error.

(156 N. C. 267)

CHAS. S. RILEY & CO. v. W. T. SEARS & CO., Inc., et al.

(Supreme Court of North Carolina. Oct. 18, 1911.)

1. CORPORATIONS (§ 566\*)—INSOLVENCY—PRIORITY OF CLAIMS—WAGES.

Under Revisal 1905, § 1206, providing that on the insolvency of any corporation the wages due to laborers in the employment of such corporation shall be a first lien on its assets for wages due for work done within two months next preceding the proceedings in insolvency, a judgment for wages, declaring a prior lien on the corporation's assets, has a priority over the rights of a creditor who has purchased part of its property and given bond to pay prior liens on the corporation's assets, and may be paid by the receiver of the money in his hands or collected from the purchaser on his bond.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 566.\*]

2. APPEAL AND ERROR (§ 1097\*)—LAW OF THE CASE—SECOND APPEAL.

Questions well within the scope of a former appeal cannot be raised upon a second appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.\*]

Appeal from Superior Court, New Hanover County; Peebles, Judge.

Action by Chas. S. Riley & Co. against W. T. Sears & Co., Incorporated, and its receiver. Heard on motion made in the cause. Judgment for defendants, and plaintiffs appeal. Affirmed.

See, also, 154 N. C. 509, 70 S. E. 997.

Herbert McClammy, for appellants. Kenan & Stacy and E. K. Bryan, for appellees.

HOKE, J. On the hearing it appeared that this was an action by Riley & Co., holding a large claim against Sears & Co., Incorporated, secured by mortgage on part of the assets, to dissolve the debtor corporation and distribute the assets, according to law. In the progress of the cause, sale was had of a large portion or all of the property, and Chas. S. Riley & Co., creditor and mortgagee, became the purchaser at the price of \$15,000, and after paying \$2,000, an amount ascertained to be due under a mechanic's lien, gave bond in the sum of \$13,000, conditioned to pay such further claims as might be established and declared as prior liens on the corporation assets. It further appeared that certain persons, claiming to be creditors, by reason of wages due for labor performed for said corporation within two months before proceedings instituted, filed their petitions in the cause, asserting such claim, and, the same being resisted by plaintiffs, at May term, 1910, of said superior court, an issue was submitted, and it was duly established that the petitioners were due from defendant corporation certain specified amounts as wages for work and labor and within the 60 days, etc. Judgment was therefore formally entered for these amounts, declaring same a prior lien on the property of the corporation. The receiver was directed to pay the full amount of these claims out of any moneys on hand, and if not sufficient amount on hand for the purpose that he collect same from plaintiffs, Chas. S. Riley & Co., and on the bond given, as stated. Plaintiff appealed from this order to the Supreme Court. The appeal was dismissed at fall term, 1910, and this action of Supreme Court having been certified down, plaintiff made further resistance to the order, claiming that payment of the claims embodied in the former judgment cannot now be properly made by reason chiefly of certain actions of tort, now pending against defendant corporation, and which might also be declared liens on the assets. The court below, being of opinion that plaintiffs' position was untenable, gave further

directions that the receiver proceed to collect the judgment, and plaintiffs excepted and again appealed to this court.

[1] Our statute in reference to these claims (Revisal, § 1206) provides that in proceedings of this character the wages due to "laborers and workmen and all persons doing labor or service, of whatever character, in the regular employment of such corporations, shall be a first lien upon the assets for the amount of wages due them, respectively, for their work rendered within two months next preceding the date when proceedings in insolvency shall be instituted." And if this were a question now open to plaintiff, the statute and authoritative interpretations of it would seem to be against plaintiffs' position. *Trust & Deposit Co. v. Fisher*, 200 U. S. 38, 26 Sup. Ct. 186, 50 L. Ed. 367; *Cox v. Lighting & Power Co.*, 152 N. C. 164, 67 S. E. 477; *Railroad v. Burnett*, 123 N. C. 210, 31 S. E. 602; *Dunavant v. Railroad*, 122 N. C. 1001, 29 S. E. 837; *Coal Co. v. Electric Co.*, 118 N. C. 232, 24 S. E. 22. But the position is not open.

[2] At a former term of the court, the question as to the amount of these claims and their priority as liens upon the assets were investigated, and both the amount and the liens and the priority of same were fully established. Judgment to that effect was formally entered and signed by the presiding judge, and plaintiffs' appeal from such judgment, as heretofore stated, was regularly and formally dismissed. The questions which plaintiffs now seek to raise were, no doubt, fully considered and passed upon when the former judgment was entered; certainly they were well within the scope of the inquiry, and in such case we have repeatedly held that a litigant is concluded, and cannot raise the same questions upon a second appeal. *Roberts v. Baldwin*, 155 N. C. 276, 71 S. E. 319; *Holley v. Smith*, 132 N. C. 36, 43 S. E. 501; *Perry v. Railroad*, 129 N. C. 333, 40 S. E. 191.

There is no error, certainly, which gives plaintiff any just ground of complaint in entering the second judgment, simply that the receiver proceed to collect the money required to pay these claims. This will be certified, that appropriate measures be taken to enforce obedience to the judgment of the court.

Affirmed.

(156 N. C. 269)

#### JOHNSON v. CITY OF RALEIGH.

(Supreme Court of North Carolina. Oct. 18, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§ 763\*) — STREETS, SIDEWALKS, ETC.—MAINTENANCE—DUTY.

The governing authorities of a city must keep its streets, sidewalks, drains, and culverts in reasonably safe condition, so far as it can

be done by using proper and reasonable care and continuing supervision.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 821\*) — STREETS, SIDEWALKS, ETC.—LIGHTS.

As affecting a city's liability for injury to a pedestrian, who stepped into a hole in a street, absence of light at the place was not negligence per se, but only a relevant fact on the issues whether the street was kept reasonably safe and whether the authorities properly performed their duty.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 821.\*]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by Lucy Johnson against the City of Raleigh. Judgment on verdict for defendant, and plaintiff appeals. Affirmed.

Douglass, Lyon & Douglass, for appellant. W. H. Pace, for appellee.

HOKE, J. On the trial it appeared that on the night of February 5, 1910, plaintiff was crossing from her home on Bloodworth street to Barber's store, nearly opposite, and while near the sidewalk she fell into a hole, about 1½ to 2 feet in depth, and was injured; that just at the edge of the sidewalk, and nearly in front of the store, instead of an open gutter, a long box had been placed, "like a rabbit gum," as one of the witnesses described it, and covered over with dirt, and the hole had been caused, in all probability, by a wagon, in driving over or along this way, having crushed in the box. There was evidence on part of plaintiff tending to show that it was a dark night, with no light, or no sufficient light, on the street; that she crossed at the place where persons were accustomed to go; and that the authorities had actual notice of the existence of the hole in time to have remedied the defect, and, in any event, the same had been in existence for such a length of time that they should have known it, and had same properly repaired. The evidence on part of defendant tended to show that they had no notice or knowledge of the hole, and that same had not been there long enough to have enabled them to discover it in the exercise of ordinary care, and that there was adequate light at the cross street, a short distance away, etc.

[1] In the conflict of evidence, the court charged the jury in general terms that it was the duty of the governing authorities of a town to keep its streets, sidewalks, drains, and culverts in a reasonably safe condition, as far as this could be accomplished by the exercise of proper and reasonable care and continuing supervision, and under this rule submitted the issue of defendant's negligence to the jury on the question whether the authorities had notice or knowledge of the existence of the hole in

time to have remedied the defect, or whether it had existed for such length of time that they should have discovered and repaired the same.

[2] In reference to the lights, the court, in effect, told the jury that the absence of lights at the place of the injury, if such condition existed, was not negligence per se, but was only a relevant fact on the determinative questions whether the streets were kept in a reasonably safe condition and whether the authorities had properly performed their duty concerning them, at the time and place of its occurrence.

We have carefully examined the record, and are of opinion that the charge is in accord with our decisions on the subject, and the case has been fully and fairly submitted to the jury. *Revis v. City of Raleigh*, 150 N. C. 353, 63 S. E. 1049; *Kinsey v. Kinston*, 145 N. C. 108, 58 S. E. 912; *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309. And on the question of lights see *White v. City of New Bern*, 146 N. C. 447, 59 S. E. 992, 13 L. R. A. (N. S.) 1166, 125 Am. St. Rep. 476.

There is no error, and the judgment below must be affirmed.

No error.

(156 N. C. 275)

#### WALL et al. v. HOLLOMAN.

(Supreme Court of North Carolina. Oct. 18, 1911.)

#### 1. TRESPASS (§ 52\*)—TIMBER WRONGFULLY CUT—MEASURE OF DAMAGES.

The measure of damages for cutting and removing timber wrongfully, but in good faith, is the value of the logs at the place of severance, with interest from date, unaffected by enhancement of value through transportation, labor, etc., bestowed by the trespasser.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 137, 138; Dec. Dig. § 52.\*]

On Motion to Dismiss.

#### 2. APPEAL AND ERROR (§ 773\*)—ASSIGNMENTS OF ERROR—STATEMENT—SUFFICIENCY.

An appeal will not be dismissed for non-compliance with Supreme Court Rule 19, § 2 (66 S. E. vii), requiring all the exceptions relied on to be set out immediately after the statement of the case on appeal, where appellee was not prejudiced; there being only one exception taken, and that being stated in the record, though improperly.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104-3110; Dec. Dig. § 773.\*]

Allen and Walker, JJ., dissenting.

Appeal from Superior Court, Hertford County; Carter, Judge.

Consolidated actions by Mrs. Belle F. Wall and others against Luther H. Holloman. From a judgment for plaintiffs, defendant appeals, and appellees move to dismiss the appeal. Motion overruled, and judgment reversed.

The action is brought to recover for the wrongful conversion of certain sawmill logs cut from the Gatlin land, by Tully Gatlin, who transported them to the water at Sumner's Landing and there sold them to the defendant, Luther Holloman, for \$84.07, admitted to be the value of the logs at the water. It is admitted that the logs measured 12,010 feet and were worth in the woods where cut and converted by Tully Gatlin \$2 per 1,000 feet. Defendant before trial tendered judgment for \$24 and costs. It is admitted that the plaintiffs, except Mrs. Wall, are entitled to recover the value of the logs in the woods or at the landing. His honor instructed the jury to award the latter sum as the measure of damages. Defendant excepted and appealed.

D. C. Barnes, for appellant. Winborne & Winborne, for appellees.

BROWN, J. [1] It is admitted that the logs were cut in good faith by Tully Gatlin under an agreement with Mrs. Wall, the life tenant of the Gatlin land; and that they were transported some distance and at considerable expense to the landing by Tully Gatlin and sold in good faith to defendant, a bona fide purchaser, without knowledge of any defect in the title. The only question presented relates to the measure of damages for the conversion of the timber.

If plaintiffs were suing Tully Gatlin for damages for a trespass upon the land, it is admitted they could recover no more than the value of the timber at the place of severance, where it was converted into a chattel together with any actual damage done the land in removing it therefrom. *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 25 L. R. A. 813, 44 Am. St. Rep. 439; *Dorsey v. Moore*, 100 N. C. 44, 6 S. E. 270; *Bennett v. Thompson*, 35 N. C. 147.

There can be no doubt that, had plaintiffs brought an action in the nature of a claim and delivery for those logs at the landing, they would have been entitled to recover them as found, and the defendant would not have been entitled to any enhanced value by reason of the cost and expense of transporting them to the landing. This arises from the impracticability of giving the defendant the benefit of his labor. But where, as in this case, the owners of the logs voluntarily waive the right to reclaim them in specie, the difficulty of separating the enhanced value given to them by the labor of the trespasser in transporting them to the water no longer exists. "It is then," says the Supreme Court of Wisconsin, "entirely practicable to give the owner the entire value that was taken from him, which seems to be all that natural justice requires, without adding to it such value as the property may have afterwards acquired from the labor of the defend-

ant." *Weymouth v. Railroad*, 17 Wis. 550, 84 Am. Dec. 763.

It is admitted that there are two rules for the admeasurement of damages in cases like this prevailing in the courts of this country—one the severe rule, which allows the defendant however innocent, nothing for enhanced value imparted to the chattel solely by his labor; and, the other, the lenient rule, which depends largely upon the intention or mala fides of the defendant, and, according to other authorities, upon the form of the action.

In referring to this the English author Mayne, in his work on Damages (page 488), says: "In America there is as usual a conflict"—quoting from both Kent and Story. In reference to the latter Mayne says: "On the other hand, Story, J., laid it down that the true rule is the value of the property at the market price at the time of the conversion, and this is the doctrine generally prevailing. Mr. Sedgwick takes same view." In the notes on same page the annotator to Mayne says: "The general rule in this country is that the measure of recovery is the market value of the property at the time of conversion with interest to the time of the trial"—citing a great many cases in support of his text.

Am. & Eng. Ency. p. 720, vol. 28, says: "The value of the property converted is to be estimated at the place of conversion." After adverting to the conflict of decisions, the editor says: "The better rule, which is now most generally recognized, is that where the original taking is without wrongful purpose or intent, and under the belief that the taker has a right to the property, the owner can recover only the unimproved value of the property; but, where the original taking was willful and without color or claim of right, the owner is entitled to recover the value of the property at the time of demand for its return and in its condition at that time, and in such a case it is not material that the wrongdoer has changed its character or by improvements greatly enhanced its value." *Hale on Torts*, 406-410, 417; 18 Cyc. 170; *Cushing v. Longfellow*, 26 Me. 310; *Morgan v. Powell*, 43 E. C. L. 734; *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239; *Forsyth v. Wells*, 41 Pa. 291, 80 Am. Dec. 617.

The last two cases were actions of trover, and hold that in such action where the property was converted in good faith by mistake the rule of damage should be the same as in trespass. The Pennsylvania case arose out of a conversion by mistake because of the uncertainty of boundaries, and the decision is based upon Baron Parke's judgment in *Wood v. Morewood*, 43 Eny. Com. Law, 810.

A very interesting and learned discussion of the subject will be found in *Coal Co. v. Cox*, 89 Md. 1, 17 Am. Rep. 525, where the cases are reviewed. Also, see *Mining Co. v.*

*Hertin*, 26 Am. Rep. 521, in the notes to which are collated a large number of cases sustaining our view.

We think the rule as laid down by the Supreme Court of Wisconsin in *Weymouth v. Railroad*, supra, is not only the better law and founded in principles of natural justice, but that it has received the distinct indorsement of this court in *Gaskins v. Davis*, supra, wherein the opinion is quoted from at length. This rule is founded upon the reasonable and just theory that, in the absence of willful wrongdoing, compensatory damages are intended as a pecuniary equivalent for the property lost by defendant's wrong and where property is lost, converted, or destroyed, the owner is compensated when he receives its full value in money.

The place where these logs were converted and taken from plaintiffs was in the woods at the time of severance. The enhanced value at the landing was imparted solely by the cost and expense of transporting them there. If between the time of severance and the date they were found at the landing the logs had increased in value from other causes, not imparted by the innocent trespasser's labor, plaintiffs would be entitled to recover such increased value; but no such claim is made in this case. It is not denied that the enhanced value arises entirely from the cost and expense of transportation to the water. Therefore we are of opinion that the plaintiffs are entitled to recover the value of 12,010 feet at \$2 per 1,000 feet, the admitted value of the logs at the place of severance, with interest from that date.

Reversed.

#### On Motion to Dismiss Appeal.

[2] Appellee moves to dismiss the appeal for noncompliance with rule 19 (86 S. E. vii) in regard to assignments of error.

We are of opinion that the rule has not been fully complied with. *Jones v. Railroad*, 153 N. C. 419, 69 S. E. 427. But inasmuch as the appellant had the errors properly assigned, printed and attached to the record before the case was called, for reasons given by counsel and in the exercise of a sound discretion, we will not dismiss the appeal, as is usually done. Section 2 of rule 19 provides that "all the exceptions relied on, grouped and numbered, shall be set out immediately after the statement of the case on appeal." This assignment of errors must be a part of the transcript of appeal and embodied in it when sent to this court and printed so counsel for appellee can know what exceptions are relied upon and intended to be presented to the court and prepare accordingly. It is a rule which, when properly complied with, greatly facilitates the consideration of appeals. In this case the appellee has not been taken at any disadvantage, as there was only one exception taken on trial, and

that was stated in the record but not properly stated.

Motion denied.

ALLEN, J. (dissenting). Tully Gatlin wrongfully cut timber trees on the lands of the plaintiff, and sold them to the defendant. The trees were worth \$24.02 on the land after they were severed, and \$84.07 at the time of sale to the defendant. The court is of opinion that the plaintiffs can recover \$24.02, while I think they ought to recover \$84.07. The amount involved is small, but the precedent to be established is important and may affect many transactions. It is for this reason I feel justified in stating the grounds of my dissent.

Four propositions are announced in the opinion of the court: (1) That in an action for conversion against the original trespasser, who has cut timber on the land of another, the measure of damage is the value of the trees on the land, after they have been severed. (2) That the owner of the land is not compelled to sue in conversion, but may follow the property and may reclaim the trees wherever he finds them, and although in the hands of a purchaser without notice. (3) That, if the owner elects to take the trees, he is not chargeable with any expense of cutting or transporting the trees, nor with any enhancement in value. (4) That the usual rule for the admeasurement of damages in actions for conversion is the value of the property at the time of the conversion. These principles seem to be well established, and are sustained by the authorities in this and other states; but, with great respect, I think they have been misapplied to the facts.

No authority is referred to in the opinion of the court which deals with the rights of the owner as against the purchaser. The plaintiffs here are not suing the original trespasser, but the purchaser from him, and there is no suggestion in the record that they had elected to sue for damages prior to the purchase by the defendant, or that they had abandoned their property in the trees. They are demanding damages of the defendant for his conversion, and, if we fix the time of the conversion, they are entitled to recover the value of the property as of that time.

Under the opinion of the court, the plaintiffs were the owners of and entitled to the possession of the trees at the time the defendant bought them. If so, the defendant bought the trees of the plaintiffs, and, by buying, converted them, and if it be conceded that there can be but one conversion, and the plaintiffs had done no act prior to the purchase by the defendants indicating an election to recover damages, and they had the right to recover the trees at the time of the purchase, the conversion then took place, and by the defendant. The person who sold the trees had committed a trespass, but it was with the plaintiffs to elect

whether they would follow the trees or treat them as converted, and, until they exercised this right, no conversion had, in law, taken place. In other words, the theory upon which the law is administered in actions like this, as I understand it, is that the trespasser has wrongfully taken away the property of the owner, and that the owner may follow the property and reclaim it, or he may sue the trespasser for damages. If he sues the trespasser for damages and recovers, the title passes to the trespasser, and he may do with it as he pleases. If, however, the owner does not sue the trespasser, but elects to demand the property in specie, he may do so, and can recover it in the hands of an innocent purchaser. In both cases, that of the trespasser and the purchaser, there is an act of conversion; but the property has not been converted until the owner waives his right to the property itself by demanding its value in damages.

In the present case, the owner had the right to demand of the defendant the trees taken from his land. If he had done so, and there had been a refusal to surrender possession, can there be any doubt of the right of the owner to recover their value at the time of the refusal? If it should be held otherwise, and that he could only recover the value at the time of the severance of the trees on the land, the right of the owner of property would be dependent on the act of a wrongdoer, and not on his own consent. In the estimation of the law, the rule for which I contend can work no hardship, as the purchaser, if required to pay the value of the property, can recover the same amount from his vendor upon the implied warranty of title, which obtains in sales of personal property. On the contrary, to what results may the rule adopted by the court lead?

It may enable a wrongdoer to go upon the land of another and cut timber without the consent of the owner, and sell it for \$84, and the purchaser gets a good title upon paying \$24. That is the judgment of the court between the parties to this record.

It may also do a great injustice to the purchaser. Suppose the trespasser cuts timber worth \$100 on the land after it is severed, and it deteriorates in value, and it is taken to market and is sold to a purchaser for its value at that time, \$50. It is an old saying, and true, that "it is a poor rule that does not work both ways"; and under the rule adopted by the court the innocent purchaser must pay \$100, the value of the trees when severed, for property worth \$50.

There is eminent authority for the views I entertain. In *Wooden Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, timber trees were cut on the lands of the government by a willful trespasser and sold to the Wooden Ware Company, "which was not chargeable with any intentional wrong or misconduct or bad faith in the

purchase." The trees were worth \$60.71 on the land after they were severed, and \$850 at the time and place they were sold to the Wooden Ware Company. It was held that the government was entitled to recover \$850, and the court says: "The timber at all stages of the conversion was the property of the plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of caveat emptor applies, and hence the right of recovery in plaintiff."

I would not be candid if I did not say that the court lays much stress on the fact that the original trespass was willful, and suggests that the rule might be different if it were not for this fact, but, in dealing with one who buys in good faith, I cannot see how the undisclosed motive of his vendor can affect him. In *Wright v. Skinner*, 34 Fla. 464, 16 South. 338, the Supreme Court of Florida says: "If the defendants are innocent vendees, without notice, of a willful trespasser, then the measure of damage against them would be the value of the logs at the time and place of their purchase thereof from such willful trespasser." In *Nesbitt v. L. Co.*, 21 Minn. 491, the trees were cut on the land of the plaintiff without his permission, and sold to the defendant. The trees were worth \$2.50 per M on the land, and \$8 per M when sold to the defendant at Anoka. It was held that the plaintiff could recover \$8 per M; the court saying: "That plaintiff did not lose his property in the logs by the wrongful removal of them is admitted. He was as much the owner of them at Anoka, where they were converted, as on his land, where they were wrongfully taken from him. This being so, his right to recover the logs themselves, or their value at the time and place of conversion, would seem to follow of course." The same principle is laid down in *Tuttle v. White*, 46 Mich. 487, 9 N. W. 528, 41 Am. Rep. 175.

For the reasons presented, and upon authority, I think the judgment should be affirmed.

WALKER, J., concurs in this opinion.

(156 N. C. 286)

GROGAN et al. v. ASHE et al.

(Supreme Court of North Carolina. Oct. 18, 1911.)

1. WILLS (§ 766\*)—LEGACIES—ADEMPTION.

Where testatrix bequeathed one-third of \$10,000 to G. for life, and, after her death, to her daughters, who should then be alive, or, if any were dead leaving issue, to her issue, the children taking the share of the parent, a gift by testatrix to G., during her lifetime of \$2,500, to aid in constructing a home for G., did not adeem the legacy pro tanto, in the absence of proof that it was so intended.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1981-1985; Dec. Dig. § 766.\*]

2. WILLS (§ 766\*)—LEGACIES—ADEMPTION—TRANSFER OF PROPERTY.

A prior legacy may be adeemed by a payment or transfer of property to the legatee, made for that purpose by testator during his life, but whether he intended to so satisfy the legacy is a question of intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1981-1985; Dec. Dig. § 766.\*]

3. WILLS (§ 770\*)—LEGACIES—ADEMPTION—INTENTION—EVIDENCE.

Parol evidence is admissible to establish testator's intention to adeem a legacy by payment or transfer of property to the legatee in testator's lifetime.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1992; Dec. Dig. § 770.\*]

4. WILLS (§ 766\*)—LEGACIES—ADEMPTION—GIFT TO LEGATEE.

Where a bequest is made by one standing in loco parentis to the beneficiary, and subsequent thereto payments are made by the testator to the beneficiary equal to or less than the legacy, such payments are prima facie a complete satisfaction or a satisfaction pro tanto; but, if the testator does not stand in loco parentis, the payment does not prima facie have any relation to the prior legacy.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 766.\*]

5. WILLS (§ 770\*)—LEGACIES—ADEMPTION—EVIDENCE—DECLARATIONS OF TESTATRIX.

Where testatrix bequeathed to G. \$1,000 to "make her home comfortable according to her wishes," and testatrix borrowed \$1,000 from a bank and paid it to G. during testatrix's life, evidence of her declarations when borrowing the money that G. and her husband were relatives to whom she expected to leave a bequest in her will, but, as they needed the money, testatrix would be glad if the bank from which it was obtained would loan it to them with testatrix as surety, which note, if not paid before testatrix's death, would be taken care of by the bequest intended for them, was admissible as showing testatrix's intention to satisfy the legacy.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 770.\*]

6. WILLS (§ 767\*)—LEGACIES—ADEMPTION—SPECIFIC AND GENERAL LEGACIES.

A specific legacy is held to be adeemed when the testator has collected the debt, if the legacy consisted of specific notes, or has disposed of the devised chattels or stocks in his lifetime, whatever may have been his purpose in doing so, but, when a general legacy is given of a sum of money without reference to any special fund set apart to pay it, the intention of the testator is of the essence of adeemption.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1986; Dec. Dig. § 767.\*]



**7. WILLS (§ 766\*)—LEGACIES—ADEMPTION.**

Where testatrix bequeathed a legacy of \$1,000 to G. for the purpose of making her a comfortable home, and she testified that the proceeds of a \$1,000 note were received by her from testatrix during her lifetime, and which her estate was compelled to pay for the specific purpose of assisting G. in building her home, there was an ademption of the legacy as a matter of law.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 766.\*]

**8. EXECUTORS AND ADMINISTRATORS (§ 315\*)—DISTRIBUTION OF ESTATE—ORDER OF COURT—PRESERVATION OF PROPERTY.**

Where testatrix bequeathed a pecuniary legacy to G. for her life, and, after her death, to her daughters who should then be alive, or, if any were dead leaving issue, to such issue, the children taking the share of the parent, the court on distribution should make such orders and decrees as were necessary for the preservation of the principal of the fund and the payment of the income only to the legatee during her life.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 315.\*]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by Mary L. Grogan and others against S. A. Ashe and others, as executors of Henrietta Martin, to recover two legacies, one for \$3,333.33 and one for \$1,000, devised by defendants' testatrix to plaintiffs. From a judgment for plaintiffs as to the first legacy and for defendants as to the second, both parties appeal. Affirmed on both appeals.

At the conclusion of the testimony, it was agreed by the parties that his honor, acting for and instead of the jury, should answer the issues made by the pleadings, and that his answers should have the force and effect as if they were answered by the jury and no more, and should be subject to like objection, etc. His honor, after hearing the evidence, rendered his judgment, to which both parties excepted and appealed.

Aycock & Winston, for plaintiffs. R. H. Battle & Son, for defendants.

**Defendants' Appeal.**

**BROWN, J.** [1] It is admitted that in the second codicil of her will the testatrix devised one-third of \$10,000 to "Mary Perkins Grogan for her life and after her death to her daughters who shall then be alive or if any be dead leaving issue, to her issue, the children taking the share of the parent." It is admitted that the legacy has not been paid to the plaintiffs, Mrs. Grogan and her daughters. The defendants, the executors, aver that at the time of the death of the testatrix she, said testatrix, had outstanding against her a note for \$2,500 made to the People's National Bank of Winston, N. C., the proceeds of which note were obtained for the use of the plaintiff Mary, and

for the benefit of her separate estate, and with the consent of her said husband, and that since the death of said testatrix said note has been paid by defendants at the suit of said bank, and defendants say that it was the intention of said testatrix that said note should be paid out of the legacy made in said codicil. The plaintiffs deny that said legacy was satisfied in the testatrix's lifetime or any part thereof, but aver that said \$2,500 was a gift made to the plaintiff Mary P. Grogan to aid her in building a home while her aunt, the testatrix, was on a visit to her at Winston. The only evidence introduced was by the defendants. They proved by S. A. Ashe the payment of the \$2,500 note out of the funds of the estate, and introduced the deposition of Mrs. Mary P. Grogan. The substance of her testimony is to the effect that the \$2,500 was a gift, and so intended by the testatrix. Upon this evidence his honor adjudged that the legacy had not been adeemed.

[2, 3] A prior legacy may be adeemed or satisfied by a payment or transfer of property to the legatee made for that purpose by the testator during his lifetime. Gardner on Wills, 567. But whether the testator intended to satisfy a legacy during life by a subsequent gift made to the legatee is largely a question of intention. And parol evidence may be received to establish the plea. 1 Roper, 409; 2 Redfield, 539; Hopwood v. Hopwood, 7 House Lords, p. 741. In this case there is no evidence whatever that the \$2,500 was intended as a satisfaction pro tanto of the legacy that had already been given in the will. The gift was to Mrs. Grogan, while the legacy was to her for life only and then to her daughters. There is no evidence of any declaration of the testatrix that she so intended the gift, nor are the defendants helped by any rule of presumption. The testatrix did not stand in loco parentis to Mrs. Grogan, and consequently no presumption of ademption arises.

[4] It has been held that where a bequest is made by one standing in loco parentis to the beneficiary, and subsequent thereto payments are made by the testator to the beneficiary equal to or less than the legacy, such payments are prima facie a complete satisfaction, or a satisfaction pro tanto. But, if the testator does not stand in loco parentis, such payment does not, prima facie, have any relation to the prior legacy. Gardner says that, although criticised, this doctrine has never been denied either in English or American jurisprudence. Wills, p. 569.

We are of opinion that there is no evidence that the testatrix intended the \$2,500 as a pro tanto satisfaction of the legacy theretofore devised in the second codicil of her will to Mrs. Grogan and her daughters.

The judgment on defendants' appeal is affirmed.

#### Plaintiffs' Appeal.

BROWN, J. In item 8 of her will the testatrix devised \$1,000 to Mary Perkins Grogan for the purpose of "making her home comfortable according to her wishes." This legacy has not been paid, and defendants aver that it has been satisfied in following manner, to wit: That shortly before her death testatrix borrowed from the Mechanics Savings Bank, of Raleigh, N. C., for the benefit of the plaintiff Mary Perkins Grogan, \$1,000, and made her note therefor, along with plaintiff, said Mary Grogan, and her husband, J. S. Grogan, and with his written consent, signified by his joining in said note, and that the said \$1,000 was received by the husband of said Mary P. Grogan as her agent and for her use and for the benefit of her separate estate, to wit, for the improvement of her home in Winston, and that it was the intention of said testatrix at the time of the transaction in procuring said money for Mrs. Grogan that the note given for the same should be paid out of the legacy to said Mary Perkins Grogan; that said note has been paid by defendants, and that such payment should be taken as a payment of the legacy. The plaintiffs reply, and admit that the testatrix borrowed the \$1,000 as alleged by defendants, and that she paid it over to Mrs. Grogan, but they aver it was not intended by Mrs. Martin as an ademption and satisfaction of the thousand dollar legacy, and they further aver that Mrs. Grogan and her husband signed the note as sureties for the testatrix.

[5] The following evidence was introduced by defendants. Walter Durham testifies as follows: "I am cashier in a bank in Raleigh. I knew Mrs. Martin, the deceased." The \$1,000 note is shown to witness, who states further: "Mrs. Martin applied for a loan, and said Mr. and Mrs. Grogan were engaged in building, and needed some money to complete the building, that they had applied to her for this money, and she did not have any money on hand. As they were relatives, she expected to leave them a bequest in her will, but, as it appeared that they needed the money at this time, she would be glad for the bank to make a loan of \$1,000 on the note of Mr. and Mrs. Grogan, with herself as surety, which note, if not paid before her death, would be taken care of by the bequest she intended making them." The court admitted this evidence, and plaintiffs excepted. Mrs. Grogan admitted receiving this \$1,000, but testified that it was given to her as a gift, that the testatrix signed the note as principal, that she and her husband signed it as sureties, and that the money was given to her to aid in the building of her home. Neither she nor her husband paid the note. We are of opinion that the testimony

was competent and properly admitted as the declarations of the testatrix characterizing her act at the time, and manifesting her intention to satisfy the legacy already devised in her will. Taking the testimony of Durham as a true statement of the fact, which his honor sitting by consent as a trier of the facts as well as of the law did, it makes out a clear case of the ademption of the \$1,000 general legacy to the plaintiff Mrs. Grogan.

[6] There is quite a difference between the ademption of a specific and a general legacy depending upon very different principles. A specific legacy is held to be adeemed when the testator has collected the debt (if the legacy consisted of specific notes) or has disposed of the devised chattels or stocks in his lifetime, whatever may have been his purpose in so doing. But when a general legacy is given of a sum of money, without regard to any especial fund set apart to pay it, the intention of the testator is of the very essence of ademption. Shaw, C. J., in *Richards v. Humphreys*, 15 Pick. (Mass.) 136, says: "The testator during his life has the absolute power of disposition or revocation. If he pay a legacy in express terms during his lifetime, although the term 'payment,' 'satisfaction,' 'release' or 'discharge' be used, it is manifest that it will operate by way of ademption, and can operate in no other way, inasmuch as a legacy during the life of the testator creates no obligation upon the testator or interest in the legatee, which can be the subject of payment, release, or satisfaction. If therefore a testator, after having made his will, containing a general bequest to a child or stranger, makes an advance, or does other acts which can be shown by express proof or reasonable presumption to have been intended by the testator as a satisfaction, discharge, or substitute for the legacy given, it shall be deemed in law to be an ademption of the legacy."

As we have shown in the opinion upon defendants' appeal in this case, all of the circumstances surrounding the case are to be considered, and parol evidence is admissible to aid in arriving at the testator's intention in making the gift or advancement. *Carmichael v. Lathrop*, 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; *In re Youngerman's Estate*, 136 Iowa, 488, 114 N. W. 7. While declarations of the testator, made generally and at any time and place, are not generally admissible, these declarations of Mrs. Martin were made at the time she procured and advanced the money for Mrs. Grogan, and as such they are held to be competent as against the legatee because they characterize at the time the act of the testatrix, and are unmistakable evidence of her purpose and intention to give the thousand dollars in satisfaction of the legacy. 14 Ency. of Evidence, p. 486, and cases cited; *Richards v. Humphreys*, supra; 8 Elliott on

Ev. § 2087. These declarations made at the time of the advancement are not the only evidence of the purpose and intent of the testatrix. They are corroborated by the similarity in amount as well as purpose between the gift and the legacy as expressed in the will. This evidence, taken together, amply justifies the final judgment of the judge that "Mary P. Grogan is not entitled to recover the one thousand dollars given to her in item eight of the will of Mrs. Henrietta P. Martin."

[7] But assuming that the declarations of the testatrix are incompetent, and excluding them entirely from consideration, as matter of law upon the admitted facts, the thousand dollar legacy has been satisfied, and Mrs. Grogan, upon her own testimony, is not entitled to recover it. It is expressly declared in the will that this legacy is given to the legatee for the purpose of making her a comfortable home. Mrs. Grogan testifies that this thousand dollars (given to her by the testatrix long after the execution of the will) was given for the specific purpose of assisting her in building her home. Ademption, as a mode of payment or satisfaction of a legacy, is sometimes decreed as matter of law upon admitted facts. Thus it is very generally held that where a testator is given a legacy for a particular purpose, and afterwards gives the legatee the same sum for the same purpose, this is of itself an ademption of the legacy; nothing else appearing. *Monck v. Monck*, 1 Ball & B. 298; *Wigram on Wills*, p. 360; 1 *Underhill on Wills*, §§ 440-449; 2 *Williams on Ex'rs*, pp. 651-657. "Where the legacy is given for a special purpose, the accomplishment thereof by the testator is also an ademption, and in this connection the rule of ejusdem generis is often applied." 1 *Am. & Eng. p. 619*, and cases cited; *Taylor v. Tolen*, 38 N. J. Eq. 97; *Pym v. Lockyer*, 5 My. & Cr. 29.

It was held by Lord Chancellor Eldon in a leading case that where a father, after bequeathing property to a child, gives him in the father's lifetime a portion of the same property, a total satisfaction of the legacy takes place, though the amount of the portion given is less than the legacy. *Ex parte Pye*, 18 Ves. 152. Mr. Underhill says this rule of a total satisfaction by payment of only a part never found favor in this country, and has been repudiated in England. 1 *Underhill*, § 440.

But courts and text-writers all agree that, where the gift and the legacy are ejusdem generis, the sum given and the purpose named being practically and substantially identical, in both gift and legacy as in this case, the legacy is adeemed and satisfied by the subsequent gift.

The judgment of the superior court upon plaintiffs' appeal is affirmed.

### Additional Opinion.

PER CURIAM. [8] The judgment of the superior court directs that the legacy of \$3,333.33 be paid to Mrs. Mary P. Grogan to be held by her for her life, and, after her death, to her daughters who shall then be living, etc., according to the terms of the will.

When the opinion is certified down, the superior court will make such orders and decrees as are necessary for the preservation of the principal of the fund and the payment of the interest to Mrs. Grogan during her life.

(156 N. C. 283)

McKELLAR et al. v. McKAY et al.

(Supreme Court of North Carolina. Oct. 18, 1911.)

#### 1. EVIDENCE (§ 178\*)—SECONDARY EVIDENCE—DESTRUCTION OF RECORDS.

In partition, where defendants claimed under a special administration sale and deed, the records as to which had been destroyed by fire, it was open to plaintiffs, in attacking the defendants' deeds, to offer parol evidence of the contents of the destroyed records.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.\*]

#### 2. JUDGMENT (§ 485\*)—COLLATERAL ATTACK—JUDGMENT VOID ON ITS FACE.

A proceeding absolutely void on its face may be attacked collaterally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 919; Dec. Dig. § 485.\*]

#### 3. COURTS (§ 35\*)—EVIDENCE (§ 82\*)—PRESUMPTIONS—JUDICIAL PROCEEDINGS.

Every presumption is in favor of the jurisdiction of a court, and the regularity of a special proceeding therein for the sale of land.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140-146; Dec. Dig. § 35.\* Evidence, Cent. Dig. § 104; Dec. Dig. § 82.\*]

#### 4. DISMISSAL AND NONSUIT (§ 48\*)—DISMISSAL BEFORE PLAINTIFF RESTS—STATUTORY PROVISIONS.

Under the express provision of Revisal 1905, § 539, the granting of a motion to dismiss before plaintiff has rested his case is error.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 96; Dec. Dig. § 48.\*]

Appeal from Superior Court, Cumberland County; Cooke, Judge.

Partition suit by Peter McKellar and others against Malcolm McKay and wife, J. H. Alexander, and the Buckthorn Lodge Association. Dismissal as against Alexander, and the Association and plaintiffs appeal. New trial.

Q. K. Nimocks and Sinclair & Dye, for plaintiffs. Rose & Rose, J. G. Shaw, J. A. Murchison, and King & Kimball, for defendants.

BROWN, J. This proceeding for partition of the land described in the pleadings was commenced in 1882, and appears never to have been brought to a final conclusion. It

appears that on May 7, 1910, a new and amended petition for partition was filed, and other defendants, to wit, J. H. Alexander and the Buckthorn Lodge Association, made parties defendant. The latter answered, claiming sole seisin of the land under a deed from J. H. Alexander, which the plaintiffs aver in their petition is null and void.

On the trial, for the purpose of attacking them, plaintiffs introduced the three deeds under which the Lodge Association claims—A. M. McKay, administrator of Henrietta McKellar to Annabella McKay; W. T. McKay and wife to J. H. Alexander; and deed from the latter to the Lodge Association. Plaintiffs then introduced the clerk of the court, who testified as to loss of original petition in this proceeding, and J. A. Howard, who testified as to condition of the land. The record referring to Howard's evidence and subsequent proceedings contains the following: "To all of the foregoing evidence given by the witness Howard the defendants in apt time objected. Objections overruled, and defendants excepted. Q. Who sold the property, Mr. Howard? Objections by the defendants; sustained, and plaintiffs except. At this juncture the plaintiffs moved to amend their complaint. To this the defendants, and each of them, objected, and each moved the court to dismiss the action. The court overruled the motion by plaintiffs, so far as J. H. Alexander and the Buckthorn Lodge were concerned, to amend, and likewise the motion of the defendants, Malcolm McN. McKay and wife, V. C. McKay, and sustained the motion of J. H. Alexander and Buckthorn Lodge Association. The plaintiffs excepted. Judgment, and plaintiffs again excepted and appealed in open court to the Supreme Court."

The error assigned is that his honor prematurely dismissed the action as to the principal defendants before plaintiffs had rested their case.

[1, 2] In doing so we are of opinion the learned and careful judge inadvertently erred. The principal defendant is the Lodge Association, which claims to be sole seised in fee of the land under an administration sale made in Harnett county in 1880. This sale and the deed made in pursuance of it are open to attack. It is true his honor refused to allow an amendment to the petition, asked presumably for the purpose of setting up facts upon which to ask equitable relief. But it was still open to plaintiffs to offer parol evidence, if they could, of the contents of the records in Harnett county destroyed by fire, with a view to show that the special proceeding by the administrator to sell the land was void on its face. It is well settled that a proceeding absolutely void on its face may be attacked collaterally. *Harrison v. Hargrove*, 109 N. C.

346, 13 S. E. 939. Perhaps plaintiff may have had other evidence to offer.

[3] It is true that every presumption is in favor of the jurisdiction of the Harnett court, and also of the regularity of the special proceeding to sell the land, and it may be the plaintiffs could offer no competent evidence to rebut and overturn such presumption; but they were cut off from the opportunity. We have no means of knowing what they could have offered in evidence.

[4] When plaintiff rested, it was the defendant's privilege to move to nonsuit and not before. The language of the statute is specific: "When on trial of an issue of fact in a civil action, or special proceeding, the plaintiff shall have produced his evidence and *rested* his case the defendant may move to dismiss the action, or for judgment as in case of nonsuit." Revisal, § 539.

New trial.

(156 N. C. 323)

### BERGER v. SMITH et al.

(Supreme Court of North Carolina. Oct. 18, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§§ 625, 626\*)—POLICE POWER—ORDINANCE—REASONABLENESS.

A city ordinance prohibiting the construction and operation of mills within certain boundaries, in order to constitute a valid exercise of the city's police power, must not only be reasonable, but must apply impartially and fairly to all concerned.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. §§ 625, 626.\*]

#### 2. NUISANCE (§ 34\*)—INJUNCTION—QUESTION FOR JURY.

While defendants were constructing a saw-mill and gin at the edge of the town of P., an ordinance was passed prohibiting the erection of any steam mill within certain boundaries, including the location of defendants' mill. On the block on which the mill was being erected there were only four residences and three stores, all on the east side of the block, while the mill was on the west side, which until then had been used for farming purposes. In a suit to restrain defendants' construction and operation of the mill, they answered that the ordinance was unreasonable, and that plaintiff, who operated a rival plant in the heart of the town, had procured it to be passed to prevent defendants' competition. *Held* that, since the construction and operation of such a mill was not a nuisance per se, though its location might make it a nuisance, it was error to grant a perpetual injunction without submitting the disputed facts to a jury, and on the issues found then determine the reasonableness of the ordinance.

[Ed. Note.—For other cases, see *Nuisance*, Dec. Dig. § 34.\*]

Appeal from Superior Court, Johnston County; Whedbee, Judge.

Suit by N. B. Berger against R. H. Smith and another for a perpetual injunction to restrain the construction of a mill. Decree for complainant, and defendants appeal. Modified.

Langston & Allen, for appellants. Aycock & Winston and M. T. Dickinson, for appellee.

CLARK, C. J. On January 18, 1911, the commissioners of the town of Pikeville passed an ordinance prohibiting the erection or operation of any sawmill or other steam mill within certain boundaries within said town, which are set out in the ordinance. Prior to the adoption of said ordinance the defendants had begun the erection of a sawmill and gin within said territory. Upon the block on which the mill was being erected there were only four residences and three stores, all on the east side of said block; the mill being on the west side, which till then had been used for farming purposes. The town of Pikeville is a village of 310 inhabitants. The defendant alleges that the plaintiff, Berger, owns a third interest in a rival plant of similar character which was being operated nearer the heart of the village. The defendants continued the erection of their plant until they were enjoined in this proceeding.

[1] "An ordinance must not be oppressive or discriminating, but must be reasonable and lawful." 2 Dill. Mun. Corp. (5th Ed.) § 589; 2 Abb. Mun. Corp. § 545. When an ordinance is "within the grant of power to the municipality, the presumption is that it is reasonable, unless its unreasonable character appears upon its face. But the courts will declare an ordinance to be void, because unreasonable, upon a state of facts being shown which makes it unreasonable." *Id.* § 591, and cases there cited. It is further said that "an ordinance must be impartial, fair, and general. It would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal and done by another not so. Ordinances which have this effect cannot be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed." *Id.* 593.

[2] Upon the allegations in the answer, if found to be true, the defendant was forbidden by this ordinance to erect and operate his steam mill in the edge of town, while the rival plant in which the plaintiff is interested is being operated much nearer the heart of town without restriction. The answer further alleges that this ordinance was procured to be passed by the influence of the plaintiff. While the courts cannot inquire into the motives in passing an ordinance, it is competent to inquire into allegations as to the ordinance being oppressive or discriminative. Ordinances in regard to a subject peculiarly within the duties of the town authorities, such as the regulation of streets and the like, are usually conclusive.

But when an ordinance like this depends upon the power to declare the subject-matter a nuisance, it is a subject of judicial review. In some cases the court will determine whether the subject-matter is a nuisance *per se* as a matter of law from its nature or from the attendant circumstances. Here there are disputed allegations of fact as to discrimination and whether the steam plant is in fact a nuisance. It is not a nuisance *per se*, though its location may make it such. In such case the disputed facts should be submitted to a jury, and upon the issues found the court will determine whether as a matter of law the ordinance is reasonable or not. In *Small v. Edenton*, 146 N. C. 530, 60 S. E. 413, 20 L. R. A. (N. S.) 145, it is said: "The reasonableness of an ordinance is for the court; the jury only being called in to find the facts, when in dispute"—citing *Abb. Mun. Corp.* § 545; *Smith, Mun. Corp.* § 1133. In that case it is said that the issue of nuisance in many cases must be found by the jury.

We are of opinion that the disputed issues of fact should have been submitted to the jury. The court should not have granted a perpetual injunction, but at the utmost should have granted the restraining order to the hearing. The judgment below is thus modified. The plaintiff will pay the costs of this appeal.

Modified.

WALKER, J. I concur in the conclusion reached by the court in this case, but it must not be understood that, in doing so, I am committed to the doctrine that the state, or any one of its municipalities, cannot, in the exercise of its police power, enact a law or pass an ordinance forbidding the erection of a mill within limited and defined territory, and declaring the same to be a nuisance. There are many reasons which can be assigned for holding, in view of the nature of such plants, with their smoke, noise, etc., that the right to legislate by statute or ordinance against them falls within the general police power. But any ordinance may be declared void, if in itself, or because of the peculiar facts and circumstances which gave rise to its adoption, or with reference to which it must be enforced, it will be unreasonable and oppressive in its operation. For this reason, I think the court is right in modifying the order and requiring that the injunction should extend only to the hearing, so that the facts in this particular case may be found by a jury, when we can the more intelligently pass upon the validity of the ordinance in question.

HOKE, J., concurs in this opinion.

(156 N. C. 273)

**BIZZELL et al. v. ROBERTS et al.**

(Supreme Court of North Carolina. Oct. 18, 1911.)

**1. MORTGAGES (§ 401\*)—MATURITY OF DEBTS.**

A provision of a mortgage securing a debt payable in installments, providing that the entire debt shall mature on nonpayment of interest or any installment as it becomes due, is valid and enforceable, in absence of fraud or unconscionable advantage in executing it.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1160-1165; Dec. Dig. § 401.\*]

**2. MORTGAGES (§ 408\*)—WAIVER OF FORFEITURE.**

A provision of a mortgage securing a debt payable in installments that the entire debt shall mature on nonpayment of interest or any installment as it becomes due is waived by the mortgagee where the maturing of the debt is at his option and he accepts arrears with the intent to waive the forfeiture.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 408.\*]

**3. PLEDGES (§ 30\*)—NOTE—ENFORCEMENT.**

A creditor, who takes a note as additional security for his debt, may upon its maturity collect it according to its terms, whether the principal debt is due or not, in the absence of stipulations to the contrary.

[Ed. Note.—For other cases, see *Pledges*, Dec. Dig. § 30.\*]

Appeal from Superior Court, Wayne County; Peebles, Judge.

Action by George D. Bizzell and others against J. B. Roberts and others. From a judgment overruling a demurrer to the complaint, defendants appeal. Affirmed.

Langston & Allen, for appellants. W. T. Dortch and M. T. Dickinson, for appellees.

**HOKE, J.** It appeared in the complaint: That on the 3d of March, 1909, defendants J. B. Roberts and Julia Kate Roberts became indebted to plaintiff in the aggregate sum of \$2,750, payable by installments and evidenced by the promissory notes of said defendants under seal, first, for \$600, payable 60 days after date; second, for \$500, payable 1 year after date; third, for \$500, payable 2 years after date; fourth, for \$500, payable 3 years after date; fifth, for \$650, payable 4 years after date. There was mortgage on real estate securing said indebtedness and containing the stipulation that, if default be made on the payment of either of said notes and interest thereon when due, then all of said notes should become "due and payable at once." That defendant Roberts had made payments on said notes as follows: "On the first of said notes was paid \$141 on March 18, 1909, and said note was paid in full on the 9th day of November, 1909, and the second of said notes was paid in full on the 9th day of November, 1909, and on the third of said notes \$252.62 was paid on the 9th day of November, 1909, and on the 17th day of February, 1911, there was paid on the balance due on said notes

the sum of \$1,050, which credit is subject to a deduction of \$47.23, the amount paid by the plaintiffs for taxes on said land for the years 1909 and 1910, and that no further payment has been made upon said notes, and the remainder of said indebtedness, to wit, \$565.21, with interest thereon from the 17th day of February, 1911, is now due and owing to the plaintiffs by the defendants." The complaint further stated that on the 3d of June, 1909, defendants J. B. and Julia Kate Roberts, and their codefendant Zilphia A. Warren, in further security of said first-mentioned notes, executed their promissory note under seal for \$450, with interest, etc., payable January 1, 1910, and that no part of this note had been paid; and on these allegations plaintiff demanded judgment on the \$565.21 balance due on the principal indebtedness and for \$450, with interest, being the amount due on the collateral. The present action was instituted on May 16, 1911, and defendant demurred to the complaint, assigning for cause that no part of plaintiffs' claim had matured at the time of action commenced.

[1] Authority here and elsewhere is to the effect that where a debt is payable in installments, and same is secured by a mortgage containing provision that the entire debt shall mature on failure to pay the interest or specified portions of the principal as it comes due, or any other reasonable stipulation looking to the care and preservation of the property or the maintenance of the lien thereon, such stipulation, in the absence of circumstances tending to show fraud or oppression or "unconscionable" advantage, is enforceable as a valid contract obligation. *Gore v. Davis*, 124 N. C. 234, 32 S. E. 554; *Parker v. Oliver*, 106 Ala. 549, 18 South. 40; *Odell v. Hoyt*, 73 N. Y. 343; *Insurance Co. v. Westerhoff*, 58 Neb. 379, 78 N. W. 724, 79 N. W. 731.

[2] And it is also generally held, uniformly so far as examined, that a provision of this character is primarily for the benefit of the mortgagee. *Jones on Mortgages*, § 1183(a). And from this it would seem to follow that the same may be waived by him, and as a rule will be by the acceptance of all arrears, the occasion of the default. This is undoubtedly the correct position when the maturing of the debt is expressed to be at the option or election of the mortgagee, and he accepts the arrears with the expressed or implied intent to waive the forfeiture. *Van-Visseringen v. Lenz*, 171 Ill. 162, 49 N. E. 422; *Development Co. v. Post*, 55 N. J. Eq. 559, 37 Atl. 892; *Sire v. Wightman*, 25 N. J. Eq. 102; *Smalley v. Ranken*, 85 Iowa, 612, 52 N. W. 507; *Mfg. Co. v. Robinson*, 56 Fed. 690, 6 C. C. A. 79; *Jones on Mortgages*, § 1186; 27 Cyc. p. 1532.

[3] It has been said, however, that this waiver will not result from the acceptance

of arrears, when on the face of the mortgage or other instrument the stipulation as to the maturing of the debt is absolute, and not made to depend on the election of the mortgagee. *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466. Without final decision on this question, as the mortgage is not set out in "ipsisssimis verbis," there seems to be no conflict of authority on the position that, where a creditor takes a note or other collateral as additional security for his debt and the same has matured, he may, in the absence of binding stipulation to the contrary, proceed to collect it according to its tenor, and whether the principal debt is due or not. *Bank v. Doyle*, 9 R. I. 76, 98 Am. Dec. 868, 11 Am. Rep. 219; *Hunt v. Nevers*, 15 Pick. (Mass.) 500, 26 Am. Dec. 616. The case of *Hilliard v. Newberry*, 153 N. C. 104, 68 S. E. 1056, is in recognition of the same general principle.

From this it follows that, whether the maturing of the principal indebtedness has been waived or otherwise, the plaintiff has an apparent right to prosecute the action on the collateral obligation of \$450, which is past due, and the demurrer of defendant, therefore, was properly overruled.

**Affirmed.**

(156 N. C. 345)

**THOMPSON v. SMITH et al.**

(Supreme Court of North Carolina. Oct. 18, 1911.)

**REFERENCE (§ 100\*)—FINDINGS OF FACT AND LAW—REVIEW.**

Where exceptions are taken to the referee's findings of fact and law, the superior court must consider the evidence, and give its own conclusion on the facts and law; and it is error to merely consider the evidence to ascertain whether there is any evidence to sustain the findings.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 164-166; Dec. Dig. § 100.\*]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by Fannie H. Thompson against Marcellus Smith and another, administrators. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

J. H. Fleming, for appellant. B. M. Gatling, for appellees.

**WALKER, J.** We have in this case a voluminous record and elaborate briefs upon several very interesting questions, involving the merits of the cause, and yet we must remand it to the court below for another hearing, because of what the learned and able judge said at the time he heard the case, indicating that he would not, independently as a judge, examine the evidence for the purpose of forming a conclusion as to the facts, where the findings of the referee had been the subject of exception, but only for the pur-

pose of ascertaining if there was any evidence to sustain the referee's findings, and if there was he would adopt those findings as his own.

We do not consider this to be the rule in such cases. The party excepts to the finding of the referee, when one of fact, because he impliedly says it is not backed by a preponderance of the evidence, and if his exception is overruled by the referee he appeals to the judge. What is the use of appealing, if the judge can simply decide that the exception is not well taken, if there is *any* evidence to support the finding? It is for him to say, *of course*, not if there is any evidence, but if all the evidence adduced by the party, upon whom rests the burden of proof, is, by its greater weight, sufficient to establish the fact, which is essential to his success. The learned judge might as well have said that he would sustain the conclusions of law, if there was any authority to support them. But the rule adopted by his honor does not apply to the superior court, but only to this court. We have said that, where the evidence has been considered by the referee and by the judge, upon exceptions to the referee's findings, we will not review the judge's conclusions as to them, because the appellant has had two chances; and when two minds, one at least, and perhaps both, professionally trained and accustomed to weigh evidence, and to compare and balance probabilities as to its weight, arrive at the same conclusion, there is a strong presumption in favor of its correctness; or the same is true, even when the judge differs from the referee as to his findings, and we may safely rely on its correctness. The referee is selected in such cases in place of a jury, and the judge so acts when he reviews the referee. If there is any evidence to support the findings, and no error has been committed in receiving or rejecting testimony, and no other question of law is raised with respect to the findings, we accept what the judge has found as final, as we do in the case of a jury. *Malloy v. Cotton Mills*, 132 N. C. 432, 43 S. E. 951; *Lambertson v. Vann*, 134 N. C. 108, 46 S. E. 10; *Clark's Code* (3d Ed.) p. 564, and cases there collected; *Ramsey v. Browder*, 136 N. C. 251, 48 S. E. 651; *Commissioners v. Packing Co.*, 135 N. C. 62, 47 S. E. 411. When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases, use his own faculties in ascertaining the truth, and form his own judgment as to fact and law. This is required, not only as a check upon the referee and a safeguard against any possible errors on his part, but because he cannot *review* the referee's findings in any other way. The point

was presented clearly and directly in *Miller v. Groome*, 109 N. C. 148, 13 S. E. 840, and it controls this case. His honor did not review the findings of the referee, as he said, if there was any evidence to sustain them, he would affirm his rulings. He might have found some for that purpose; whereas, the preponderance may have been heavily the other way. We need not consider the numerous exceptions so ably argued before us by Mr. Gatling and Mr. Fleming.

It will be certified that there was error in the respect indicated, and the cause is remanded, with directions that the judge of the superior court review the referee's findings of fact, and his rulings as to the law, upon the exceptions thereto, in accordance with the usual practice in such cases.

Error.

(156 N. C. 233)

**AUTRY v. ATLANTIC COAST LINE R. CO.**  
(Supreme Court of North Carolina. Oct. 18, 1911.)

**RAILROADS (§ 274\*)—INJURIES AT DEPOTS—NEGLIGENCE.**

A railroad company's failure to keep its freight depot premises in a reasonably safe condition for persons coming thereon to transact business is actionable negligence if injuries result.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 868-872; Dec. Dig. § 274.\*]

Appeal from Superior Court, Cumberland County; Cooke, Judge.

Action by E. V. Autry, administratrix of B. L. Autry, against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The court submitted these issues:

"(1) Was the plaintiff's intestate, B. L. Autry, killed by the negligence of the defendant? Answer: Yes.

"(2) Did the said B. L. Autry, by his own negligence, contribute to his death? Answer: No.

"(3) What amount is the plaintiff entitled to recover as damages? Answer: \$2,000."

From the judgment rendered the defendant appealed.

Rose & Rose, for appellant. H. L. Cook and Sinclair & Dye, for appellee.

**BROWN, J.** In apt time the defendant moved to nonsuit. His honor properly denied the motion.

There is abundant evidence in the record tending to prove that plaintiff's intestate, an employé of the Hope Mills Manufacturing Company, was sent with a wagon to defendant's freight depot for certain heavy boxes of mill machinery, that they were safely loaded on the wagon, and that on the way out from the depot the wagon wheel ran into a rut or hole eight inches deep, which caused

the boxes to topple over, throwing the intestate out of the wagon, and the box which he had attempted to hold steady fell upon, and crushed his, head. Plaintiff also introduced evidence tending to prove that "the place or hole where the wagon dropped in was 2½ feet from corner of depot. No other way to get out from the depot but to go that way. It was on the right of way, and it was not a public road along there." There was also evidence tending to prove that the mayor of the town had notified by letter defendant's general manager of the condition of the right of way and that he had written that it should be properly attended to. There was evidence also by defendant that the hole was not on the right of way, as well as other evidence contradicting plaintiff's averments. We think the jury were warranted by the evidence offered by plaintiff in finding that plaintiff's intestate was rightfully at the station removing the freight, that he took the only way out, that on the defendant's premises the wagon wheel ran into the deep rut, and caused the boxes to fall on the intestate and kill him.

[1] The negligence consists in evidence of defendant's failure to keep its premises in a reasonably safe condition to persons who come for the purpose of transacting business. *Finch v. Railroad Co.*, 151 N. C. 105, 65 S. E. 742, and cases cited. *Railroad v. Wolfe*, 80 Ky. 82; *Railroad v. Grush*, 67 Ill. 262, 16 Am. Rep. 618. The disputed question as to whether the hole was on the defendant's premises was properly and fairly put to the jury. As to what was the proximate cause of the injury, instead of leaving it to the jury his honor might well have charged them that upon all the evidence it was the falling of the wagon wheel into the hole.

We have examined the several assignments of error, and think that none of them can be sustained. To discuss them *seriatim* is in our opinion needless.

No error.

(156 N. C. 183)

**CARTER et al. v. BOARD OF DRAINAGE COM'RS OF MATTAMUSKEET LAKE DRAINAGE NO. 1.**

(Supreme Court of North Carolina. Oct. 11, 1911.)

**1. DRAINS (§ 18\*)—ISSUE OF BONDS BY COMMISSIONERS—INJUNCTION.**

That a sum less than the amount of bonds, which drainage commissioners purpose to issue for maintenance of the drainage system during its construction, and for payment of interest on the bonds issued for cost of construction, will be sufficient for such purpose is matter for exception in the proceedings for their issuance, and not matter entitling the landowners who are subject to assessment to enjoin the issue.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 18.\*]



**2. DRAINS (§ 18\*)—POWER OF COMMISSIONERS TO ISSUE BONDS.**

From the grant of power to drainage commissioners to issue bonds for costs of construction of a drainage system, power to issue bonds to pay the interest on the bonds for the cost of construction arises by implication.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 18.\*]

**3. DRAINS (§ 69\*)—LIMIT OF ASSESSMENT—WAIVER.**

A land company having bought the lands of the state board of education to be drained by a proposed drainage system, the provision of Laws 1909, c. 509, made for the protection of such board and the state, to the effect that such lands should be liable for assessment for only \$300,000 of the cost, could be waived by the company.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 69.\*]

**4. DRAINS (§ 82\*)—ASSESSMENT—COLLATERAL ATTACK.**

The decree in drainage proceedings, that a certain amount would be necessary for construction of the work, not having been appealed from, may not be questioned in a suit to enjoin issuance by the drainage commissioners of bonds for a further amount, to pay the cost of maintenance of the work during the construction, and the interest on the bonds issued for cost of construction.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 82.\*]

**5. DRAINS (§ 18\*)—ISSUE OF BONDS BY COMMISSIONER—INJUNCTION.**

The execution by drainage commissioners of the power, clearly conferred on them by Laws 1911, c. 67, § 15, to issue bonds for maintenance of the work during the construction, and to pay interest on bonds issued for cost of construction, will not be enjoined, unless their action is influenced or procured by fraud.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 18.\*]

**6. DRAINS (§ 18\*)—BONDS AND ASSESSMENTS—POWERS OF LEGISLATURE.**

The Legislature, after providing, by Laws 1909, c. 442, for the creation of a drainage district and the issuance of bonds and an assessment for the construction, may, by a subsequent act, provide for issuance of other bonds, and for another assessment therefor.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 18.\*]

Appeal from Superior Court, Hyde County; Allen, Judge.

Action by H. C. Carter and others against the Board of Drainage Commissioners of Mattamuskeet Lake Drainage No. 1. Judgment for defendants. Plaintiffs appeal. Affirmed.

Ward & Grimes, H. C. Carter, Jr., and J. C. B. Ehringhaus, for appellants. Mann & Jones, for appellees.

CLARK, C. J. Under chapter 442, Laws 1909, the plaintiffs and other landowners filed a petition for the drainage of Mattamuskeet Lake and adjacent lands. The state board of education, by virtue of its ownership of the lake bottom, was made a party, and was chargeable with three-fourths of the expense of the drainage under chapter 509,

Laws 1909. Said proceeding was prosecuted to a final decree. Exceptions were filed by plaintiffs and others which were sustained and the final judgment rendered, to which there were no exceptions or appeal. Under the judgment in that proceeding, \$400,000 in bonds were directed to be issued for construction. Each tract of land was assessed its pro rata part for the payment of said bonds and interest thereon, upon payment of which its owner would be discharged from liability. No owner is responsible for other owners by reason of their failure to pay except through the method of assessment provided by the statute.

By virtue of Laws 1911, c. 67, the drainage commissioners purpose to issue \$100,000 in additional bonds, \$40,000 of which is to be expended in the maintenance of the system during the three years till its final completion, and \$60,000 to provide interest on the other bonds during the two years, thus making a total bond issue of \$500,000. Of this sum the Southern Land Reclamation Company is charged with three-fourths, by reason of its purchase from the state board of education, besides the charge upon the other lands to the extent of many thousands of dollars, which said reclamation company has purchased from other landowners within the drainage district.

This injunction is sought by the plaintiffs to restrain the issue of the additional \$100,000 bonds. His honor properly held that the plaintiffs had not shown sufficient grounds to entitle them to such restraining order. The additional \$100,000 in bonds is not an addition to the debt for the purposes of improvement, but to provide for those expenses which are the necessary and natural result. \$60,000 is to provide interest on the other bonds during two years. This interest must be provided for either out of the pockets of the landowners, or by issuing bonds. It is the legal incident of the \$400,000 in bonds, which are to be issued under a decree to which the plaintiffs were parties, and from which they did not appeal. Any one of them, or any other landowner, can pay his pro rata part of such interest, and thereupon the amount of bonds will be diminished accordingly. The same is true as to the \$40,000, which are to be issued to maintain and keep the work in condition for the three years which will be required for its completion. The \$400,000 being required, as adjudged by the final decree, for the construction of the work, money must be provided for the maintenance and good condition of the work as it is done, from time to time, until its final completion. This money must be raised by the property which is chargeable with the \$400,000 of bonds, else there will be serious loss by impairment of the work while being constructed.

[1] It is open to the plaintiffs and any

others to file exceptions as to these amounts and show, if they can, that a lesser sum will maintain the work during the progress of construction. They can also file exceptions in like manner, and show, if they can, that a less sum than \$60,000 will discharge the interest accruing during the two years. But these are not matters which entitle the plaintiff to an injunction to restrain the issue of the bonds.

[2] In the original act, chapter 442, Laws 1909, § 34, authorized the commissioners to issue bonds for the full amount of the assessment for construction, "together with interest thereon, costs of collection or other incidental expenses." This section has been repealed by section 11, c. 67, Laws 1911, but it shows that the original act authorized the issuing of bonds for "interest and other incidental expenses." Indeed, the power to issue bonds for interest arises by implication even if there is no express delegation of this power in the statute. "The limitation of indebtedness does not, however, relate to interest coupons attached to the bonds, and, although they may swell the indebtedness beyond the limitation, the bonds are nevertheless valid." 21 A. & E. Enc. (2d Ed.) 43, and note 2.

[3, 4] The limitation in Laws 1909, c. 509, was to protect the state and the state board of education, because of the power in said act enabling the state to guarantee three-fourths of said bonds to be repaid out of the sales of land. This limitation has been waived by the Southern Land Reclamation Company, by proper resolutions of the stockholders and directors, which, as successor to the state board of education, it had power to do. Chapter 67, Laws 1911, was intended to cure any defect in the machinery of the tax levy, to take care of the bonds, and empower the defendant to issue bonds for interest. Unless there is a provision to take care of the interest for the two years, and to provide for maintaining the work, as it progresses, up to its completion, the board will doubtless be unable to dispose of the \$400,000 bond issue. It will require that entire amount, according to the decree itself, to provide for the construction of the work. Hence the interest and the maintenance of the work during the progress of construction cannot be paid out of the \$400,000. The decree adjudging \$400,000 to be necessary for the construction of the work, and directing the issue of bonds for that amount, not being appealed from, the plaintiffs cannot now be heard to contest it.

[5] As already said, if there is any question as to the full amount of \$100,000 being necessary to pay off the interest and for maintenance during construction, the plaintiffs can pay their assessment under protest, and bring suit to recover any amount in ex-

cess, as provided by the statute. But they should not be allowed to stay a work of great public improvement, affecting many hundreds of other people, upon the allegations made in this complaint. The power to issue the \$100,000 additional bonds is clearly conferred upon the drainage commissioners by the statute (Laws 1911, c. 67, § 15), and the execution of their powers will not be interfered with, unless their action is influenced or procured by fraud. *Sanderlin v. Luken*, 152 N. C. 744, 68 S. E. 225. If there should be any misconduct on the part of the commissioners, they can be held responsible in an action against them; but the work itself will not be stayed, nor the issuance of the bonds for construction, interest, and maintenance, which is necessary for that end.

[6] The Legislature was not restricted to the amount of bonds, or the assessment made, under the first act passed in 1909. *Durrett v. Davison*, 122 Ky. 851, 93 S. W. 25, 8 L. R. A. (N. S.) 546, and cases cited in the notes thereto.

Affirmed.

HOKE, J., concurs in result.

(156 N. C. 326)

THEO. A. KOCHS CO. v. JACKSON et al.  
(Supreme Court of North Carolina. Oct. 18, 1911.)

#### 1. PARTIES (§ 76\*)—OBJECTIONS—WAIVER.

The complaint in an action to recover personalty designated plaintiff as the "Theo. A. K. Co." without alleging that it was a corporation, or, if a partnership, the names of the partners. Revisal 1905, § 478, provides that, if no objection for defect of parties or that plaintiff has not legal capacity to sue be taken by demurrer or answer, defendant shall be deemed to have waived the same. *Held*, that the defect of parties plaintiff or incapacity to sue did not appear on the face of the complaint, and that any objection on that ground was waived by defendants by answering to the merits, and not taking the objection by answer or demurrer; the question not being properly raised by a demurrer *ore tenus* at the trial, especially where the answer failed to deny the execution of the chattel mortgage sued on, and where defendant gave a replevy bond to plaintiff so as to retain possession pending the action.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 76.\*]

#### 2. EXECUTION (§ 268\*)—SALE OF PROPERTY—TITLE OF PURCHASER.

The purchaser at an execution sale of attached property only takes the title of the defendant in the attached property, and, where the judgment debtor had previously executed a chattel mortgage which was duly registered on the property, the purchaser took no title as against the mortgagee.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 268.\*]

Appeal from Superior Court, Cumberland County; Cooke, Judge.

Action by the Theo. A. Kochs Company against Andrew Jackson and others. From a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

judgment for plaintiff, defendants appeal. Affirmed.

This is an action to recover possession of personal property. The plaintiff is designated in the summons and complaint as the "Theo. A. Kochs Company," and there is no allegation that the plaintiff is a corporation, and, if a partnership, the names of the partners are not given. The plaintiff alleges in his complaint the execution of certain notes by one Andrew Jackson, payable to the Theo. A. Kochs Company, and the conveyance by chattel mortgage of the property described in the complaint to secure the same, that there has been a default in the payment of the notes, and that the property described in the mortgage is in possession of the defendants, which they have refused to surrender on demand. The defendants file an answer in which they deny the allegations of the complaint, except the allegation of the execution of the chattel mortgage to secure the payment of the notes, and they allege that they are the owners of the property by virtue of a purchase at a sale under execution against Andrew Jackson. The chattel mortgage was duly registered, and after its registration the said Jackson left the state, and under regular proceedings against him, to which the plaintiff in this action was not a party, said property was attached and sold, and the defendants became the purchasers at the sale. When the case came on for trial, the defendants demurred to the complaint *ore tenus*, for that it did not allege that Theo. A. Kochs Company was a corporation, or if not a corporation, but a partnership, it failed to allege the names of the partners. The motion was overruled, and the defendants excepted. His honor also held that the purchase by the defendants at the sale under execution was no defense against the claim of the plaintiff, and the defendants excepted. There was a judgment in favor of the plaintiff, and the defendants excepted and appealed.

Rose & Rose and H. L. Cook, for appellants. Newton, Herring & Oates, for appellee.

ALLEN, J. (after stating the facts as above). The demurrer *ore tenus* to the complaint was properly overruled.

[1] It was an objection to the complaint upon the ground of defect of parties, or that the plaintiff did not have the legal capacity to sue, and such objections are waived, unless taken by a written answer or demurrer, under the provisions of section 478 of the Revisal. Besides, it does not appear on the face of the complaint that there is a defect of parties, or an incapacity to maintain the action, and the defendants do not deny in their answer the execution of the chattel mortgage to secure the notes, and they have

executed a replevy bond, payable to the plaintiff, by means of which they retain the property pending the action. A similar question was raised in *Stanly v. Railroad*, 89 N. C. 331, in which the court says: "The appearance and plea to the merits or answer is a concession of the sufficiency of the designation of the person, natural or artificial, and, if intended to be disputed, it should be under the present practice by answer." The defendants rely on *Heath v. Morgan*, 117 N. C. 505, 23 S. E. 489, as on authority in favor of their position, but an examination of the opinion in that case shows that the court acted upon the assumption that the plaintiff was a partnership, which does not appear in this case, and also that a demurrer was filed upon the ground that the names of the partners were not stated in the summons or complaint.

[2] The defendants acquired no title as against the plaintiff by purchase at the execution sale. The execution was against Jackson, who had executed to the plaintiff a chattel mortgage, which was duly registered. "The execution is issued by the clerk as a matter of course upon the judgment, and, under it, the property levied upon under the attachment is sold (if liable to sale), and what title the purchaser gets will be determined after the execution sale, for the purchaser buys only the right of the defendant in the attached property, as in all other sales under execution." *Electric Co. v. Engineering Co.*, 128 N. C. 201, 38 S. E. 831.

We find no error.

No error.

(156 N. C. 307)

# WYATT v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Oct. 18, 1911.)

## 1. PLEADING (§ 34\*) — CONSTRUCTION OF PLEADING.

A pleading should be liberally construed with a view to substantial justice; every reasonable intendment being made in favor of the pleader.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 66; Dec. Dig. § 34.\*]

## 2. RAILROADS (§ 478\*)—FIRES—NEGLIGENCE—COMPLAINT.

The complaint in an action against a railroad company alleged that defendant's agents, "in operating and running an engine over said railway near the premises of the plaintiff above described, negligently and carelessly permitted said engine to emit sparks and coals of fire therefrom, which fell on plaintiff's property, and set fire thereto. Held, that the complaint sufficiently alleged negligence in emitting the sparks from the engine, so that evidence of defects in the engine was admissible.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 478.\*]

## 3. RAILROADS (§ 464\*)—FIRES—CAUSE—NEGLIGENCE.

Where the fire destroying buildings off of the right of way was not shown to have originated in combustible materials on the right of way, the property owner must show, to recover

damages, that the fire was caused by a defect in an engine or by its negligent operation.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 464.\*]

**4. RAILROADS (§ 461\*)—FIRES—INJURIES—CONTRIBUTORY NEGLIGENCE.**

Failure of a property owner to repair buildings destroyed by fire set from a railroad engine so as to make them less combustible or remove weeds, etc., from his premises, is not contributory negligence, barring a recovery.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1682; Dec. Dig. 461.\*]

**5. EVIDENCE (§ 524\*)—OPINION EVIDENCE—VALUES.**

The opinions of qualified experts as to the value of land, houses, etc., are admissible in evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2332; Dec. Dig. § 524.\*]

**6. EVIDENCE (§ 113\*)—INJURY TO REAL PROPERTY—VALUE.**

While in an action for damage to realty in estimating the value as an element of damage the jury is restricted to value at the time of the injury, evidence may be given as to the value of the property at other times as bearing on its value when injured.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 113.\*]

**7. DAMAGES (§ 174\*)—VALUE OF PROPERTY—TAX ASSESSMENT—EVIDENCE.**

In an action against a railroad company for injuries to a building by fire, evidence of the reduction of the valuation of the property for taxation after the fire was not admissible on the question of damage; plaintiff not controlling the action of the taxing officers, and the tax lister having testified that he did not recollect the amount of the reduction asked for by plaintiff.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 174.\*]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by W. F. Wyatt against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

This action is to recover damages for the negligent destruction of property of the plaintiff by fire.

The allegation of negligence is as follows: "That on the 11th day of April, 1910, the employes and agents of the defendants, in operating and running an engine over said railway near the premises of the plaintiff above described, negligently and carelessly permitted said engine to emit sparks and coals of fire therefrom, which fell on plaintiff's property above described, and set fire thereto and burned up and destroyed the same, to his damage in the sum of five thousand dollars (\$5,000), as he is informed and believes." The defendant denies negligence, and for a further defense alleges: "That if the plaintiff's property was destroyed by fire as alleged in the complaint, which the defendant denies, plaintiff by his own negligence contributed to bring about such injury, in that he permitted his property to become and remain in an inflammable state, and in a negligent condition and failed to

provide a watchman therefor, and his contributory negligence is set up by the defendant in bar of plaintiff's right to recover in this action." The defendant does not contend that there is no evidence that the defendant set out the fire which burned the property of the plaintiff, but insists that the complaint alleges negligence in the operation of the train, and that this allegation is not supported by evidence of a defective spark arrester.

This contention is presented by two prayers for instruction, which were refused:

"There is no evidence of negligence in the operation of this engine by the employes of the defendant, and you will answer the second issue, 'No.'"

"In order to answer the second issue 'Yes,' you must find that the defendant's employes negligently operated the engine on the train which set out the fire, if you find that it was set out by an engine."

His honor instructed the jury to answer the issue of contributory negligence "No," and defendant excepted. The evidence in support of the plea of contributory negligence is as follows: "Plaintiff testified that he placed one of his buildings as near the railroad line as he could get it; that he had no tenant for the tannery or bark sheds. J. H. Harrison, witness for the plaintiff, said the roof of the bark house where fire started was rotten and very dry, and that he might have described it as burning like powder; that the tannery property was a loafing place for hoboes, and there was one who cooked in the building one or two nights. The buildings were in a dilapidated condition. For the defendant A. L. Pritchett testified that the grade is north at the point of the fire. From the outside buildings were ragged looking, especially the roof; conditions around the buildings grassy and trashy looking. J. H. Edgerton said the buildings were in a very dilapidated condition; the shingles were turned up and mossy; grass and weeds around the building. Charles Creighton testified that the buildings were in a very bad state. They were all decayed and rotten; roof all rotten; doors off; windows off; and in every way in bad state. The property did not appear to ever be looked after, and it was in bad fix. Weeds as high as a man's head were in the yard around the buildings. It was a regular 'hold-out for hoboes.' W. T. Smith said the property was in pretty bad shape, mostly rotten down, the roof especially, and the shingles were curled up, and there was moss on the shingles. Sides of building were torn off, the floors up, windows out, the plastering knocked off in the cottage, and part of the flooring torn up. T. B. Moseley testified that the buildings were dilapidated and run down for want of repairs. They seemed neglected; grown up in weeds; 'the condi-

tion of an old settlement that has been abandoned.' J. J. Haywood testified that the property was in bad shape. It was all gone down and dilapidated; no windows at all; doors all down, and some panels knocked out. The building nearest the railroad was pretty near down. The weather boarding and roof were rotten. It was used by gamblers, white and colored, and disreputable women. The grounds around the buildings were grown up in dry weeds and grass. The buildings had been used by tramps, and it could be seen that they had built fires in the buildings."

Plaintiff asked the witness J. H. Harrison: "What in your opinion was the value of the property that was burned, in the condition the property was in at the time of the fire?" The witness answered, "Not less than \$4,000, if it was mine." The defendant objected to the question and answer. John Briggs, who qualified as an expert, testified as follows: "Q. Taking the buildings as you saw them, what would you say they were worth? A. I base my calculation on them as of the last time I saw them, and I figured on the sizes from what I was told. I have no personal recollection of the sizes of the buildings, or of the size of the part I put up. Q. Can you give an opinion satisfactory to yourself as to their value? A. I think so. Q. Assuming that the jury should find from the evidence that the two tan bark houses were 25x100 feet and 30x80 feet, respectively, and taking into consideration your own personal knowledge of the construction of the two houses, what were they worth on the day of the fire? A. One tan bark house 25x100 feet I value at \$1,000. One tan bark house 30x80 feet, with 30-foot basement, I value at \$1,320. The three-story tannery, 25x50 feet, I valued at \$1,500. The three-room cottage I valued at \$650, making a total of \$4,470. [That part of the answer as to the three-story tannery and cottage was excluded.] Q. Assuming that the jury should find from the evidence that the tannery was 25x50 and three stories high, from your own knowledge of the condition of it the last time you saw it, can you form an opinion satisfactory to yourself as to the value of the tannery? A. Yes. Q. What would you say the tannery was worth? A. Fifteen hundred dollars." The defendant excepted to the admission of this evidence. The defendant introduced M. R. Haynes, a tax lister of Wake county, and proposed to prove by him that after the fire the plaintiff, through his agent, asked for a reduction in the valuation of his property, and the amount of the reduction asked for. The witness testified that he did not know what reduction was asked for, that he only knew how much was made. He was then asked what reduction was made. This evidence was excluded, and the defendant excepted. The defendant also offered in evidence the abstracts before and after the fire to show the difference in

valuation. This evidence was excluded, and the defendant excepted.

The jury returned the following verdict: "(1) Was plaintiff's property damaged by fire set out by defendant's engine? Answer: Yes. (2) If so, was the fire set out by sparks negligently emitted by the defendant's engine? Answer: Yes. (3) Did the plaintiff by his own negligence contribute to the cause of said fire? Answer: No. (4) What damage has plaintiff suffered by reason of said fire? Answer: Two thousand and five hundred dollars."

There was a judgment in favor of the plaintiff, and the defendant appealed.

Murray Allen, for appellant. Aycock & Winston and D. L. Ward, for appellee.

ALLEN, J. (after stating the facts as above). [1] The uniform rule prevailing under our present system is that the allegations of a pleading shall be liberally construed with a view to substantial justice between the parties, and that every reasonable intendment is made in favor of the pleader. *Brewer v. Wynne*, 154 N. C. 472, 70 S. E. 947. The just application of this rule tends to the trial of cases upon their merits, and we would not be justified in relaxing it in a case like this, where there has been a trial before a jury, and both parties have had full opportunity to present their evidence.

[2] It would require a very strict construction of the allegations of the complaint to give it the meaning contended for by the defendant, to wit, that it only alleges negligence in the operation of the train. If we give to the pleading every "reasonable intendment in favor of the pleader" and "construe it liberally," as our authorities require, the negligent act alleged in the third paragraph of the complaint is that the defendant "negligently and carelessly permitted said engine to emit sparks and coals of fire therefrom, which fell on plaintiff's property," etc., and the preceding language "in operating and running an engine" merely indicates where the engine was, and what was being done with it, at the time of the negligent act. If so, it was competent for the jury to consider evidence of defects in the engine under the allegations of the complaint. The defendant's counsel presented his contention as to the contributory negligence of the plaintiff with much force and ability, and cited authority from eminent courts in support of his position. We do not, however, agree with him that the weight of authority sustains his view, and we think his honor held correctly that there was no evidence to sustain the plea. The buildings which were destroyed by fire were on the land of the plaintiff, adjoining the right of way of the defendant, and the negligence alleged is that the plaintiff failed to repair them, and had permitted the roofs, where the fire began, to become rotten and highly

inflammable. The buildings had been erected about 18 years, and there is no evidence they were ever ignited prior to the time they were destroyed.

[3] As the buildings were not on the right of way, and there is no evidence that fire caught in combustible matter on the right of way and was communicated to them, the plaintiff could not recover unless he succeeded in proving that the engine of the defendant was defective, or that it was negligently operated. *Williams v. Railroad*, 140 N. C. 624, 53 S. E. 448.

[4] If so, to hold that a failure to repair is contributory negligence would require the plaintiff to foresee the negligence of the defendant and to provide against it. We think the contrary is the rule, and that the plaintiff had the right to assume that the defendant would perform its duty, and that it would not operate an engine negligently or one that was defective. "The general rule is that every person has the right to presume that every other person will perform his duty and obey the law, and, in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger, which can come to him only from violation of law or duty to such other person. Hence failure to anticipate defendant's negligence does not amount to contributory negligence, even though he places his property in an exposed or hazardous position." 29 Cyc. p. 516. "Since a person is not required to anticipate the negligence of another, he will not be guilty of contributory negligence because the injury results in part from the defective condition of the property, or because its condition is such as to render the danger greater." *Ib.* 526. Again, it is said in 30 Cyc. p. 1343: "As a general rule, an owner of land has a right to use it in the ordinary and usual way, and is not bound to remove dry grass, weeds, leaves, or other combustible material from his land adjoining a railroad right of way, in anticipation of probable negligence on the part of the railroad company, and a failure to perform such acts will not make him guilty of contributory negligence so as to preclude a recovery for damages caused by a fire originating through the railroad company's negligence."

The following authorities, among many others, sustain the text: *Salmon v. Railroad*, 38 N. J. Law, 12, 20 Am. Rep. 356; *Railroad v. Insurance Co.*, 82 Miss. 779, 35 South. 304; *Kendrick v. Towle*, 60 Mich. 371, 27 N. W. 567, 1 Am. St. Rep. 526; *Walker v. Railroad*, 76 Kan. 34, 90 Pac. 772, 12 L. R. A. (N. S.) 624, 123 Am. St. Rep. 119; *Railroad v. L. Co.*, 125 Ala. 261, 28 South. 438, 50 L. R. A. 620; *Matthews v. Railroad*, 121 Mo. 334, 24 S. W. 591, 25 L. R. A. 161; *Railroad v. Short*, 110 Tenn. 718, 77 S. W. 936; *Kalbfelsch v. Railroad*, 102 N. Y. 521, 7 N. E. 557, 55 Am. Rep. 832; *Railroad v. Burger*, 124 Ind. 278, 24

N. E. 981; *Railroad v. Shultz*, 93 Pa. 345; *Railroad v. Jones*, 86 Ind. 500, 44 Am. Rep. 334; *Railroad v. Medley*, 75 Va. 506, 40 Am. Rep. 734; *Caswell v. Railroad*, 42 Wis. 199; *Snyder v. Railroad*, 11 W. Va. 28. We quote from only two of them. In the case from Pennsylvania the court says: "Again, complaint is made that the court refused to instruct the jury that if either Schultz, or the owner of the strip lying between his land and the railroad, allowed the accumulation of dry leaves, brushwood, and other rubbish on his property, which would be readily fired by sparks ordinarily issuing from a properly equipped locomotive, that might be regarded as contributory negligence. This was certainly an extraordinary proposition, first, because the learned judge throughout the trial held that, if the defendant's locomotive was properly equipped with spark-arresting appliances, the plaintiff could not recover whether he had been careful or negligent; second, because it is an attempt to impose upon property owners along the line of a railroad duties unknown and unnecessary before the building of the road; and, third, if this proposition means anything, it means that upon such property owners devolves the duty of guarding against the negligence of railroad companies and their servants, but this is simply absurd." And in the Michigan case: "The obligation of care to prevent the fire from the defendant's engine burning the plaintiff's mill rested upon the defendant, and the fact that old, combustible matter accumulated about the mill, and in near proximity to the railroad cannot be urged as contributory negligence on the part of the plaintiff. He had a right to use the offal of his mill to fill up the waste and low places with it, just as he was accustomed to do before the railroad was built. He was not obliged to guard his premises to relieve the defendant from liability for his negligent acts." The same principle has been recognized in *Phillips v. Railroad*, 138 N. C. 19, 50 S. E. 464: "The owner of premises is not bound to anticipate negligence of a railroad, and by way of prevention make provision against communication of fire."

[5] Opinions of witnesses as to value of land, houses, etc., have been very generally received when the witnesses by experience and information are qualified to speak, and we think there was no error in their admission in this case. 1 Wig. Ev. §§ 714-720; *Whitfield v. L. Co.*, 152 N. C. 214, 67 S. E. 512.

[6] It is true that in estimating value as an element of damage the jury is restricted to the time of the injury, as his honor held, but a witness may speak of value at other times as bearing on the value when the injury occurred.

[7] The evidence as to reduction in the valuation of the property for taxation after the fire was properly excluded. *Ridley v.*

Railroad, 124 N. C. 37, 32 S. E. 379; Railroad v. Land Co., 137 N. C. 330, 49 S. E. 350, 68 L. R. A. 333. It was the act of the officers of the law which the plaintiff could not control, and the tax lister testified that he had no recollection of the amount of the reduction asked for by the plaintiff or his agent.

We have examined with care the entire record, and find no error.

No error.

(156 N. C. 319)

### HOCKADAY v. LAWRENCE et al.

(Supreme Court of North Carolina. Oct. 18, 1911.)

#### 1. JURY (§ 28\*)—RIGHT TO TRIAL BY JURY—WAIVER—STATUTORY PROVISIONS.

Revisal 1905, § 540, which prescribes that the right to a trial by jury may be waived by failing to appear at the trial, by written consent filed with the clerk, or by oral consent entered in the minutes, excludes other modes of waiver.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 176-196; Dec. Dig. § 28.\*]

#### 2. COSTS (§ 2\*)—NATURE AND GROUNDS OF COSTS.

Items of cost as they arise in an action are in no legal sense the subject of the litigation, and arise only incidentally in the progress of the cause.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 4, 26; Dec. Dig. § 2.\*]

#### 3. INSANE PERSONS (§ 103\*)—ACTIONS—NEXT FRIEND—COSTS.

In an action by an insane person by his next friend appointed by the court, the next friend, unless guilty of bad faith or mismanagement, is not liable to costs.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 187; Dec. Dig. § 103.\*]

#### 4. JURY (§ 12\*)—ACTION BY NEXT FRIEND—DEATH OF PLAINTIFF—ISSUE OF FACT.

An action was brought by an insane person by his next friend appointed by the court, and, after the decease of the insane person, his executor, made a party to the action by order of the court, answered, alleging that the action was not for the best interest of the estate of the decedent, and should be dismissed at the cost of the plaintiff and the surety on his prosecution bond. *Held*, that the answer raised no issue of fact as to the next friend's bad faith or mismanagement, so as to entitle the executor to a trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 27-34; Dec. Dig. § 12.\*]

On petition of defendant Sikes to rehear, before Supreme Court. Dismissed.

Action by J. M. Hockaday, by his next friend, against C. M. Lawrence, in which, after Hockaday's death, his devisees and his executor, G. T. Sikes, were made parties by order of the court. From an order taxing costs against the executor, he appealed. This case was decided at the last term, and is now before the court upon a petition to rehear.

The following facts appear in the record: On the 4th day of February, 1907, W. N.

Fuller filed an application before the clerk of the superior court of Granville county for the appointment of a next friend for James M. Hockaday, who had been found by a jury to be non compos mentis, and on the same day H. C. Hockaday was appointed such next friend, and instituted this action for the purpose of setting aside certain deeds, executed by the said James M. Hockaday to the defendant, which purported to convey the timber on certain lands, and also to restrain the defendant from cutting said timber. A restraining order was issued in the action; and after notice, and upon a full hearing, the same was continued to the hearing. After the institution of the action, a guardian was appointed for the said James M. Hockaday, who was made a party, but who took no active part in the prosecution of the action. In 1908 or 1909 James M. Hockaday died, leaving a will, and his executor and devisees were made parties to the action by order of court, and they filed answers in which they say "that in their opinion the above-entitled action is not for the best interest of the estate of J. M. Hockaday, and should not be prosecuted further." A caveat was filed to said will, upon the ground that the testator did not have sufficient mental capacity to make a will and the will was sustained. At April term, 1910, of the superior court, an order was entered in the action dissolving the restraining order, and thereupon an arbitration was entered into between the defendant and the sureties on the prosecution bond, and an award was rendered in favor of the defendant for \$82, which was paid. The cause again came on for hearing at November term, 1910, of said court. Both parties tendered judgment, the principal difference between them being as to costs, the defendant asking that judgment for costs be rendered against the next friend and the sureties on the prosecution bond, and the sureties asking that it be rendered against the executor of James M. Hockaday. His honor found as a fact that the action was instituted for the benefit of the estate of said Hockaday, and taxed the costs against the executor, and the executor excepted and appealed.

Graham & Devin, for appellant. A. A. Hicks and T. T. Hicks, for appellees.

ALLEN, J. The executor insists that he raised an issue of fact in his answer by alleging "that he is of opinion that this action is not for the best interest of the estate of James M. Hockaday, and should not be prosecuted further, but should be dismissed at the cost of plaintiff and the surety on his prosecution bond," and that as he has not waived the right in the mode prescribed by statute, he is entitled to have this issue passed on by a jury.

[1] It is true, as contended by the defendant, that Rev. § 540, prescribes only three ways in which a trial by jury may be waived: (1) By failing to appear at the trial. (2) By written consent filed with the clerk. (3) By oral consent entered in the minutes, and that there is no such waiver on this record. The statute was construed to exclude other modes of waiver in *Hahn v. Brinson*, 133 N. C. 8, 45 S. E. 359. If, therefore, an issue of fact is raised by the answer, the defendant is entitled to a reversal of the judgment.

In our opinion no issue is raised, and the former judgment of this court should stand.<sup>1</sup>

[2] Items of cost, as they arise in an action, are in no legal sense the subject of the litigation, and arise only incidentally in the progress of the cause. As was said in *Martin v. Sloan*, 69 N. C. 128, if parties at the beginning of a suit were to admit that they had no rights involved, but wished to see which could make the other pay the costs, the courts would refuse to hear them. The different sections of the Code in reference to costs clearly contemplate the action of the judge, and recognize his power to pass upon the questions that may arise in determining who is chargeable. "Costs may be allowed or not, in the discretion of the court." Rev. § 1267. "Costs shall be taxed." Section 1268, etc.

[3] If, however, the rule was otherwise, the defendant has not raised an issue in the answer, because he has failed to allege bad faith or mismanagement on the part of the next friend, who is not in the ordinary sense a party to the action. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176; *Smith v. Smith*, 108 N. C. 360, 12 S. E. 1045, 13 S. E. 113. In the last case Justice Clark uses language appropriate to this case. He says: "It is to be presumed that the order of the court appointing next friends was made regularly, after due inquiry, and in the interest of Larkin Smith. He is the party plaintiff in fact and in law, and appeared by next friends, who merely represented him, under the authority and appointment of the court. Code, § 180. It is contended, however, that, though not strictly parties to the action, the next friends in the case at bar in resisting the motion to discharge them were in fact (virtually found by the verdict of the jury) resisting the will of Larkin Smith, a person of full age and competent to appear for himself, that such next friends officiously and unnecessarily caused themselves to be appointed, and that they, and not Larkin Smith, should pay the costs incurred by their false clamor. There is some force in this suggestion. While 'next friends' may not be embraced in the strict letter of the Code (section 535), they come within the purview of that section. It was held error to tax trustees of an express

trust who are parties to an action with the costs, unless the court had adjudged that they were guilty of 'mismanagement or bad faith in such action.' *Smith v. King*, 107 N. C. 273 [12 S. E. 57]. A fortiori, it is error to tax 'next friends' who are not parties without at least a similar finding. This is not alleged here in the answer or found by the court. Indeed, the presumption by virtue of their appointment by the court is that they acted in good faith, and they cannot be liable to costs unless there is an express finding against them of the facts requisite to tax them with costs."

[4] The allegation in the answer that in the opinion of the executor it is not for the best interest of the estate to further prosecute the action falls far short of an allegation of bad faith or mismanagement.

We find no error, and the petition is dismissed.

Petition dismissed.

(156 N. C. 296)

KIVETT et al. v. WESTERN UNION  
TELEGRAPH CO.

(Supreme Court of North Carolina. Oct. 18, 1911.)

1. TELEGRAPHS AND TELEPHONES (§ 67\*)—  
NEGLIGENT DELIVERY OF TELEGRAM—AC-  
TION—DAMAGES.

In an action by a father and son against a telegraph company for negligence in the delivery of a telegram to the son, announcing the death of his brother and informing him of the time fixed for the funeral, plaintiffs cannot recover substantial damages, unless they show that the son could and would have reached home in time for his brother's funeral, if the telegram had been promptly delivered.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 67.\*]

2. EVIDENCE (§ 471\*)—OPINION EVIDENCE—  
FACTS OR MATTERS OF OPINION.

The statement of plaintiff, in an action against a telegraph company for negligence in the delivery of a death message, that, had there not been a delay in the delivery of the message, he could and would have attended his brother's funeral at the time stated in the message, and that he had made railroad connections once, and knew the movements of the trains, is the statement of a fact, and not of an opinion.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 471.\*]

3. TELEGRAPHS AND TELEPHONES (§ 66\*)—  
NEGLIGENT DELIVERY OF TELEGRAM—AC-  
TION—EVIDENCE—RELATIONSHIP OF PLAINT-  
IFF TO DECEASED.

In an action for damages for the negligence of a telegraph company in delivering a message announcing the death of plaintiff's brother, and fixing the time for the funeral, evidence by plaintiff that his deceased brother had gone West with him, and had stayed with him in the West three years, was properly admitted as tending to prove a close association between them.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

<sup>1</sup> Affirmed per curiam.



**4. TELEGRAPHS AND TELEPHONES (§ 66\*)—NEGLIGENT DELIVERY OF TELEGRAM—ACTION—PRESUMPTION OF MENTAL ANGUISH.**

In an action for negligence of a telegraph company in delivering a message announcing the death of plaintiff's brother, and fixing the date of the funeral, so as to prevent plaintiff from attending the funeral, which he would otherwise have done, mental anguish will be presumed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 61; Dec. Dig. § 66.\*]

**5. TRIAL (§ 260\*)—INSTRUCTIONS—REPETITION.**

A party whose instructions have been refused cannot complain, where they have been substantially given in the charge of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**6. TELEGRAPHS AND TELEPHONES (§ 37\*)—DELIVERY OF TELEGRAM—INQUIRY AT PLACE OF RESIDENCE.**

Where a telegram is sent in care of another person, it is not sufficient to make inquiry for the sendee at the place of residence of such person, if it is not delivered to him.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 37.\*]

**7. TRIAL (§ 252\*)—NEGLIGENT DELIVERY OF TELEGRAM—ACTION—INSTRUCTIONS—APPLICATION TO EVIDENCE.**

Where there is no evidence, in an action against a telegraph company for negligence in the delivery of a death message, that the company "offered" the message at plaintiff's boarding house, or "delivered" it at his place of business, instructions assuming an offer or delivery of the telegram as a fact are properly refused, as being inapplicable to the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

**8. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.**

Instructions, in an action by a father and son against a telegraph company for negligence in the delivery of a death message to the son, that it was the duty of the son to use all available means to have the funeral postponed, and to get there if possible, and that if he had not used his best efforts there could be no recovery, and that if the father, by the exercise of reasonable care, could have postponed the funeral and arranged for the attendance of the son, then only nominal damages could be recovered, are properly refused, since they were only appropriate to issues on contributory negligence, which was not pleaded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

**9. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.**

In an action by a father and son against a telegraph company for negligence in the delivery of a death message to the son at Detroit, where plaintiffs did not seek any damages for failure to deliver a telegram sent from Detroit, the refusal of instructions that plaintiffs could not recover for alleged nondelivery of the telegram, alleged to have been sent from Detroit, is not error.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 251.\*]

**10. TELEGRAPHS AND TELEPHONES (§ 74\*)—NEGLIGENT DELIVERY OF TELEGRAM—ACTION—SUBMISSION OF ISSUES.**

In an action by a father and son against a telegraph company for damages for delay in the delivery of a message to the son, announcing the death of his brother and the time of

the funeral, so that he was unable to attend the funeral, the court's submission of issues as to whether defendant negligently delayed to deliver the telegram to the son, whether, had it been delivered promptly, he could have attended the funeral of his brother, and what damages the father and son could recover, enabled the parties to present their contentions before the jury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 74.\*]

**11. EVIDENCE (§ 244\*)—ADMISSIBILITY—DECLARATION OF DEFENDANT'S AGENT.**

In an action for damages for failure to deliver a death message, where the evidence showed that plaintiff, to whom the message was sent, had called at the defendant's place of business to inquire about the message, a declaration of defendant's agent that there was no message, made in the performance of a duty, is admissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 244.\*]

Appeal from Superior Court, Harnett County; Cooke, Judge.

Actions by Z. T. Kivett and H. H. Kivett against the Western Union Telegraph Company, tried together. Judgment in each case for plaintiff, and defendant appeals. Affirmed.

These were two separate civil actions; each action being for the recovery of damages for mental anguish alleged to have been caused by the delay and nondelivery of telegrams, relating to the death of one Herndon H. Kivett. One suit was in the name of Z. T. Kivett, father of the deceased, and the other in the name of H. H. Kivett, twin brother of the deceased. By consent the two cases were tried together.

There was evidence on the part of the plaintiffs tending to establish the following facts: That on the 23d day of July, 1909, the plaintiff, Z. T. Kivett, was living at Bule's Creek, Harnett county, N. C., and the plaintiff H. H. Kivett, his son, was living at Detroit, Mich., and was boarding with a Mrs. Pack, at 28 Stimson Place, and was working at the Ford Motor Company shops in that city. That at 7 o'clock a. m. on the 23d of July, a message was delivered to the defendant at Benson, in the following words: "Bule's Creek, N. C., July 23rd, 1909. H. H. Kivett, Detroit, Mich., 28 Stimson Place. Herndon died this morning. Heart failure. Will bury Sunday evening. Wire if you come. Z. T. Kivett." That at 7:35 said message was promptly dispatched by the Benson office and was received at the office of defendant in Detroit at 7:23 a. m. (central time), being about an hour later. That about 8 o'clock the same morning this telegram was carried by a messenger boy of the defendant to 28 Stimson place, where he was told by the sendee's landlady, Mrs. Edith M. Pack, that the sendee, H. H. Kivett, was not at home, that he was at the Ford motor works. That she offered to pay the charges, but was told by the messenger boy that it must be delivered personally. That

the said H. H. Kivett was at work at said motor works on said day, and the telegram was not delivered to him there. That on returning to the boarding place at 6 o'clock p. m. on the same day the telegram arrived, he was informed by his landlady that a telegram had come to the house for him during the day, and he thereupon went to the main office of the defendant company in Detroit, shortly after 6 o'clock p. m., and asked for the telegram, and was told by the defendant's agent in charge that none had come to his address during the day. That, after retiring for the night at about 12:30, the next morning the telegram was delivered to the plaintiff. That he immediately wired to his father that he could not reach home in time for the funeral, paid for both telegrams, and delivered this last one to the same messenger boy who had delivered the first. That if the telegram had been delivered at any time during the day up to 10 o'clock p. m. the plaintiff H. H. Kivett could and would have left Detroit in time to have reached his father's home in Buie's Creek before the funeral. There was also evidence tending to show that at the time the telegram was delivered at 12:30 a. m., July 24th, that it was impossible for plaintiff to reach Buie's Creek in time for the funeral.

A witness for the defendant, Mary Nolan, testified that on the date of the receipt of the telegram at Detroit she was in charge of a branch office of the defendant in that city; that she handled the message in controversy and sent it to the Ford motor works. She did not claim that she carried the message herself, and no witness was introduced who testified that he went to the motor works with the message.

The plaintiff, H. H. Kivett, was examined as a witness and testified that he had made the railroad connection between Detroit and Dunn once, and knew the movement of the trains. He was then asked: "Q. If the telegram had been delivered to you in the morning at the time Mrs. Pack, your landlady, told you it came there, or at a reasonable time thereafter at the Ford automobile shop, could or would you have gone home to the funeral? (Defendant objects.) A. I could and would have reached home. Q. If the company had delivered the telegram to you at or about the time they brought it to the landlady the second time at 10 o'clock, if they had delivered it to you at the Ford automobile shop, could you have gotten home? (Defendant objects; overruled. Exception.) A. I could have reached home if they had delivered that telegram any time before 9 o'clock p. m. Friday, July 23d. I could have reached home in time for my brother's funeral. I would have done it. I could have reached home at the time I inquired for it in time for my brother's funeral." He was also asked: "Q. When you went out West, state whether or not your brother went with you. A. He did. Q. How long did he stay with

you? (Defendant objects.) A. About three years."

The defendant tendered the following issues: (1) Did the defendant negligently delay the delivery of the telegram sent to H. H. Kivett? (2) Did the defendant receive and negligently fail to transmit and deliver a telegram from Detroit, Mich., to Dunn, N. C., as alleged in the complaint of Z. T. Kivett? (3) Were the plaintiffs injured thereby? (4) What damages, if any, is the plaintiff Z. T. Kivett entitled to recover as mental anguish caused by such negligence, if any there was? (5) What damages, if any, is the plaintiff H. H. Kivett entitled to recover as mental anguish caused by such negligence, if any there was? Which his honor refused to submit, and defendant excepted.

His honor submitted the following issues: (1) Did the defendant negligently delay to deliver the telegram addressed to H. H. Kivett, in Detroit, Mich., as alleged in the complaint? (2) If the telegram had been delivered promptly, could and would plaintiff's son, H. H. Kivett, have attended the funeral of plaintiff's son, Herndon H. Kivett? (3) What damages, if any, is the plaintiff, Z. T. Kivett, entitled to recover of the defendant? (1) Did the defendant negligently delay the telegram sent to H. H. Kivett in Detroit? (2) If the telegram had been delivered promptly, could and would plaintiff have attended the funeral of his twin brother, Herndon H. Kivett? (3) What damage, if any, is the plaintiff, H. H. Kivett, entitled to recover of the defendant company? Defendant objected to the submission of the issues in both cases. Objection overruled, and defendant excepted.

The defendant tendered the following prayers for instructions:

"(1) That if the jury find from the evidence that the telegram as sent was directed to H. H. Kivett, at No. 28 Stimson place, Detroit, Mich., that the same was promptly transmitted to Detroit, and within a short time after its receipt there offered the same at the said address, the boarding place of the plaintiff, but the plaintiff was not there, then any effort made by the defendant to deliver at another place was not called for in the contract under which the message was sent, and you should answer the first issue, 'No.'" Refused, and defendant excepted.

"(2) If the jury find from the evidence that the message was delivered within a reasonable time, to the Ford motor works, in pursuance of information furnished to the messenger boy, then the defendant has fulfilled its contract, and it was not the defendant's duty to locate plaintiff H. H. Kivett among the several employes of that company, and if you so find, you should answer the first issue, 'No.'" Refused, and defendant excepted.

"(3) The plaintiffs cannot recover damages for any suffering occasioned by the death of Herndon Kivett, but, if at all, only

such mental anguish as resulted directly from the inability of H. H. Kivett to get to the funeral, and the jury must be satisfied by the greater weight of the evidence that such inability to reach the funeral was caused directly by the negligence of the defendant." Refused, and defendant excepted.

"(4) It was the duty of the plaintiff H. H. Kivett to use all available means to have the funeral postponed, and to get there, if possible, before he is entitled to recover at all, and if you are not satisfied that he used his best efforts you should answer the second issue, 'No.'" Refused, and defendant excepted.

"(5) Mere disappointment, sorrow, or regret at not being able to reach the funeral, or at not having the son at such funeral, would not constitute what the law deems mental anguish, and if there is no more than this, then plaintiffs can recover only nominal damages; and there is no evidence in this case that either of the plaintiffs suffered more than disappointment, sorrow, or regret at the inability of H. H. Kivett to get to the funeral." Refused, and defendant excepted.

"(6) The plaintiff H. H. Kivett cannot recover for any alleged nondelivery of the telegram alleged to have been sent from Detroit to Z. T. Kivett at Dunn." Refused, and defendant excepted.

"(7) The plaintiff Z. T. Kivett cannot recover anything for an alleged nondelivery of the telegram claimed to have been sent from Detroit to Dunn, as there is no evidence that the laws of the state of Michigan allow such a recovery." Refused, and defendant excepted.

"(8) If the plaintiffs, by the exercise of reasonable care, could have postponed the funeral and arranged for the attendance of H. H. Kivett at the funeral, then the plaintiffs could only recover nominal damages." Refused, and defendant excepted.

His honor charged the jury as follows:

"First. It is the duty of a telegraph company to be diligent in transmitting and delivering messages which are received by it, and any failure of this duty on its part would be negligence, and if damage results from such negligence, either to the sender or the sendee of such message, it would be actionable negligence.

"Second. If the message refers to a case of sickness or death of some member of the immediate family of the sender or sendee, and there be actionable negligence on the part of the defendant company to deliver it, then the law would presume mental anguish, but there would be no presumption as to the amount of damages beyond nominal damages, and it would be upon the defendant to prove by the preponderance of the evidence that there was no mental anguish, and the burden would be upon the plaintiff to establish by the greater weight of the evidence the amount of damages beyond nominal damages. Mental anguish, for which a

plaintiff would be entitled to recover, is not that which is due to the death, but it must be that which is caused by the negligence of the defendant. Sorrow and grief for the death of a member of the family, however does not constitute a cause of action, unless it is intensified by the negligence of the telegraph company until it becomes mental anguish, and mental anguish is a very intense mental suffering, so much so as to temporarily increase mental pain, and, although the fact that the negligence of the defendant made the cause of disappointment and regret attending upon the sorrow and grief, because of the act of negligence on the part of the defendant company, still, unless a greater feeling than that was produced, it would not amount to mental anguish.

"Third. The damages to be allowed for mental anguish are compensatory, and not exemplary, and should be limited to a satisfactory or reasonable compensation. These are psychological in their nature, and may be difficult of assessment, but still the jury should be careful to allow as damages whatever is a fair and reasonable compensation to the plaintiff for his mental anguish, caused by the negligence, and no further.

"Fourth. The two cases of Z. T. Kivett against the Western Union Telegraph Company and of H. H. Kivett against the Western Union Telegraph Company are by consent of the parties being tried together. The court further instructs the jury as follows: Now apply the principles of the law above expressed to the facts of these cases as the jury shall find them.

"Fifth. Then upon the first issues submitted in the case of Z. T. Kivett against the Western Union Telegraph Company, if the jury shall find by the greater weight of the evidence that the defendant negligently delayed to deliver the message addressed to H. H. Kivett in Detroit, as alleged in the complaint, the jury should answer the first issue, 'Yes.' If they should not so find, they should answer that issue, 'No'; if they should answer that issue, 'No,' they need not go any further, and this instruction is given as to the first issue in the other case of H. H. Kivett against the Western Union Telegraph Company; but if they should answer the first issue, 'Yes,' as to any of them, then as to both cases, if so answered, or as to the one whereof the answer is, 'Yes,' as the case may be, the jury shall proceed to consider the second issue, and upon that issue the court instructs the jury that, if they shall find by the greater weight of the evidence that if the message had been delivered with reasonable promptness H. H. Kivett could and would have reached his father's home in time to, and would have attended his brother's funeral or burial, they should answer said issue, 'Yes'; if they should not so find, they should answer that issue, 'No,' in both cases, and if they should answer that issue, 'No,' they need not go any further.

"Sixth. But if they should answer that issue, 'Yes,' upon the third issue the court instructs the jury that they must allow nominal damages in each case, and in addition thereto they should allow in each case a reasonable compensation for the mental anguish which they find the respective plaintiffs suffered because of the negligence of the defendant, which the court has heretofore advised, so that the damages allowed for this cause should be reasonable, and only in compensation for the anguish caused by the negligence of the defendant. The court charges you that in your deliberations on that subject a spirit of fairness should control."

Rose & Rose, for appellant. Baggett & Baggett and J. C. Clifford, for appellees.

ALLEN, J. (after stating the facts as above). [1, 2] The plaintiffs could not recover substantial damages, unless they established the fact that H. H. Kivett could and would have reached home in time for his brother's funeral, if the telegram had been promptly delivered. His evidence on this point was therefore material, and we do not think it is subject to the criticism of the defendant that the witness was stating an opinion, not a fact, and that he does not show that he was familiar with the schedules of the trains. He does not use the word "schedule," but says he had made the connection between Detroit and Dunn once, and knew the movement of the trains. We think the evidence competent.

[3] It was also competent for him to testify that his deceased brother had stayed with him in the West three years, as bearing upon the relationship between them.

[4] While mental anguish will be presumed under conditions presented by this record, when the relationship is that of brothers, this does not exclude other evidence tending to prove a close association between them.

[5] The third and fifth prayers for instructions were substantially given in the charge of the court, and we think there was no error in denying the others.

[6] The first of these prayers, if accepted as law, would relieve the telegraph company from any duty to make inquiry for the sendee of a message, when the street address is given, further than at the place indicated by the address, and is opposed to the doctrine in *Hendricks v. Telegraph Co.*, 126 N. C. 312, 35 S. E. 543, 78 Am. St. Rep. 658, where it is held that, although a telegram is sent in care of another person, it is not sufficient to make inquiry at the place of business of such person, if not delivered to him. The rule contended for, if sustained, might relieve the defendant from liability in this case, but it would result in imposing additional burdens and expense on it, because

under such a rule no one would add a street address to a telegram, and the defendant would have to search a city for a sendee.

[7] Again, there is no evidence that the defendant "offered" the message at the boarding house. On the contrary, the keeper of the house testified that she told the messenger boy she would pay for the message, and he said it must be delivered personally, and she was not contradicted.

The second prayer could not have been given, because there was no evidence of a delivery at the motor works. The only witness on this question was Mary Nolan, who was in charge of a branch office of defendant in Detroit, and who testifies to no fact, except that she gave the message to a messenger boy, who was not a witness.

[8] The fourth and eighth prayers relate to the conduct of the plaintiff, and, if containing correct statements of law, should have been directed to issues on contributory negligence, instead of to the issue of negligence. The fact that the defendant did not tender an issue on contributory negligence is very strong evidence that it did not arise. It would seem that if he had attempted to postpone the funeral it would not have availed him, as he had to communicate with his father by telegraph, and he sent a telegram which was not delivered.

[9] The court could, with propriety, have given the sixth and seventh prayers, but the refusal to do so is not error. The plaintiffs did not seek to recover damages for failure to deliver the telegram sent from Detroit, and the charge clearly and explicitly confines the jury to the consideration of the telegram sent from Bule's Creek.

[10] The issues submitted by the court are almost identical with those which were approved in *Dobson v. Telegraph Co.*, 152 N. C. 766, 68 S. E. 176, and enabled the plaintiffs and the defendant to present their contentions before the jury. "It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy, and each party has a fair opportunity to present his version of the facts and his views of the law, so that the case, as to all parties, can be tried on the merits." *Wilson v. Taylor*, 154 N. C. 215, 70 S. E. 288.

[11] The record does not disclose that an exception was taken to the conversation with the agent of the defendant, when the plaintiff called at the telegraph office about 6 o'clock, and asked if there was a telegram for him; but, in any event, we think the evidence is competent, because the declarations were made in furtherance of a duty the agent was then performing for the defendant.

There was evidence of negligence, and the motion to nonsuit could not have been allowed.

No error.

(89 S. C. 545)

**VERNER et al. v. MULLER et al., Board of Com'rs of Richland County.**

(Supreme Court of South Carolina. Oct. 25, 1911.)

**1. Towns (§ 52\*)—TOWNSHIP BONDS—BRIDGES—"BUILD."**

Const. art. 10, § 6, provides that the General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds for any purpose, "except for educational purposes, to build and repair roads, buildings and bridges, etc." Act Feb. 20, 1908 (25 St. at Large, p. 1431), providing for free bridges across certain rivers between counties named, the purchase thereof by a township, and the issue of bonds, if approved by the electors for the purposes of such purchase, conferred authority to "build" or purchase and to maintain such bridge, etc. *Held*, that the purpose of the Constitution was to leave the Legislature free to authorize counties and townships to establish and maintain public roads, buildings, and bridges, and that the word "build" might be employed in the sense of obtain, secure, or acquire, as well as in the ordinary meaning, and that hence the purchase of standing bridges was not in violation of the Constitution (citing 1 Words and Phrases, 887).

[Ed. Note.—For other cases, see Towns, Dec. Dig. § 52.\*]

**2. EVIDENCE (§ 10\*)—JUDICIAL NOTICE—GEOGRAPHICAL FACTS—LOCATION OF CITIES.**

The court takes judicial notice of the geographical situation and the fact that the state capital (Columbia) is situated in Columbia township, near the confluence of the Congaree and Broad rivers.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 9-14; Dec. Dig. § 10.\*]

**3. STATUTES (§ 76\*)—SPECIAL LAWS—FREE BRIDGES IN CERTAIN LOCATION.**

Act Feb. 20, 1908 (25 St. at Large, p. 1431), undertaking to provide for free bridges across certain rivers in the state, is not a special law, in contravention of Const. art. 3, § 34, subd. 11, which provides that, "in all other cases where a general law can be made applicable, no special laws shall be enacted," since the object to be accomplished related to a corporate purpose of the township in which the bridges were to be provided, and the situation was one which could not have been dealt with by a general law.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 76.\*]

Supplemental petition by James S. Verner and others to enjoin W. F. Muller and others, as members of the Board of County Commissioners of Richland County, from issuing certain township bonds for bridge purposes. Injunction denied, and petition dismissed.

See, also, 89 S. C. 117, 71 S. E. 654.

Weston & Aycock, for petitioners. Clarkson & Clarkson, for respondents.

**JONES, C. J.** Under the original petition in this case, petitioners sought to enjoin the board of county commissioners of Richland county from issuing certain bonds of Columbia township, in said county, for bridge purposes, pursuant to the act of February 20,

1908 (25 St. at Large, p. 1431), and the questions then presented were decided by this court in an opinion filed June 14, 1911, reported in 89 S. C. 117, 71 S. E. 654, in which the injunction sought was denied.

[1] Under a supplemental petition and with leave of the court, it is sought to renew the request for an injunction upon other grounds than those already considered. It is now contended that the act of 1908, construed to authorize the purchase of standing bridges, is obnoxious to section 6, art. 10, of the Constitution, which provides: "The General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds for any purpose, except for educational purposes, to build and repair public roads, buildings and bridges, etc." The purpose of the Constitution was to leave the Legislature free to authorize counties and townships to establish and maintain public roads, buildings, and bridges. The word "build" may be employed in the sense of obtain, secure, or acquire, as well as the ordinary meaning. In *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254, 85 N. W. 67, 1 Words and Phrases, 887, authority to loan funds for "building" homesteads was construed to include the idea of purchasing lots and buildings. In *Bascom v. Oconee*, 48 S. C. 55, 25 S. E. 984, authority to the county commissioners to open and establish a public road connecting with a bridge over a stream included power to purchase the bridge already constructed. In *Dick v. Scarborough*, 73 S. C. 153, 56 S. E. 86, it was held that authority to issue bonds for establishing municipal waterworks included the acquirement of waterworks by purchase.

[2, 3] It is also contended that the act of 1908 is a special law, in contravention of subdivision 11, § 34, art. 3, of the Constitution, which reads as follows: "In all other cases where a general law can be made applicable no special law shall be enacted." The purpose of the act was to provide for free bridges across the Congaree and Broad rivers in this state, between Columbia township, in Richland county, and the county of Lexington.

The court takes judicial notice of the geographical situation and the fact that the state capital (Columbia) is situated in Columbia township, near the confluence of these rivers. The object to be accomplished related to a corporate purpose of Columbia township, and the situation was one which could not have been dealt with by a general law. *State v. Brock*, 66 S. C. 362, 44 S. E. 931.

Injunction denied, and petition dismissed.

**GARY, A. J., and WOODS and HYDRICK, JJ., concur.**

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(39 S. C. 535)

**PINCKNEY v. ATLANTIC COAST LINE R. CO. et al.**

(Supreme Court of South Carolina. Oct. 25, 1911.)

**1. MASTER AND SERVANT (§ 243\*)—RAILROADS—CAR REPAIRERS—INJURY—CONTRIBUTORY NEGLIGENCE.**

A railway car repairer is guilty of contributory negligence in working under a car in disregard of a rule requiring him to protect himself by posting a flag at the head of the track, if he could comply with the rule with reasonable effort.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.\*]

**2. MASTER AND SERVANT (§ 265\*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

The burden is on an employer, sued for personal injury, to show a rule requiring the employé to protect himself, and the latter's violation thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.\*]

**3. MASTER AND SERVANT (§ 201\*)—NEGLIGENCE OF FELLOW SERVANTS.**

An employé cannot recover for injury proximately resulting from negligence of a fellow servant as the sole cause, or as a cause concurring with plaintiff's own negligence; but he can recover if the proximate cause was the negligence of defendant combined with that of the fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

**4. MASTER AND SERVANT (§ 285\*)—RAILROADS—CAR REPAIRERS—INJURY—JURY QUESTIONS.**

In an action for injury to a railway car repairer by movement of a car under which he was working, *held*, under the evidence, a jury question whether the injury resulted from defendant's, a fellow servant's, or plaintiff's own negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002-1053; Dec. Dig. § 285.\*]

Appeal from Common Pleas Circuit Court of Colleton County; Ernest Gary, Judge.

"To be officially reported."

Action by J. B. Pinckney against the Atlantic Coast Line Railroad Company and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Legare & Holman and Howell & Gruber, for appellant. Jas. E. Peurifoy, W. H. Fitz-Simons, P. A. Willcox, and F. Barron Grier, for respondents.

**WOODS, J.** The plaintiff, a car repairer, was injured on the railroad yard at Yemassee by the impact of a moving freight train against the car under which he was working. In his complaint he alleged that he went under the car to work, relying on the assurance of the conductor of the train that he had finished his work at Yemassee, and was about to start for Augusta; and that the conductor, without notice to him, "carelessly, negligently, wantonly, and in gross

and reckless disregard of the safety and rights of the plaintiff," moved the locomotive and train upon the siding, and struck and violently moved the car, and thus inflicted the injuries complained of. The defenses material to the appeal are: Denial of negligence; the allegation of contributory negligence, in that the plaintiff "carelessly and negligently went between and under said cars to work thereon, without placing the blue flag or signal to denote that he was at work under or about the cars, in direct violation of the rules of the company and his orders as car inspector"; and the allegation that the injuries received by plaintiff, if not due to his own negligence, were due to the negligence of a fellow servant or fellow servants of the plaintiff. At the close of plaintiff's testimony, the circuit judge ordered a nonsuit, summarizing as follows his reasons for holding that the plaintiff could not recover: "(1) He knew it was dangerous to go under that car. He made that statement. (2) That there was at the time a train in the yard. (3) That he knew the rule of the company to protect himself with a blue flag. (4) That he did not protect himself with a blue flag. (5) That in place of a flag he, by his own act, delegated that power, that trust, to his colaborer, Freeman. (6) That this colaborer or fellow servant, or partner, as he expressed it, did not warn him of the approach of the backing train. (7) That if the fellow servant had warned him he could have escaped the injury."

[1, 2] The case turns mainly on whether the evidence offered by the plaintiff proved conclusively that he had been guilty of contributory negligence in disregarding the rule of the company, requiring a car repairer working under a car to protect himself by a blue flag. If the plaintiff proved that he did disregard such a rule, known to him to be in force and so essential to his own safety, as well as the safety of other employés and the general public, when he could have complied with it by reasonable effort on his part, and thus prevented the injury, then the nonsuit was proper. *Stephens v. Southern Ry. Co.*, 82 S. C. 542, 64 S. E. 601. The alleged contributory negligence in failing to use the protection of a blue flag, as required by the rule, being an affirmative defense, it was not incumbent on the plaintiff to prove that he had not violated the rule, or that he could not have complied with it by reasonable effort; on the contrary, the burden was on the defendants to prove the rule and its violation. Of course, the defendants could rely for such proof on the evidence offered by the plaintiff.

All the testimony on the subject was the following, adduced from the plaintiff: "Q. I want you to tell the jury what transpired before you were injured, and how you were injured. A. When I was working, I used a

blue flag—that is, we used two or more flags; we placed them at the head of the tracks to warn out other trains; and I worked there about 25 days, and most of our flags were broken up the day before I went to work there. Q. The day before what? A. The day before I was injured I had both flags broken. (Objected to on the ground that there is no allegation in the complaint that improper appliances were furnished the plaintiff with which to work. Objection sustained by the court.) Q. Well, omit about the flags for the present. Now, at that time, Mr. Pinckney, just before you were injured, was there any freight train in the yard at that time? Cross-examination: "Q. When you were working at Florence as repairer, you knew, of course, that the rules did not permit you to go under a car without displaying a blue flag? A. I had never been told so, but I learned it from working with them. Q. Now what kind of signal do you use at night under a car? A. I don't know. I never worked at night. Q. But you do know you use a blue flag in daylight? A. Yes, sir. Q. You say you did know that was the rule? A. Yes, sir. Q. That was the same rule you had with the C. & W. C. and A. C. L. before you went to Florence? A. Yes, sir. Q. Where did you put that blue flag? A. At the head of the track you were working on. Q. So the engineer would see the flag? A. Yes, sir. Q. And that would stop him? A. It was supposed to do that."

It thus appears that after plaintiff had told of the general use of the flags and of the condition of those furnished him, objection was made by defendants, and sustained, to his testimony that the flags were broken. There was no conclusive evidence that the blue flags were not used on this occasion, but, even if there had been, we are unable to agree that a nonsuit was proper without allowing the plaintiff to testify as to the condition of the flags furnished him; for it might have appeared that they were so broken as to be useless, and that he had been unable to procure others.

[3, 4] The testimony was direct that the conductor of the train assured plaintiff that he was through with his work, and was about to leave for Augusta, and that the plaintiff relied on this statement in going under the car. The act of the conductor in running his train back and striking the cars standing on the siding under these circumstances furnished some evidence of negligence on the part of the defendants. It may be that the plaintiff's fellow laborer, Freeman, who at plaintiff's request was on watch against the approach of a train, was negligent in not signaling the train to stop, and in not warning plaintiff of its approach, and that his negligence was a proximate cause of the accident. If the negligence of Freeman, the fellow servant, was the sole prox-

imate cause, or one of the proximate causes, the negligence of the plaintiff being the other, then the plaintiff could not recover. But, if the proximate cause of the injury was the negligence of the defendants combined with the negligence of Freeman, the fellow servant, the plaintiff would not be precluded from recovery. *Elms v. Sou. Power Co.*, 79 S. C. 502, 60 S. E. 1110; *Roberts v. Virginia C. C. Co.*, 84 S. C. 233, 66 S. E. 298. We think the evidence required that these issues and the issue of contributory negligence growing out of the rule requiring the use of a blue flag should be submitted to the jury.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remanded to that court for a new trial.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(89 S. C. 540)

WEST et al. v. SMITH et al.

(Supreme Court of South Carolina. Oct. 25, 1911.)

WILLS (§ 634\*)—ESTATE CONVEYED—VESTED REMAINDER.

A will bequeathed the remainder of testator's estate to two trustees, the income to be paid to testator's married daughter for her natural life, and provided that on her death the property should pass to his daughter's "child or children and to the issue of any deceased child or children; the child or children of such deceased child or children representing and taking the share or shares to which his, her, or their deceased parent or parents would have been entitled, had they survived the said" daughter. Held, that the daughter's children took a vested remainder, so that upon the death of three daughters of testator's daughter, without children, before their mother died, leaving a brother and their mother surviving, the latter inherited the shares of such daughters, and upon the brother's death without children his share passed by inheritance to his mother and his widow.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

Appeal from Common Pleas Circuit Court of Charleston County; B. C. Watts, Judge.

"To be officially reported."

Action by Emmett T. West and others against Gertrude I. Smith and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Smythe, Lee & Frost, for appellants. Ficken, Hughes & Ficken, for respondents.

WOODS, J. In this action the plaintiffs, as heirs at law of John Magee, seek to recover of the defendant Gertrude I. Smith all the property which passed under the following clause of John Magee's will: "I bequeath the remainder of my said estate to my friends, the said Thomas O'Brien and John Dougherty, to them and their heirs in trust to be invested in safe personal prop-

erty and real estate, either or both, and the interest or income arising from the same shall be paid over to my daughter Mary Brown, the wife of the said Isaac Brown, her receipts alone to be taken by the said trustees as discharges in full for these payments, for and during her natural life, free from the control and in no manner whatsoever liable for the debts or contracts of her present or any future husband with whom she may intermarry. And upon her death the said investment or investments or the proceeds thereof shall pass to the said Mary Brown's child or children, and to the issue of any deceased child or children, the child or children of such deceased child or children representing and taking the share or shares to which his, her or their deceased parent or parents would have been entitled had they survived the said Mary Brown, to them and their heirs severally, forever."

The facts as stated by the master are not disputed. John Magee died in 1856. Mary Brown, his daughter, the life tenant mentioned in the residuary clause, had four children, three daughters and one son. The three daughters predeceased their mother and their brother, dying intestate, unmarried, and without issue. The son, Charles A. Brown, married and died intestate, and without issue, on October 16, 1904, leaving as his heirs and distributees his widow, Gertrude I. Brown, and his mother, the life tenant, Mary Brown. Mary Brown died in 1907, leaving a will in which she devised and bequeathed all her property to her daughter-in-law, Gertrude I. Brown, and appointed her executrix of the will. Gertrude I. Brown afterwards intermarried with one Smith, and in this action appears as the defendant Gertrude I. Smith.

The plaintiffs' claim depends on the proposition that the children of Mary Brown took under the will nothing more than a contingent remainder, and when they all died during the life of their mother, without issue, the property reverted to or became vested in the plaintiffs as heirs of John Magee.

The defendants' position is that the devise created a vested remainder in the children of Mary Brown, who took the property as soon as the will became operative, the title thus taken being subject only to defeasance by death with a child or children surviving, in which event the child or children would have taken; that upon the death of the three daughters without children their shares were inherited by their mother, Mary Brown, and their brother, Charles A. Brown, and upon the death of Charles A. Brown without children his interest, derived directly under the will and inherited from his sisters, passed by inheritance to the defendant, his widow, and Mary Brown, his mother; that when Mary Brown devised all her interest to the defendant her title became completa.

The master to whom the case was referred reported in favor of the defendants, and his report was confirmed by the circuit court. It is important to observe that the devise in remainder is not to the child or children of Mary Brown who may survive her, but to her child or children generally; for upon this distinction many of the cases cited by counsel depend. The subject has been so often and so fully considered by the court that it requires no extended discussion at our hands. In considering a devise of the same kind, Chief Justice McIver thus states the rule now recognized in this state: "The authorities in this state appear to be somewhat conflicting, but it seems to us that the more recent cases support the view that the remainders vested in such of the issue as were in esse at the date of the deed, at that time, opening to let in other issue as they came into existence, whose interests were also vested at their birth, and that such vested interests were not divested by the death of any such issue, leaving no issue in the lifetime of the life tenant; and hence that the circuit judge erred in excluding the representatives of Robert L. Deas and Zephania from any participation in the division of the property. \* \* \* It will be observed that the remainder is to the issue of Eliza C. Deas, *not* to her *surviving* issue, or to her issue *then living*, which would have been the words that most naturally would have been used, if the intention had been to confine the gift to such issue only as might be in esse at the death of the life tenant; but, on the contrary, as we have said, the remainder is to the issue generally, in such terms as import a fee simple, which was to vest *in possession* at the time of the death of the life tenant; and hence, as was said in *Rutledge v. Rutledge*, Dud. Eq. 201, 'necessarily all falling within the description of issue up to that time are entitled to an equal participation in the estate.'" *Gourdin v. Deas*, 27 S. C. 479, 4 S. E. 64.

On this point, there is no way of distinguishing the remainder in the Magee will from those considered in *Boykin v. Boykin*, 21 S. C. 513, and *Brown v. McCall*, 44 S. C. 503, 22 S. E. 823. In these cases it was held that the children who had died without issue during the life of the life tenant had taken a vested remainder, transmissible to their grantees or heirs. This conclusion is in accord with the general rules stated in the recent case of *Walker v. Alverson*, 87 S. C. 55, 68 S. E. 966, 30 L. R. A. (N. S.) 115, though the precise point now under consideration was not involved in that case. Reliance is placed on *Earle v. Maxwell*, 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012, as an authority to the contrary, where a devise somewhat similar to this, but with important differences, was treated as a contingent remainder. But the appeal in that case did not involve the point, and the case is not an authority, and has not the force



even of a dictum on this subject. The circuit judge there held that Maxwell, the bankrupt, had only a contingent remainder, and that that remainder was property within the meaning of the bankrupt law, and therefore subject to sale as a part of the bankrupt estate. There was no appeal from his decision as to the nature of Maxwell's interest, and therefore the construction of the will under which he took was not before this court. Indeed, counsel conceded that the remainder was contingent. The only points decided by this court were that the remainder, necessarily treated as contingent because so finally adjudged by the circuit court, was subject to sale as a part of the property of the bankrupt, and that the circuit court was right in entertaining a suit instituted by the trustee before the sale to remove, as a cloud on the right of the trustee to the interest of Maxwell, the latter's claim that such interest did not pass to the trustee, and was not the subject of sale.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(89 S. C. 539)

**MILLER v. HAMILTON BROWN SHOE CO.**

(Supreme Court of South Carolina. Oct. 25, 1911.)

**1. LIBEL AND SLANDER (§ 111\*)—MALICE—EVIDENCE.**

In an action for slander, consisting of a charge that defendant was unfit for business because of the use of drugs, defendant was entitled to prove any facts tending to show that other reasonable men in the situation of its agent, who made the charge, would have drawn the inference that the plaintiff had, by the use of drugs, rendered himself unfit to be intrusted with important business, to rebut the charge of malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 315-324; Dec. Dig. § 111.\*]

**2. LIBEL AND SLANDER (§ 111\*)—EVIDENCE—PRIOR ACTS.**

In an action for slander for charging plaintiff with being under the influence of drugs, as a reason for defendant's refusal to deliver samples to him on July 19, 1909, evidence that on the 17th of June previous plaintiff had been in a state of gross intoxication for five days was admissible, as bearing on the question whether plaintiff's condition, when he applied for samples, was due to drugs, or an attack of paralysis, as claimed.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 315-324; Dec. Dig. § 111.\*]

**3. LIBEL AND SLANDER (§ 111\*)—EVIDENCE—MATERIALITY.**

Where, in an action for slander, consisting of a charge that plaintiff had rendered himself unfit for business by the use of drugs, a letter containing the alleged slander also stated that plaintiff had been given an opportunity to make good, but that at the time his best ability was required he had failed, evidence

of plaintiff's total incapacity to attend to defendant's business because of drunkenness was admissible to show that the charge was well founded, and not malicious.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 315-324; Dec. Dig. § 111.\*]

**4. LIBEL AND SLANDER (§ 111\*)—EVIDENCE—MALICE.**

In an action for slander, consisting of a charge that plaintiff had unfitted himself for business because of drugs, evidence that witness had expressed to defendant's agent, who made the alleged false charge, that plaintiff had been taking some kind of opiate was admissible in mitigation of damages, as tending to show that the charge was not made maliciously, or without foundation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 315-324; Dec. Dig. § 111.\*]

**5. TRIAL (§ 81\*)—OBJECTIONS TO EVIDENCE—SUFFICIENCY.**

On the reading of an answer from a witness' deposition, plaintiff's counsel stated: "I object to his answer there, on the ground of specific instances that he had heard he [plaintiff] was drinking at other times. I object to that, but read it because, under your honor's ruling, it would go in anyway." Held insufficient to move the court to pass on the admissibility of the testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 193; Dec. Dig. § 81.\*]

**6. EVIDENCE (§ 474\*)—MENTAL CONDITIONS.**

In an action for slander, consisting of a charge that plaintiff had rendered himself unfit for business by taking drugs, witnesses who testified that they had seen persons under the influence of drugs, and were familiar with their effects, were properly permitted to testify that they saw plaintiff shortly prior to the publication of the charge, and that, in their opinion, he was under the influence of the drugs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.\*]

Appeal from Common Pleas Circuit Court of Abbeville County; John S. Wilson, Judge.

"To be officially reported."

Action by J. C. Miller against the Hamilton Brown Shoe Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. N. Graydon, for appellant. Wm. P. Greene, for respondent.

WOODS, A. J. In this action of slander, the verdict was for the defendant and the plaintiff appeals, assigning error in the admission of testimony offered by the defendant.

The uncontroverted facts as they appear from the record are as follows: The plaintiff was a traveling salesman for the defendant, a corporation doing a wholesale shoe business in St. Louis, Mo. On and immediately after July 19, 1909, the plaintiff was in St. Louis for the purpose of obtaining his samples for use in soliciting business. John E. Ritchey, the agent of the defendant, through whom it dealt with its salesmen, charged the plaintiff in the presence of other employes, with being "doped," or under the influence of "dope," and refused to allow him to take

samples. After the plaintiff had returned to his home in Abbeville, S. C., the same agent of the defendant wrote a letter to the plaintiff, and addressed it to him, reiterating the charge by saying, "You cannot make me believe anything different from what I told you last Tuesday." This letter was opened by plaintiff's wife, and the defendant afterwards sent a copy of it to M. T. Coleman. The plaintiff did not deny that he was in a very bad condition when he was in St. Louis, but alleged that his condition was due to an attack of paralysis, and was not caused by "dope," or the use of drugs.

[1] The issues in the case were: First, was the charge made by the defendant false? Second, was it a privileged communication, made to employees in the regular course of business? And, third, if false, was the charge maliciously made? On the last issue, it is manifest that the defendant had a right to prove any facts tending to show that other reasonable men in the situation of its agent would have drawn the inference that the plaintiff had, by the use of drugs, rendered himself unfit to be intrusted with important business.

[2] The first error assigned is the admission of the testimony of T. G. Patterson that he saw the plaintiff, at the Central Hotel, at Florence, S. C., very drunk, on June 13, 1909, and of V. O. Willis that he was in the same condition, at the same place, from the 15th to the 17th of June, 1909, when he last saw him. It is true, as argued by plaintiff's counsel, that the rule is against allowing proof of specific acts of past conduct, occurring at a different time, similar to that mentioned in the alleged slanderous charge; but the rule does not extend to the exclusion of testimony as to other specific acts which may be reasonably considered so closely connected in sequence with the alleged slanderous charge as to throw light on the inquiry as to its truth or falsity. According to the evidence of these witnesses, the plaintiff was in a state of gross intoxication from June 13 to June 17, 1909. The evidence does not disclose how long this condition continued, but there was no abatement when Mr. Willis left him on June 17th. The knowledge is common to all men that the use of drugs, popularly known as "dope," is very commonly resorted to after periods of extreme intoxication. In view of this fact, we do not think there ought to be any doubt that the evidence was competent on the sharp issue whether the sad condition in which the plaintiff appeared about a month later at defendant's store in St. Louis was due to "dope" or an attack of paralysis.

[3] But, aside from that consideration, the testimony was competent as bearing directly on one of the charges of the complaint. The letter written by defendant, alleged to be slanderous, contained this statement: "I gave you an opportunity to make good, and at the time your best ability was required you laid

down on us." Evidence of the total incapacity of the plaintiff to attend to the business of the defendant because of drunkenness was competent, as tending to show that the charge in the letter was well founded, and not malicious.

[4] The case of *Galloway v. Courtney*, 10 Rich. 414, is conclusive that there was no error in admitting the statement of the witness Galloway that he expressed to Ritchey the opinion that the plaintiff had been taking some kind of opiate. According to that case, such testimony is admissible in mitigation of damages, as tending to show that the charge was not made maliciously, without any foundation whatever.

[5] Plaintiff's counsel asked R. Galloway, a witness on behalf of the defendant, whose testimony was taken *de bene esse*, "What was Miller's general reputation among traveling men, prior to this charge made against him, made in St. Louis by Ritchey and others?" The witness answered: "I never heard anything against Mr. Miller until the early part of this year, when I received a letter from Mr. Lee Willis, of Charlotte, N. C., in which he mentioned that Mr. Miller had been on a spree for several days in Florence, S. C. I have since heard of his drinking at other times. I have seen very little of Mr. Miller myself, but I have heard that as a rule he was popular among the traveling men." We do not think the point that this testimony was incompetent was made available by proper objection. In reading this answer, plaintiff's counsel said: "I object to his answer there, on the ground of specific instances that he had heard he was drinking at other times. I object to that, but read it because, under your honor's ruling, I suppose it would go in anyway." The presiding judge was not called on to pass on the admissibility of the testimony, and we are unable to find that in ruling on any other objection he had decided that a witness, not representing the defendant in the charge made against the plaintiff, could testify to having heard of specific instances of intemperance by the plaintiff.

[6] The remaining exceptions allege error in the admission of the testimony of a number of witnesses, who saw the plaintiff in St. Louis, that, in their opinion, he was under the influence of a drug. Before giving this opinion, every one of these witnesses testified that he had seen persons under the influence of drugs, and was familiar with their effects. The testimony was clearly admissible. The recognized rule is thus well stated in *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 449, cited with approval in *Jones v. Fuller*, 19 S. C. 66, 45 Am. Rep. 761: "Courts and text-writers all agree that, upon questions of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates. But, without reference to any

recognized rule or principle, all concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health; questions also concerning various mental and moral aspects of humanity such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention." That the opinion of a witness as to whether a person under his observation was drunk or sober is admissible will hardly be doubted. On the same principle, a witness who has observed some of the numerous victims of the drug habit may express his conclusion, based on observation, that the condition of a certain person was due to the influence of a drug. Wigmore on Evidence, § 1974; Elliott on Evidence, § 676; Burt v. Burt, 168 Mass. 204, 46 N. E. 623.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(137 Ga. 30)

WRIGHT v. GARLAND.

(Supreme Court of Georgia. Oct. 12, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977\*)—REVIEW—GRANT OF NEW TRIAL.

The law and the facts of this case did not require the verdict returned, and, as the judgment complained of is the first grant of a new trial, it will not be disturbed. Civil Code 1910, § 6204.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3863; Dec. Dig. § 977.\*]

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action between Susan Wright and J. W. Garland. From the judgment, Wright brings error. Affirmed.

B. H. Manry and R. L. Berner, for plaintiff in error. Cleveland & Goodrich and Henry O. Farr, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 22)

COLEMAN v. BARBER.

(Supreme Court of Georgia. Oct. 11, 1911.)

(Syllabus by the Court.)

1. SPECIFIC PERFORMANCE (§ 114\*)—PROCEEDINGS—PLEADING.

Coleman brought an action for specific performance against Barber. The substance of the petition was: Defendant sold to plaintiff a named city lot. At the time of the sale defendant gave to plaintiff the following receipt: "Received of G. L. Coleman \$25, to close trade on lot corner Crawford and Mill streets, balance payable \$750 on delivery of papers. This 12th day of January, 1910. [Signed] J. A. Barber." The agreed purchase price was \$775, to be paid \$275 cash, and five shares of stock of the Moultrie Telephone Company, of the value of \$100 each. Plaintiff paid \$25 cash, and, subsequently to the execution of the receipt, tendered to defendant \$250 cash and five shares of stock of the Moultrie Telephone Company, and demanded of defendant a deed in accordance with the contract. Defendant refused to accept such tender and to convey the property to the plaintiff. Held, the petition was properly dismissed on general demurrer, for the reason, if for no other, that the receipt, so far as the petition showed, contained the whole contract and expressed the intention of the parties; that is, that the sum of \$750, balance of the purchase price of the lot, was to be paid in cash (see Wellmaker v. Wheatley, 123 Ga. 201, 51 S. E. 456; Southern Bell Tel. & Tel. Co. v. Smith, 129 Ga. 558, 59 S. E. 215; Hawkins v. Studdard, 132 Ga. 285, 63 S. E. 852, 131 Am. St. Rep. 190), and therefore a tender of the \$250 cash and five shares of the corporate stock of the telephone company was not a tender of the balance of the money due defendant under the contract, and he was under no obligation to accept the same and to execute a deed to plaintiff.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.\*]

2. EVIDENCE (§ 419\*)—PAROL EVIDENCE AFFECTING WRITING—ADMISSIBILITY.

In the absence of an allegation that the real contract was that \$500 of the price of the lot was to be paid in five shares of the stock of the telegraph company, and that this part of the contract was not inserted in the writing because of fraud, accident, or mistake, parol evidence would not be admissible to show that such was the real contract. Civil Code 1910, § 5788, 2 Enc. Ev. 443, b, and cases cited in note 61.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

Error from Superior Court, Colquitt County; J. H. Merrill, Judge.

Action by G. L. Coleman against J. A. Barber. Judgment for defendant, and plaintiff brings error. Affirmed.

Edwin L. Bryan, for plaintiff in error. Shipp & Kline and L. L. Moore, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(127 Ga. 35)

**KAIGLER v. BRANNON.**

(Supreme Court of Georgia. Oct. 12, 1911.)

*(Syllabus by the Court.)***1. FRAUDS, STATUTE OF (§§ 84, 116\*)—SALES OF PERSONALTY—CONTRACT OF AGENT.**

Brannon brought suit against Kaigler, making in the original and amended petition substantially the following allegations: The defendant directed the plaintiff, on April 26, 1909, to sell for him 20 bales of cotton at 10 cents per pound, to be delivered October 1, 1909. Plaintiff, in accordance with such instructions, sold Ford & Co. 20 bales of cotton, to be delivered October 1, 1909. The defendant refused to deliver the cotton, and the plaintiff was compelled to pay Ford & Co. "the difference between the price of cotton at 10 cents, at which it was sold, and the price of 13 3/4 cents, its market value at the date of settlement. Petitioner made such settlement at the instance and request of G. O. Kaigler, who promised then and there to repay petitioner the sum of \$312, which petitioner paid out for said Kaigler, and had failed and refused so to do, although petitioner has made demand for said sum." The defendant, among other things, pleaded that, if there was any contract between him and the plaintiff, it was not binding because of the statute of frauds. A verdict was rendered in favor of the plaintiff, and to the order of the court refusing the defendant a new trial he excepted. The evidence authorized a finding that the following was true: In the spring and summer of 1909 Kaigler orally directed Brannon, when he was able to do so, to sell for him 20 bales of cotton at 10 cents per pound, to be delivered on October 1, 1909, and both parties contemplated an actual delivery of the cotton by Kaigler, should Brannon make the sale as directed. No writing existed between them in regard to the matter. McGinty, who was a representative of Ford & Co., would not buy any cotton from Kaigler for future delivery, and soon after the directions were given Brannon made written contracts with McGinty, acting for Ford & Co., whereby Brannon sold the latter, at 10 cents per pound, 50 bales of cotton, to weigh at least 480 pounds each, and to be delivered on October 1, 1909. This was a legal contract and binding on Brannon. Twenty of the bales thus sold were sold by Brannon for Kaigler, and the remaining 30 were sold by him for other parties. Brannon signed the contract individually, and not as agent for Kaigler, whose name was not signed to the contract, nor mentioned therein. Soon after making the contract Brannon notified Kaigler that he had sold 20 bales of cotton for him at 10 cents per pound. Brannon sold 50 bales of his "own cotton in a separate contract." After October 1, 1909, upon being requested by Brannon to deliver the cotton, Kaigler told Brannon he was not ready to deliver it, and directed Brannon to pay Ford & Co. the difference between the contract price of the 20 bales and the market value of the cotton at the time and place of delivery, and that he (Kaigler) would reimburse Brannon the amount thus paid, and Brannon subsequently made such payment, amounting to \$320. *Held*, if the facts set forth in the foregoing statement existed, which the jury were authorized to find did exist, they required a verdict in favor of the plaintiff, though there was no written contract between Kaigler and Brannon with respect to the sale of the cotton, or in reference to the payment made by the latter to Ford & Co.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 141, 251-260; Dec. Dig. § 84, 116.\*]

**2. FRAUDS, STATUTE OF (§§ 84, 116\*)—SALES OF PERSONALTY—CONTRACT OF AGENT.**

The charges of the court excepted to, being in accordance with the foregoing ruling, were not subject to the exceptions thereto, to wit: That they were not correct statements of the law applicable to the facts of the case, and were not adjusted to the evidence in the case. There is no evidence of any binding contract between Kaigler and Brannon, or between Kaigler and any other person. The charges ignore the contention of Kaigler that "the contract between him and Brannon falls within the statute of frauds." "The evidence tends to show that, if Brannon paid any money to B. B. Ford & Co., it was on a contract made for 50 bales of cotton in his own name, and in which contract Kaigler was in no way concerned." "The court erred in charging the jury, under the circumstances stated, the fact that, though no written contract was made, it would still be binding upon the plaintiff if he made an oral contract; the charge being error, because under the evidence in this case the contract falls within the statute of frauds."

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 141, 251-260; Dec. Dig. § 84, 116.\*]

**3. FRAUDS, STATUTE OF (§§ 84, 116\*)—SALES OF PERSONALTY—CONTRACT OF AGENT.**

The court did not err in refusing a new trial on the ground that "the court ignored the contention of the defendant that said contract was within the statute of frauds"; nor on the ground that "there was no evidence that G. O. Kaigler had made any written contract, either with Brannon or with any other person, which was binding on him"; nor on the ground that "the evidence tends to show that, if Brannon paid any money to B. B. Ford & Co., it was on a contract made for 50 bales of cotton and in his own name, and in which contract Kaigler was in no way concerned."

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 141, 251-260; Dec. Dig. § 84, 116.\*]

**4. FRAUDS, STATUTE OF (§§ 84, 116\*)—SALES OF PERSONALTY—CONTRACT OF AGENT.**

The court did not err in failing to charge the jury as follows: "I charge you that any contract for the sale of goods, wares, and merchandise, in existence or not in esse, to the amount of \$50 or more, except the buyer shall accept part of the goods and actually receive the same, or give something in earnest to bind the bargain or in part payment, must be in writing and signed by the party to be charged therewith, or some person by him lawfully authorized." Nor in failing to charge the jury "upon the subject of statute of frauds, and upon one of his contentions and upon his special plea filed in said case, wherein movant pleaded in said case, if there was any contract of sale made, that the same was within the statute of frauds, and therefore void."

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 141, 251-260; Dec. Dig. § 84, 116.\*]

Error from Superior Court, Quitman County; W. O. Worrill, Judge.

Action by L. G. Brannon against G. O. Kaigler. Judgment for plaintiff, and defendant brings error. Affirmed.

G. Y. Harrell and Rosser & Brandon, for plaintiff in error. J. R. Pottle and M. C. Edwards, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(136 Ga. 381)

**MANNING v. WEBB.**

(Supreme Court of Georgia. Sept. 28, 1911.)

*(Syllabus by the Court.)***1. EVIDENCE (§ 501\*)—OPINION EVIDENCE—EXAMINATION OF WITNESSES—FACTS FORMING BASIS OF OPINION.**

The testimony of the plaintiff, offered as a nonexpert witness, to the effect that the continuance of the alleged nuisance arising from the discharge of sewage and pollution of a stream near his house was calculated to injure the health of himself and family, based on facts previously stated by him, was not subject to the objection that the witness had not given enough facts to authorize him to state his opinion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292-2305; Dec. Dig. § 501.\*]

**2. APPEAL AND ERROR (§ 692\*) — GROUNDS — EXCLUSION OF EVIDENCE.**

The refusal by the trial court to permit a witness called by the party examining him to answer a question will not be cause for the grant of a new trial, where it does not appear what answer the witness was expected to give, or would have given, to the question propounded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. § 692.\*]

**3. WATERS AND WATER COURSES (§ 77\*)—PRIVATE NUISANCE—ACTIONS TO ENJOIN—ADMISSIBILITY OF EVIDENCE.**

Evidence that a third party had built a barn in the rear of his house, near the branch alleged to have been polluted by the sewer complained of as a nuisance, was irrelevant, and should have been excluded; such third party not having testified in the case.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 77.\*]

**4. WATERS AND WATER COURSES (§ 77\*)—PRIVATE NUISANCE—ACTIONS TO ENJOIN—ADMISSIBILITY OF EVIDENCE.**

Under the facts and pleadings in the case, it was competent to show by a witness, who was a tenant of the plaintiff and occupied lands affected by the alleged nuisance, that if the same continued he would be compelled to move from the premises because of the nature of the nuisance, and the effect which it had and would have on the health of his family.

It was further competent to show that the tenant just referred to advised his landlord, the plaintiff in the court below, that in the event the sewer was continued he would be compelled to vacate the premises which he was then occupying as a tenant.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 77.\*]

**5. EVIDENCE (§ 366\*)—PUBLIC RECORDS—MODE OF PRODUCING.**

It was material in this case to inquire into the question of the solvency or insolvency of the defendant; and it was error for the court to exclude the original execution against the defendant, which issued from the superior court of the county in which this case was being tried, and which counsel for plaintiff had obtained from the clerk of the court, who voluntarily turned it over to him; and the fact that the *fi. fa.* referred to had not been brought into court by a notice to produce, or a subpoena duces tecum, was not a valid ground for excluding it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1521-1539; Dec. Dig. § 366.\*]

**6. WATERS AND WATER COURSES (§ 77\*)—ACTION FOR INJUNCTION—QUESTION FOR JURY.**

There was some evidence in this case from which the jury would have been authorized to find that the continued use of the sewer com-

plained of would constitute a continuing nuisance, which, if not enjoined, would result in the infliction of injuries upon the plaintiff, irreparable in their character, and for which he could not be adequately compensated in pecuniary damages; and the court should not have granted a nonsuit upon the conclusion of the plaintiff's testimony, but should have submitted the case, under an appropriate charge, to the jury.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 77.\*]

Error from Superior Court, Milton County; N. A. Morris, Judge.

Action by T. H. Manning against R. J. Webb. Judgment for defendant, and plaintiff brings error. Reversed.

G. B. Walker and Gober & Griffin, for plaintiff in error. J. P. Brooke and Mozley & Moss, for defendant in error.

BECK, J. T. H. Manning filed an equitable petition against R. J. Webb, seeking to enjoin the defendant from constructing a sewerage system in the town of Alpharetta in connection with a hotel lately erected by the defendant, alleging that the sewage from said hotel would be emptied into a certain tan-yard branch, along and near to which petitioner owned a large tract of land, and near to which were petitioner's dwelling and those of two of his tenants. He alleged that the stream referred to would become so contaminated as to render it unfit for the use of cattle and stock, and hence destroy his adjacent lands for pasturage purposes; likewise that a small spring within a few feet of said branch, used by his tenants for drinking purposes, would become contaminated and destroyed for such use; that his health and that of his family and his tenants would be seriously endangered on account of the stench which would arise from the branch, if the proposed sewerage system were permitted to be constructed; that the branch into which it was proposed to empty the sewage from the hotel is weak and does not flow sufficient water to prevent an accumulation of filth therein, especially in dry weather; that he would suffer a loss in the rents and profits from his lands and houses; that the defendant is insolvent; and that the damage and injury to petitioner would be irreparable. By way of amendment he alleged that the defendant had completed the construction of the sewerage system, that the same emitted vapors and noxious gases injurious to the health of petitioner and his family, and that the stench and effluvia were so offensive as to render his home undesirable. Upon the trial at the conclusion of the evidence offered by the plaintiff, the court granted a nonsuit. The plaintiff excepted.

[1] 1. Counsel for the plaintiff propounded the following question to him when he was on the witness stand: "Now, from having seen all this, and having experienced a year and a half of the operation of this sewer,

and from having noticed particularly the conditions down there, I will get you to state as a nonexpert whether or not it is calculated to injure the health of you and your family." It is alleged that the witness would have answered this question in the affirmative. Counsel for defendant objected to the question, on the ground that the plaintiff had not given enough facts to answer the question. The witness had previously stated: "The point of discharge of the sewer is, I guess, 250 yards from my home. \* \* \*

As to the character of the stream [the stream into which the sewer emptied], it is weak. At this season of the year, it flows a right smart of water; but in the summer time I have seen it dry up. In the summer and fall the stream is very weak. Along this last fall, it was pretty dry; and you get in the branch and the pasture old green stuff just all over it, within 50 or 60 yards of the discharge. At the spring, during the seasons I have referred to, there is a stench, and along that branch since this sewer was put in there is an accumulation of filth. It is discharged in a liquid form, and on the edges of the stream there is a green scum, on the edges and along the banks. \* \* \*

As to the conditions as to the discharge of this sewer, and as to whether or not there is an almost continual flow of the liquid matter from the sewer, I will say that I have never been along there but what it was running. I have been along there, and from this sewer there was running a stream, and that stream goes into the tan-yard branch, and in dry weather it smells pretty bad. The effect of it on my home is that at times I have smelled it—a half dozen times or more. This last year was very favorable on it; give it two weeks dry weather, and you can smell it when it is dry; and in the summer and fall, when the branches dry up, the conditions are very bad. There is a scent and green along the banks of the branch, and sides of the spring are as green as poison." Having so testified, we think the witness should have been permitted to state whether or not, in his opinion, the continued maintenance of the sewer would injuriously affect the health of himself and his family. The question involved was one of opinion, and in regard to such matters a nonexpert witness may state the facts upon which he bases it, and then state to the jury his opinion thus founded. "Where it is sought to have a nonexpert witness give his opinion, formed from facts or observation, the proper practice is to let the witness testify to the facts, and then state to the jury his opinion based upon those facts." *Credille v. Credille*, 131 Ga. 42, 61 S. E. 1042; *Georgia So., etc., Railway Co. v. Walker*, 5 Ga. App. 155, 62 S. E. 720. We think that in formulating his question, the answer to which was rejected, in view of the testimony of the witness immediately preceding the question which was held to be objectionable, there was a substantial conformity to the practice

indicated as being the correct practice in the case just referred to.

[2] 2. Exception is taken to the ruling of the court refusing to permit the plaintiff to answer the following question, which was propounded to him by his counsel: "I will get you to state whether or not, from having the experience, and all of a year and a half of the discharge down there, and from having inhaled the gases and effluvia down there, the maintenance of that sewer is calculated to injure the health of you and the people living in the vicinity of that stream and of your tenants." It is not shown what answer the witness thus interrogated was expected to give, or would have given, to this question. And, as this court has frequently ruled, before the refusal by the trial court to permit the propounding of a question to a witness called by the party examining him can be held to constitute reversible error, it must be made to appear what answer was expected from the witness.

[3] 3. Evidence that a person living in the neighborhood had built a barn in the rear of his house, near the branch alleged to have been polluted by the sewer complained of as a nuisance, was irrelevant, and should have been excluded; such person not having testified in the case.

[4] 4. One of the grounds of complaint in the petition being that, on account of the character of the sewer, the maintenance of which the plaintiff sought to enjoin, the plaintiff would suffer a loss in rents and profits of certain lands occupied by tenants in case the sewer were maintained, it was competent to show by one of the tenants of plaintiff, then occupying a portion of the land alleged to be affected by the sewer and the pollution of the stream into which the sewer emptied, that, "on account of the stench, effluvia, and noxious gases emanating from the sewer," and the effect which such conditions would have upon the health of his family, he would be forced to move. It was further competent to show that the tenant just referred to advised his landlord (the plaintiff in the court below) that in the event the sewer was continued he would be compelled to vacate the premises which he was then occupying as tenant.

[5] 5. The *fi. fa.* referred to in the fifth headnote was relevant and material upon the question of the solvency or insolvency of the defendant. Other than as indicated above, no error is shown in the rulings of the court on the question of the admissibility of evidence.

[6] 6. We are of the opinion that the court erred in granting a nonsuit in this case. The evidence was sufficient to make out a prima facie case for submission to the jury. See, in this connection, *Farley v. Gate City Gas Light Co.*, 105 Ga. 337, 31 S. E. 193; *Georgia Chemical Co. v. Colquitt*, 72 Ga. 172.

Judgment reversed. All the Justices concur.

(136 Ga. 372)

**MOORE v. SOUTHERN RY. CO.**

(Supreme Court of Georgia. Sept. 26, 1911.)

*(Syllabus by the Court.)***RAILROADS (§ 381\*)—INJURIES TO TRESPASSER.**

At the conclusion of the testimony introduced by the plaintiff, there was no evidence before the court and jury that would have authorized a recovery against the defendant, and the court did not err in granting a nonsuit.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1285–1293; Dec. Dig. § 381.\*]

Error from Superior Court, Spalding County; E. J. Reagan, Judge.

Action by Mrs. Lou Moore against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. B. Arnold and T. E. Patterson, for plaintiff in error. C. E. Battle and Howell Hollis, for defendant in error.

BECK, J. The plaintiff, Mrs. Lou Moore, brought suit against the Southern Railway Company to recover for the killing of her son, Travis Moore, near the Griffin Mills, in the city limits of Griffin, about 9 o'clock at night in the month of August, 1908. It was alleged, that the decedent was upon the track of the defendant, and was run upon and over by an engine and train of the defendant running at the rate of 40 miles an hour; that this was a negligent and reckless rate of speed under the circumstances; that the presence of the decedent upon the track was discovered by the engineer for a distance of 400 yards away, but, notwithstanding his knowledge of this fact, the engineer failed to exercise ordinary care to avoid striking the decedent; that by the exercise of such care he could have stopped the train before reaching him; and that the employés of the defendant failed to give proper signals of approach by bell and whistle. The place at which Moore was killed was alleged to have been in a "district thickly populated; there is a path and footway across the track at this point, a public road runs parallel to the defendant railway company's track on both sides, and there is a path from one side to the other, used daily by hundreds of people in going to and from the church and the various settlements on both sides of the railroad." Upon the trial of the case, at the conclusion of the evidence offered by the plaintiff, the court granted a nonsuit, and the plaintiff excepted.

One of the witnesses, the father of the decedent, testified: "I went to look at the place where he was killed. It was about in the center of the middle path. There were three paths. He was sitting down about on one of the three paths coming across there, on the end of two cross-ties. Seemed to be there, where they knocked him from, right in front of the church door. \* \* \*

I saw the headlight of the engine. I did not hear it coming. I could see down the track from Experiment towards Griffin to the point where he was said to have been killed. My son was prevented from seeing the train coming along by bushes and weeds as high as your head that had grown up by the side of the railroad track. They might have prevented the engineer from seeing him. My son was sitting in front of the church door. \* \* \* His foot signs were where he was sitting on the cross-ties. That is where they knocked him off in the bushes. \* \* \* I don't know how long he had been sitting there. \* \* \* There were three of the paths that crossed there. They do not make a connection, and come together and go down the bank to the railroad. They are 15 to 20 feet apart, where you go down. The paths were about 10 feet apart at the place he was. He was between the middle path and the left-hand path; about 10 feet from the left-hand path. He had been sitting near the center path, a little to the left of it. He must have been sitting on the cross-ties with his back to the track, leaning over. The church was about 30 or 40 feet from the track. At the time of the accident, that clump of bushes was between there and the church. That is where he was hit, near that clump of bushes in front of the church. They are between the church and the railroad track. He was sitting on the cross-ties, sitting with his face towards the church."

The only other witness who testified was John Noland, who testified, in part, as follows: "I don't know whether he [the engineer] seen him or not. He might have seen him, if he had looked for him. The fellow that was killed could have seen the engine, if he had looked at all. I believe he could. There was a headlight on the engine. If he was on the track, the light of the headlight was on him. I stated that I heard a man on the engine say he saw something on the cross-ties stooping over. He thought it was a dog. He was sitting on the cross-ties. He said he saw the object when he was up at the Griffin Mills. That was between three and four hundred yards away. I saw the party who made the statement on the engine. He came down the track on the east side. I was then on that side. The bushes were as close to the track as to this wall here. The embankment is low, and bushes hung over. Not close enough to be touched by the train."

The inference from this testimony is that the decedent, at the time of his death, was not only a trespasser upon the track of the defendant railway company, but was guilty of gross neglect and of an entire failure to exercise any degree of care or caution for his own safety. Under these circumstances, we do not think, taking the most favorable

view of the testimony for the plaintiff, that she was entitled to a recovery. Under no case decided by this court, to which our attention has been called, has it been held that a recovery could be had for the death of a trespasser upon the track of a railway company, who, at the time of the homicide, was guilty of carelessness and negligence so gross as was shown on the part of the decedent in this case. The decedent was evidently sitting upon the end of the cross-ties when he was struck by the engine; it was night. While it is true that one of the witnesses testified that the engineer said he saw him at a distance of several hundred yards ahead, but thought it was a dog, there is nothing in the evidence to show that the engineer was aware of the presence of a man upon the track at the point where the decedent was struck, or had any knowledge of his peril. Under the evidence for the plaintiff, the decedent was on the end of the cross-ties, sitting in such a position as to be struck by the passing locomotive; and the character of the object at the end of the cross-ties was not only obscured on account of the darkness, but the uncontroverted testimony is that there were "weeds and bushes" at the point where the decedent was sitting; and one witness, the father, testified that these weeds and bushes were as high as a man's head. It is not suggested that the train was not running on schedule time. The headlight was burning. The rate of speed was only 20 to 25 miles per hour. There is no suggestion that other trains were passing which would have rendered it impossible or difficult for one on the track to hear the approaching train. We cannot conceive of a case more clearly showing that death came to one as a result of his own voluntary exposure to peril than the instant case.

In the case of *Southern Railway Co. v. Hogan*, 131 Ga. 157, 62 S. E. 64, it was said: "One who knowingly and voluntarily takes a risk of injury to his person and property, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for his own safety and that of his property, cannot hold another liable for damages from injuries thus occasioned." The quotation given contains the ruling made in the case announced in the first headnote. And in the conclusion of the opinion it was said: "The plaintiff having knowingly and voluntarily taken the risk of so obvious a danger, and the act of taking it being so manifestly a failure to exercise ordinary care and diligence for his own safety and that of his property, he could not hold the railroad company liable for the resulting damages, and the court should have granted a new trial on the general ground that the verdict was without evidence to support it."

In the case of *Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802, it was said: "If at the time of the injury an ordinarily prudent person, in the exercise of that degree of care and caution which such a person generally uses, would have reasonably apprehended that the defendant might be negligent at the time and place where the injury occurred, and, so apprehending the probability of the existence of such negligence, could have taken steps to prevent the injury, then the person injured cannot recover, if he failed to exercise that degree of care and caution usually exercised by an ordinarily prudent person to ascertain whether the negligence which might have been reasonably apprehended existed." After citing a number of cases, Mr. Justice Cobb continued: "If there is anything present at the time and place of the injury which would cause an ordinarily prudent person to reasonably apprehend the probability, even if not the possibility, of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained; and if he fails to do this, and is injured, he will not be allowed to recover, if by taking proper precautions he could have avoided the consequences of the negligence of the person inflicting the injury."

In the case of *Southern Railway Co. v. Hogan*, supra, Chief Justice Fish, delivering the opinion, on page 160 of 131 Ga., on page 66 of 62 S. E., said: "Another case directly in point is *Mansfield v. Richardson*, 118 Ga. 250, 45 S. E. 269, wherein it was held: 'In cases of personal injuries, the plaintiff, as a conscious human agent, is bound to exercise ordinary care to avoid the consequence of the defendant's negligence, by remaining away, going away, or getting out of the way of a probable or known danger.' And that 'He can avoid danger by refraining from going into what he knows is an unsafe place.' On the same line are *May v. Central R. Co.*, 80 Ga. 363, 4 S. E. 330; *Atlanta & Charlotte R. Co. v. Leach*, 91 Ga. 419, 17 S. E. 619, 44 Am. St. Rep. 47; *Evans v. Charleston R. Co.*, 108 Ga. 270, 33 S. E. 901; *Hicks v. Georgia Southern R. Co.*, 108 Ga. 304, 32 S. E. 880; *Steele v. Central R. Co.*, 123 Ga. 237, 51 S. E. 438, and cases cited." Other cases are cited by Chief Justice Fish, in the *Hogan* Case, in addition to those set forth in the extract quoted above. See, in this connection, the following cases: *Southwestern R. Co. v. Johnson*, 60 Ga. 667; *Savannah, Florida & Western Ry. v. Stewart*, 71 Ga. 427; *Parish v. Western & Atlantic R. Co.*, 102 Ga. 285, 29 S. E. 715, 40 L. R. A. 364.

In the case of *Southwestern Railroad v. Hankerson*, 61 Ga. 114, it was said: "If one voluntarily becomes drunk, and consequently



falls down, or lies down, in a state of insensibility on a railroad track, so that he is injured by a passing train, he cannot recover for injuries so received, even though there may have been contributory negligence on the part of employes of the road." The facts of that case render the rule peculiarly applicable to the case at bar. A full discussion of the questions analogous to the ones involved in this case are to be found in several of the cases cited, which render unnecessary any elaborate discussion here.

Under the law and the evidence, the court ruled rightly in directing a nonsuit.

Judgment affirmed. All the Justices concur.

(136 Ga. 368)

### LOUISVILLE & N. R. CO. v. CLINE.

(Supreme Court of Georgia. Sept. 26, 1911.)

#### (Syllabus by the Court.)

#### 1. RAILROADS (§ 394\*)—OPERATION—INJURIES TO PERSON ON TRACK—PLEADING.

The petition in this case stated a cause of action, good as against a general demurrer.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 394.\*]

#### 2. RAILROADS (§ 395\*)—OPERATION—LIABILITY FOR INJURIES—EFFECT OF LEASE.

Whether, under the terms of a lease of the Western & Atlantic Railroad, the Louisville & Nashville Railroad Company can legally operate trains over the track of the Western & Atlantic Railroad Company is not a question that can be raised in a damage suit against the latter company, based upon the alleged tortious homicide of a child of the plaintiff, to which neither the state nor the Western & Atlantic Railroad Company is made a party.

(a) Except as indicated in the second headnote, the grounds of special demurrer were without merit.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 395.\*]

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by M. C. Cline against the Louisville & Nashville Railroad Company. To a judgment overruling general and special demurrers to the petition, the defendant brings error. Affirmed, with direction that certain paragraphs of the petition be stricken.

Neel & Neel, D. W. Blair, and Tye, Peeples & Jordan, for plaintiff in error. Colquitt & Conyers, for defendant in error.

BECK, J. The father of Lillie May Cline, a 12 year old child, brought suit against the Louisville & Nashville Railroad Company to recover damages for the killing of said child by a fast-moving locomotive and train while she was attempting to rescue a 6 year old boy companion and playmate, who had fallen upon the track in an effort to get out of the way of the train when he became aware of its approach. The defendant demurred generally and specially to the petition. The

court overruled the demurrer, and defendant excepted.

[1] 1. In the case of Crawford v. Southern Railway Co., 106 Ga. 870, 33 S. E. 826, it was said: "Conduct which might, under one set of circumstances, show that all ordinary and reasonable care and diligence had been observed, might, under a different set of circumstances, be insufficient to show an observance of such care and diligence. We think that such a rule could mean no more than this: Taking the locality where the train is running and all the surrounding circumstances, if those in control of the movement of the train have no reason to apprehend that there may likely be a human being on the track in front of the engine, they are under no duty to one who may in fact be there, until they have actually discovered that he is there. But if, from the locality or surrounding circumstances, there is reason to apprehend that the track in front of the locomotive may not be clear of human beings, then, it seems to us, it is the duty of the employes of the company to keep a lookout ahead of the train; most assuredly so unless they are performing some duty which prevents their looking out upon the track in the direction in which the train is moving. Suppose that a locomotive engineer knows that, in a particular locality, people, and especially children, without even an implied license of the railroad company, are likely to be upon the railroad track; can he, while his train is rushing at great velocity through this locality, fail to look down the track in front of him, without being guilty of negligence relatively to a child who may be injured or killed by the locomotive? Are people, children as well as adults, likely, at least in daylight, to be very near or upon a railway track within the limits of a populous city, at points where they have no right to go upon the right of way of the company? If they are, is a man charged with the running and control of a railroad train, which may in an instant become so terrible and tremendous an instrument of destruction to people in its pathway, under no duty, relatively to such people, when his train is running through such city, either to slacken its speed or to look ahead of his engine? These are questions which we feel sure no court can, as mere matters of law, decide in the negative."

Applying what was said in the extract above quoted and the ruling made in the first headnote of the case, it is clear that a question for decision by the jury was raised by the allegations of the petition in this case, as to whether or not the position of peril of the 6 year old child, in attempting to rescue whom Lillie May Cline was killed, was due to a failure upon the part of the employes of the defendant company to exercise due care in the running of the locomotive

and train. The point at which the little boy was placed in imminent peril of his life was, according to the allegations of the petition, "within a few feet of a grade crossing owned by said railroad company, near the town of Emerson. The Tennessee Coal & Iron Company has an extensive plant at and near said place; \* \* \* and upon both sides of said track near said place are houses occupied by the operatives of the said Tennessee Coal & Iron Company. The crossing aforesaid was frequently and commonly used by the residents of said neighborhood, men, women, and children, and was a regular crossing for both pedestrians and vehicles. Said crossing has been continuously used by members of the public at will as a common highway for more than 80 years." It also appears from the petition that at the place referred to there is a regular and well-beaten trail alongside of and within three feet of the railroad track, and that the travel thereon is constant, open, and uninterrupted by pedestrians to and from the said locality to the town of Emerson, and this usage has existed for many years. The territory from and including said point to the depot in the town of Emerson is practically a continuous town or village, and travel over and near said track and over the crossing was without objection from the defendant railroad company. Under the facts and circumstances thus distinctly alleged, it was within the province of the jury to decide what was due care on the part of the railroad company and its employes in reference to the speed maintained by the locomotive and train in passing this locality, and what was the duty resting upon the employes of the company in charge of the engine with reference to maintaining a lookout to ascertain the presence of any one who might be upon the track. If Lillie May Cline's companion, the 6 year old boy, was within a few feet of the crossing referred to, and in the path 3 or 4 feet from the railroad track, between a wire fence upon the edge of a deep fill on one side of her and the railroad track on the other, as was alleged, and this position of the 6 year old child could have been seen 500 feet away by the employes of the defendant on the engine, surely it was a question for the jury to decide, when the issue is raised by the pleadings, as to whether the employes of the defendant were negligent in continuing to run the train at the rate of 40 miles an hour, and in not anticipating that a little child might attempt to cross the track so as to reach a place farther from the spot at which the rushing train would pass than he could possibly do if he remained where he was when the train first came in sight. We have no hesitancy in holding that the questions of duty and negligence raised by the petition in this case are questions proper for submission to the jury, as regards the deadly peril in which the little boy was placed when

he first attempted to cross the track in view of the approaching train.

Having reached that conclusion, we think it necessarily follows that if Lillie May Cline, moved by an impulse which was perfectly natural, sprang upon the track in an attempt to save a child younger than herself, who was prone and helpless in front of an approaching locomotive, and was struck and killed by the locomotive while thus endeavoring to rescue her companion, the question as to whether or not the negligence of the employes of the company, if the jury should find that they were negligent under the attendant facts and circumstances, was the proximate cause of the death of the little girl, would be for decision by the jury. In the case of *Eckert v. Long Island Railroad Co.*, 43 N. Y. 502, 3 Am. Rep. 721, it appears that a man of mature age, seeing the danger of a child of tender years who was sitting on a railway track in front of a train which was approaching at the rate of 12 to 14 miles an hour, ran and seized the child and threw it from the track, but that he himself was struck by the engine and was so injured that he died. Suit was brought by the wife of the decedent to recover damages for the wrongful and negligent killing of her husband, and in the course of the opinion affirming a judgment in favor of the plaintiff the New York Court of Appeals said: "But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. \* \* \* The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless." See, also, *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Gibney v. State*, 137 N. Y. 1, 33 N. E. 142, 19 L. R. A. 365, 33 Am. St. Rep. 690; *Wilson v. Central Ry. Co.*, 132 Ga. 215, 63 S. E. 1121.

[2] 2. Paragraphs 11, 12, and 13 of the petition, basing the charge of negligence on the part of the defendant's employes upon the ground that the defendant had no right or authority to run and operate a train at the place and upon the track where the homicide complained of occurred, and that the operation of a train then and there by the defendant was a nuisance, are to be construed in connection with paragraph 14 of the petition, which charges that the "track at the time and place where said homicide was committed belonged to the state of Georgia,

and had been leased to the Western & Atlantic Railroad Company for the operation of its trains thereon, and the defendant, Louisville & Nashville Railroad Company, had no legal right or authority under said lease or otherwise to operate a train upon said track, but that the operation of the train by defendant constituted a nuisance." The four paragraphs last referred to were specially demurred to, on the ground that they were immaterial and irrelevant. We are of the opinion that the question as to whether or not the defendant company could legally operate a train upon the track which had been leased by the state to the Western & Atlantic Railroad Company cannot be raised in a suit for damages based upon an alleged tortious homicide committed by the defendant company, to which suit neither the state nor the Western & Atlantic Railroad Company are parties. See the case of *Hazlehurst v. Seaboard Air Line Ry.*, 118 Ga. 859, 45 S. E. 703. We therefore think that, while the general demurrer to the petition as a whole was properly overruled, the demurrer to the paragraphs last referred to should have been sustained.

The judgment of the court below is therefore affirmed, with the direction that the paragraphs of the petition last referred to be stricken. The other grounds of special demurrer were without merit.

Judgment affirmed, with direction. All the Justices concur.

(127 Ga. 40)

**FOWLER v. BRITT-CARSON SHOE CO.**  
et al.

(Supreme Court of Georgia. Oct. 12, 1911.)

*(Syllabus by the Court.)*

**SALES (§ 318\*)—FRAUD OF PURCHASER—INSOLVENCY—RIGHT OF RECLAMATION—LACHES.**

In order for the vendor of personal chattels to exercise his equitable right of reclamation on the ground that the purchaser, being insolvent at the time of obtaining the goods, committed a fraud by misrepresenting his solvency and financial standing in statements to the seller, made for the purpose of procuring the goods, and thereby deceiving him and inducing him to act to his injury, it is incumbent upon the vendor, promptly upon discovery of the fraud, to repudiate the contract and make his reclamation. If he omits to do so, but does some affirmative act recognizing title in the purchaser, such as by suing out an attachment for purchase money, and causing the property to be sold as property of the purchaser, he will thereafter be estopped, in a contest over the proceeds of sale (brought into court by the sheriff) with the trustee in bankruptcy of the purchaser, from asserting his right of reclamation.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 818.\*]

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Application by James Fowler for rule requiring the deputy sheriff to turn over funds

derived from the sale of goods alleged to belong to James E. Ricks. The Britt-Carson Shoe Company intervened. Judgment for intervener, and Fowler brings error. Reversed.

L. O. Underwood, for plaintiff in error.  
M. B. Calhoun, for defendants in error.

ATKINSON, J. On November 15, 1910, a deputy sheriff levied an attachment, which had been issued on November 6th from a justice court in favor of the Britt-Carson Shoe Company against James E. Ricks, on certain personal property as the property of the defendant in attachment, and on the 4th day of January, 1910, sold it accordingly. On the 2d day of January, 1910, less than four months from the date of the issuance of the attachment, James E. Ricks was adjudicated a bankrupt, and James Fowler became trustee of the bankrupt's estate. After the sale of the property by the sheriff, the trustee applied to the superior court for a rule requiring the sheriff to turn over to him the funds derived from the sale of the goods upon which the levy had been made. In his answer the sheriff admitted all of the allegations contained in the petition for rule, except those relative to the title of the trustee in bankruptcy, set up his want of knowledge on this subject, and answered, further, that he was holding the fund subject to the order of the superior court. The Britt-Carson Shoe Company, the plaintiff in attachment, intervened and asserted a right to the fund. It admitted all of the allegations of the petition, except those relative to the title of the trustee, which were denied. It set up that the proceeds of sale in the hands of the sheriff were derived from a certain bill of goods which had been purchased from it by Ricks, the bankrupt; that title never passed from intervener to Ricks, for the reason that he, being insolvent, purchased the goods under specified representations as to his solvency and financial standing, which were false and falsely made for the purpose of deceiving and inducing credit; that, having obtained the goods by deception in such manner, neither Ricks nor the trustee in bankruptcy of his estate acquired title; "that as soon as intervener learned that a fraud had been perpetrated upon it by said Ricks, by making said false statement, it sued out an attachment for the purchase money due upon said goods in question, and had as many of said shoes as could be found in the possession of said Ricks levied upon under said attachment; and that the money now in the sheriff's hands came from the sale of its said goods under said attachment for purchase money." It was further set up that the superior court had assumed jurisdiction of the goods and money in question long before the petition for adjudication in bankruptcy had been filed, and the superior court, having first acquired jurisdiction, should re-

tain jurisdiction of the funds in question. The intervention was allowed, and the case was afterwards submitted to the judge, upon consent of all parties that the court should hear and determine all issues of law and fact and adjudge to whom the money in the hands of the sheriff should be paid, without submitting any question to the jury. After hearing evidence, which in effect presented the matter as above stated, a judgment was entered finding that the Britt-Carson Shoe Company was entitled to the funds in the hands of the sheriff, and ordering the same turned over to it after payment therefrom of all costs of court. To this judgment the trustee excepted.

By objection to evidence, and motion to strike certain portions of the intervention of the Britt-Carson Shoe Company, and by exceptions to the finding of the court, the single question was made as to the right of the Britt-Carson Shoe Company to have the fund. The contention was: That, after knowledge of the fraud, the Britt-Carson Shoe Company had the election of two remedies: (a) To waive the fraud, affirm the contract, and sue for the purchase price; or (b) to repudiate the contract on account of the fraud, and reclaim the goods. That having elected, after knowledge of the fraud, to sue out the attachment, and cause the property to be sold as that of Ricks, the intervenor should be held to have ratified the sale and to be estopped from repudiating it and claiming the goods or their proceeds in the hands of the sheriff. The position thus taken by the trustee in bankruptcy is sound, and the judge committed error by his ruling. While upon discovery of the fraud the Britt-Carson Shoe Company could elect to repudiate the sale and reclaim the goods or their proceeds (*Newman et al. v. Clafin Co. et al.*, 107 Ga. 89, 32 S. E. 943; *Mashburn & Co. v. Dannenburg Co.*, 117 Ga. 567, 44 S. E. 97; *Silvey & Co. v. Tift, Trustee*, 123 Ga. 804, 51 S. E. 748, 1 L. R. A. [N. S.] 386), it was incumbent upon it to do so promptly. After knowledge of the fraud, if intervenor failed to repudiate it, but did something showing its intention to abide the contract, it would be held to have waived the fraud and to have ratified the contract. *Tuttle v. Stovall*, 134 Ga. 325, 328, 329, 67 S. E. 806, and citations. Suing out an attachment for the purchase money would be a ratification of the contract.

Judgment reversed. All the Justices concur, except BECK, J., absent.

(187 Ga. 27)

**MAYS v. FLETCHER et al.**

(Supreme Court of Georgia. Oct. 12, 1911.)

(*Syllabus by the Court.*)

**1. WILLS (§ 88\*)—REQUISITES—CONSTRUCTION.**

An instrument drafted in the form of a deed, declared to be a deed in the body thereof,

attested as a deed, and containing a reservation of a life estate to the grantor, is to be construed as a deed passing title in present, with the right of possession postponed until the grantor's death.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 88.\*]

**2. DEEDS (§ 208\*)—DELIVERY—EVIDENCE.**

The record of a properly executed deed is prima facie evidence of its delivery, and in the absence of rebutting proof such record is sufficient to prove the delivery of the deed.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 208.\*]

**3. TRIAL (§ 296\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.**

Where the jury are instructed that both signing and delivery are essential to the validity of a deed, a charge on an issue as to the mental capacity of the grantor, to the effect that the mental condition of the grantor relates to the time of making the deed, is not erroneous, as confining the inquiry of the grantor's mental capacity to the time of signing the deed, without reference to its delivery.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.\*]

**4. APPEAL AND ERROR (§ 1067\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

The failure to give a proper request to charge will not require a new trial, where the record discloses that the facts were such that the omission was not calculated to harm the party making the request.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

**5. INSTRUCTIONS.**

The charge fairly submitted the issues, and no sufficient reason appears why a new trial should be granted.

Error from Superior Court, Butts County; E. J. Reagan, Judge.

Action by H. M. Fletcher and others against S. H. Mays. Judgment for plaintiffs, and defendant brings error. Affirmed.

Jno. R. L. Smith, for plaintiff in error. H. M. Fletcher, for defendants in error.

EVANS, P. J. This is an action of ejectment by H. M. Fletcher, R. W. Mays, and John Billie Mays, a minor suing by next friend, against R. H. Mays. Plaintiffs and defendant claimed title from a common grantor, Mrs. M. R. Mays. The first muniment of the plaintiffs' title was an instrument, in the form of a deed and attested as such, from Mrs. Mays to R. L. Mays, Mary Mays, and John Billie Mays, dated March 21, 1899, and recorded April 25, 1899, containing in the body thereof this recital: "I hereby reserve title in the above-described land for and during my natural life, and at my death this deed to be a fee-simple title to the above-named parties." Mary Mays married H. M. Fletcher, and died leaving him as her sole heir. R. L. Mays conveyed his interest to R. W. Mays. The defendant pleaded that the instrument under which the plaintiffs claimed title was testamentary in character, and not a deed, and, not being executed and probated as a will, was void as a muniment of title; that at the time of

its execution the grantor, Mrs. Mays, was mentally incapacitated to make a deed. He further pleaded that Mrs. Mays had previously signed a deed to her grandson, Homer Mays, who owned an equitable interest in the land, and in March, 1895, Mrs. Mays entered into a parol contract of sale with the defendant, whereby she sold the land to the defendant in consideration of services to be rendered to the grandson, who was afflicted with disease; that he entered into possession under the parol contract and fully complied with its terms. The verdict was for the plaintiffs.

[1] 1. An instrument attested as a deed, drafted in the form of a deed, and declared in the body thereof to be a deed is not rendered testamentary by a reservation of a life estate to the grantor. Such an instrument is to be construed as a deed passing title in present, with the right of possession postponed until the grantor's death. *Isler v. Griffin*, 134 Ga. 192, 67 S. E. 854.

[2] 2. One of the issues in the case concerned the delivery of the deed from Mrs. M. R. Mays to R. L. Mays and others, under which the plaintiffs claimed title. The grantees in the deed were the grandchildren of the maker, and the deed was executed at the house of the maker's son, who was the father of the grantees. At the time the maker signed it she was in bed. She had previously requested the scrivener, who was the clerk of the superior court, to prepare the deed, and it was signed by the maker in the presence of the clerk and another person, both of whom attested it as witnesses and left the deed with the maker. The deed was properly attested for record, and was recorded 35 days after its date. Mrs. Mays died 6 years after the record of the deed. On the trial the deed was produced as coming from the possession of the plaintiffs. The delivery of a deed is necessary to its validity, but delivery may be inferred from various circumstances. Attestation of a deed by an officer authorized to witness a deed is presumptive proof of delivery. *Ross v. Campbell*, 73 Ga. 309. Possession of a deed by a grantee, or one taking an interest thereunder, raises a presumption of delivery. *Black v. Thornton*, 30 Ga. 361; *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436. The record of a properly executed deed is sufficient, but not conclusive, evidence of delivery. *Gordon v. Trimmer*, 91 Ga. 473, 18 S. E. 404. The mere retention by the grantor is insufficient to overcome the circumstances which afford an inference of the delivery of the deed. *Black v. Thornton*, *supra*. And especially so where the grantor reserves a life estate to himself. *Brown v. Brown*,

97 Ga. 531, 537, 25 S. E. 853, 33 L. R. A. 816. Accordingly it was not error to charge that "the record of a deed properly executed is prima facie evidence of its delivery, and it becomes conclusive evidence if it is not rebutted by proof." And as there was no controversy that the deed was properly executed and came from the possession of the grantees, it was proper to decline to charge that, if the deed was not delivered at the time of its attestation, it would not convey title, unless there was other evidence showing that it was in fact delivered.

[3] 3. In an instruction upon the degree of mental capacity of a grantor to make a deed, it is not error to charge that the mental condition related to the time of the grantor's making the deed. Such an instruction, in view of the context of the charge as to the execution and delivery of the deed, to which the charge applied, was not calculated to mislead the jury that the time referred to by the court was confined to the moment of signing, without reference to the time of delivery.

[4] 4. A written request was made of the court to charge the jury, in his instruction upon the parol contract of sale claimed to have been made by Mrs. Mays with the defendant, that the jury might consider the deed from Mrs. Mays to Homer Mays for the purpose of identifying the land referred to in any conversation that may have been had between Mrs. Mays and the defendant, if the deed was referred to in any such conversation. One of the defenses was that Mrs. Mays had orally contracted with the defendant that the land should be his in consideration of his taking care of her grandson, Homer. This request to charge was pertinent to that issue; but the omission to charge it, under the facts of the case, was not calculated to harm the defendant. It appeared in the pleadings and evidence that the land in controversy was the same as that described in the deed, and the same which the defendant claimed under the parol contract. It also appeared that Mrs. Mays had no other land, and that the various contentions of the parties concerned the whole tract, and not any part of it. Under these circumstances the jury could not have been misled that the land was other than that described in the deed to Homer Mays.

[5] 5. Other requests to charge, which were legal and pertinent, were covered by the general charge. The case was fairly submitted, and the evidence supports the verdict.

Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 21)

**JONES v. STATE.**

(Supreme Court of Georgia. Oct. 11, 1911.)

*(Syllabus by the Court.)***1. DYING DECLARATIONS.**

While the charge of the court may have been to some extent subject to criticism, especially the instructions in regard to dying declarations, under the evidence and in the light of the general charge, there was nothing in the grounds of the motion for a new trial complaining of excerpts from it which required a new trial.

**2. CRIMINAL LAW (§ 1170\*)—APPEAL—EXCLUSION OF EVIDENCE.**

Under the evidence, although a witness for the state had testified on cross-examination that she did not say, in a certain conversation, that the deceased was to blame for the whole trouble and that he began it, it will not require a new trial that the presiding judge, on objection by the solicitor general, excluded testimony that such witness had said that the deceased was in fault, and there would have been "none of it," had it not been for him.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1170.\*]

**3. NEWLY DISCOVERED EVIDENCE.**

The ground of the motion for a new trial setting up newly discovered evidence was not such as to require a new trial.

**4. SUFFICIENCY OF EVIDENCE.**

The evidence supported the verdict.

Error from Superior Court, Milton County; N. A. Morris, Judge.

Lee Jones was convicted of murder, and brings error. Affirmed.

G. B. Walker and Mozley & Moss, for plaintiff in error. J. P. Brooke, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

**LUMPKIN, J.** Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 30)

**ROBERTS v. SMITH.**

(Supreme Court of Georgia. Oct. 12, 1911.)

*(Syllabus by the Court.)***1. EXECUTORS AND ADMINISTRATORS (§ 372\*)—ADMINISTRATION OF ESTATE—SALES—REFUSAL TO COMPLY WITH BIDS—RESALE.**

A purchaser at a public sale of land by an administrator will not be relieved of liability because he was under the impression at the time of the bidding that a different tract of land was being offered for sale, when neither the administrator nor other party interested in the sale was responsible for such erroneous impression and the purchaser by the exercise of the slightest diligence could have avoided his mistake.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 372.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 371\*)—ADMINISTRATION OF ESTATE—SALES—REFUSAL TO COMPLY WITH BIDS—RESALE.**

In case a purchaser at an administrator's sale refuses to comply with his bid, where the administrator elects to resell the land at the purchaser's risk, he should do so at the earliest practicable time. Ordinarily, if the purchaser

repudiates his bid before the crowd disperses and within the legal hours of sale, the second sale should occur on the same day; but where the purchaser refuses to comply with his bid because of a contention that he is not liable thereon on account of having bid on the land through a mistake that another tract was being sold, and, in response to the administrator's offer to resell at his risk, makes a reply authorizing an inference that he declined the administrator's offer, and the administrator advertises the sale to occur on a sale day 60 days after the first sale, it is for the jury to say whether the administrator, under these and other attendant circumstances, acted with reasonable promptness, so as to make the purchaser liable for any deficiency in the second sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1517; Dec. Dig. § 371.\*]

Error from Superior Court, Jones County; H. G. Lewis, Judge.

Action by J. D. Roberts, administrator of W. H. J. Wood, against J. W. Smith. Judgment for defendant, and plaintiff brings error. Reversed.

E. T. Dumas and Hardeman, Jones, Callaway & Johnston, for plaintiff in error. J. B. Jackson and Johnson & Johnson, for defendant in error.

**EVANS, P. J.** J. D. Roberts, administrator of W. H. J. Wood, brought this action against J. W. Smith to recover the difference in the amount of a bid made by the defendant on certain land at an administrator's sale and the actual price received by the administrator at a resale of the same property two months later. After the plaintiff had submitted his evidence, a nonsuit was granted, and he excepts.

It appeared from the evidence that on the first Tuesday in November, 1908, the administrator, after legal notice, exposed for sale certain lands of his intestate, being advertised as lots Nos. 1, 2, and 3, and each separately described in the advertisement. Lot No. 2 was first offered for sale. Then lot No. 3 was offered for sale, and the defendant appeared at the sale, began to bid thereon, and it was finally knocked off to him for the sum of \$1,510. The auctioneer then proceeded to sell lot No. 1, when the defendant informed him that he had just purchased that lot. The auctioneer replied that he was mistaken, and that he had bid in lot No. 3, whereupon the defendant immediately told the auctioneer to sell it again, as he did not buy lot No. 3—that he had bought lot No. 1, the description of which had just been read by the auctioneer. After this conversation the defendant approached the administrator and said that he did not want lot No. 3, and that he wanted him to sell it, to which the administrator replied, "I will sell it at your risk." The defendant said, "Risk nothing." Thereupon the administrator said: "I have no right to resell the lot. It has been bid off and knocked down." While the sale of lot No. 3 was in progress,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the auctioneer heard a conversation between one of the bidders and his brother. When the bids had reached \$1,350, the brother remarked to the bidder, "Quit, that is high enough," to which he replied, "I think he [the defendant] thinks he is bidding on the land next to the station, and I am going to make him pay \$2,000 for it." The administrator afterwards saw the defendant and inquired of him if he was going to take the land; the defendant replying: "No; I wish, Dawson [the administrator], you would get the Wood boys to take it off my hands." The administrator readvertised the property for sale on the first Tuesday in January, 1909, and sold it on that day for \$1,050, and the difference between the first and last bid was \$460, with the additional sum of \$10.50, the cost of resale. It was admitted that the orders of sale and resale, and the advertisements and the price the land brought at the resale, were as alleged, and legal in all respects.

[1] The defendant contends that under this evidence he was not liable upon the first sale, for the reason that he bid on the land under a mistake of fact that a different lot was being offered for sale. If the party by reasonable diligence could have knowledge of the truth, equity will not relieve. Civil Code, § 4581. No pretense is made that the administrator, or any one interested in the sale of the land, said or did anything which induced the defendant to bid upon the lot of land. The land was accurately described by boundaries, and the different lots had entirely different boundaries. The slightest diligence on the part of the defendant when he began to bid would have disclosed the particular tract which was being cried by the auctioneer. Instead of making inquiries or informing himself as to the particular lot of land which was being sold, he boldly rushed into the bidding and bid upon it with the assurance of one who knew what he was doing. The evidence disclosed that the bidding was sharp and competitive. It is true that the other bidder testified that he observed from the expression upon the defendant's face that he was under the impression that he was bidding on lot No. 3 as being lot No. 1. Still he said nothing to encourage the mistake, and bid with the full knowledge that, if the land was knocked off to him, he would be bound by his bid. The last bid before it was knocked off to the defendant was within ten dollars of the final bid, and this bidder would have been liable to the estate for the amount of this bid. To relieve the defendant of the consequences of his bid because of his alleged mistake would be to grant him absolution, when he had not exercised the slightest degree of diligence to protect himself, and occasion loss to the estate of the last bid preceding his. Civil Code 1910, §§ 4581, 4571.

[2] The defendant further urges, as a reason why the plaintiff should not prevail, that

the administrator failed to offer the land for resale on the same day when he informed the administrator of his mistake and requested a resale. When a purchaser at administrator's sale refuses to comply with the terms of the sale when requested so to do, he shall be liable for the amount of the purchase money; and at the option of the administrator he may proceed against such purchaser for the full amount of the purchase money, or resell the real estate and then proceed against the first purchaser for the deficiency arising from such sale. Civil Code 1910, § 6071. If the administrator elects to resell the land at the purchaser's risk, he should offer it for resale as soon as practicable. If the bidder on the day of sale refuses to comply before the crowd disperses and the hours of sale terminate, that day is the proper time to resell; if that cannot be done, just as soon as the property can be readvertised, after notice of refusal to comply with the terms of the sale. *Saunders v. Bell*, 56 Ga. 442. The administrator cannot delay an unreasonable time, so as to speculate at the risk of the purchaser; nor, on the other hand, is there any cast-iron rule that he should resell the property on the same day. The purchaser in the present case depends, first, upon the ground that he is not bound by the first sale, and, secondly, that the administrator should have resold the property on the same day after notice of his repudiation of the sale. The last defense involves the idea that he was bound by his purchase in the first instance, and if nothing more appeared in this case than the mere request to the administrator to resell the property on the day of the first sale, and that the crowd had not dispersed and the hours of sale had not terminated, there would be considerable force in the contention; but when the defendant approached the administrator, upon discovery that he had bid upon lot No. 3, and requested a resale of it, the administrator proposed to resell it at his risk. The purchaser's reply was, "Risk nothing," which, according to his other statements, could only mean that he was not bound in the first instance, and therefore he did not propose to pay the deficiency in case of a resale. Under such circumstances the administrator was entitled to time to look into the matter. He allowed one month to elapse before inserting an advertisement for the next sale. When we come to consider that the law requires sales to occur on the first Tuesday in the month, after previous advertisement for 30 days, the time between the first sale and the insertion of the advertisement of the second sale may or may not have been sufficient for the administrator to have complied with the law in this respect. At all events it would be for the jury to say as to whether his failure was such a lack of diligence as to relieve the first purchaser of liability for the deficiency between the first and second sales.

For these reasons, we think the court should not have withdrawn the case from the jury by judgment of nonsuit.

Judgment reversed. All the Justices concur, except BECK, J., absent.

(137 Ga. 22)

**GIDDENS v. LEWIS et al.**

(Supreme Court of Georgia. Oct. 11, 1911.)

(Syllabus by the Court.)

**1. EXECUTION SALE.**

The facts set forth in the petition and the exhibits attached thereto, in the case of Giddens v. Alexander, 127 Ga. 734, 56 S. E. 1014, which case was decided on general demurrer to the petition, and upon which the first three headnotes in that case were predicated, are the same as in the present case. According to the undisputed evidence, therefore, under the rulings stated in the first three headnotes of the case cited, the sale by the sheriff of the land of the plaintiff was illegal, and he was entitled to have canceled, as a cloud upon his title, the deed made by the sheriff to the purchaser at such sale, and, accordingly, the court erred in directing a verdict in behalf of the defendants.

**2. REVIEW ON APPEAL.**

The plaintiff, according to the undisputed evidence and the rulings made in the case cited, being entitled to a verdict and decree declaring the sheriff's sale illegal and canceling the deed made in pursuance of such sale, it is unnecessary to pass on the other assignments of error.

Error from Superior Court, Berrien County; J. H. Merrill, Judge.

Action between John O. Giddens and J. B. Lewis and others. From the judgment, Giddens brings error. Reversed.

Hendricks & Christian, for plaintiff in error. Denmark & Griffin, W. H. Griffin, Bule & Knight, and Alexander & Gary, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur, except BECK, J., absent.

(137 Ga. 52)

**WRIGHT v. VAUGHAN.**

(Supreme Court of Georgia. Oct. 12, 1911.)

(Syllabus by the Court.)

**1. SALES (§ 11\*)—GAMING (§ 14\*)—CONTRACTS (§ 141\*)—VALIDITY OF CONTRACT—FUTURE DELIVERY.**

In the case of Forsyth Manufacturing Company v. Castlem, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28, it was ruled: "(1) An executory agreement for the sale of goods to be delivered at a future day is valid, though at the time the seller has not the goods in his possession, has not contracted to purchase them, and has no expectation of acquiring them, otherwise than by producing, manufacturing, or purchasing them at some time before the day of delivery. (2) Such a transaction is not rendered invalid by the provisions of section 3537 of the Civil Code [1895], unless it is made to appear that neither of the parties contemplated an actual delivery of the goods, and that it was the intention of both that there should be no actual

delivery, but that on the day fixed for delivery there should be a settlement of their differences, based on the market value of the goods on that day. In that event the transaction would be speculation upon chances, but not otherwise. (3) When a contract is valid upon its face, or, when taken in the light of the circumstances surrounding the parties at the time it was entered into, appears to be valid, it is incumbent upon him who attacks the contract to show its invalidity." See *Watson v. Hazlehurst*, 127 Ga. 293, 56 S. E. 459; *Northington Co. v. Farmers' Co.*, 119 Ga. 851, 47 S. E. 200, 100 Am. St. Rep. 210; *Sanders v. Allen*, 135 Ga. 173, 68 S. E. 1102.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 21; *Dec. Dig.* § 11; \**Gaming*, Cent. Dig. §§ 22, 25, 26; *Dec. Dig.* § 14; \**Contracts*, Cent. Dig. § 1760; *Dec. Dig.* § 141.\*]

**2. SALES (§ 411\*)—VALIDITY—CONTRACT FOR FUTURE DELIVERY.**

Under the rulings above quoted the court did not err in overruling the general demurrer of defendant to the petition, nor in overruling the demurrer based on the ground that "the allegations of said petition fail to show that the cotton forming the subject-matter of the alleged contract set forth in paragraph 4 of said petition had any actual or potential existence at the time of the alleged execution of said alleged contract, or that such cotton had such an existence as to be capable of being identified at said time so as to be the subject-matter of sale, or a contract of sale, or that said cotton was identified by said parties." Nor did the court err in striking the following allegation in defendant's answer: "For the reason that the cotton therein referred to had no actual or potential existence at the time of the execution of said alleged contract, and says that said alleged cotton, not being in existence at said time, was incapable of identification and was not identified by the parties, and could not be and form the subject-matter of any sale."

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 411.\*]

**3. SALES (§§ 19, 20\*)—CONTRACTS (§ 10\*)—VALIDITY—CONSIDERATION—MUTUALITY.**

The contract was not without consideration, nor was it invalid and unenforceable for the want of mutuality. *Northington Co. v. Farmers' Co.*, 119 Ga. 851 (3), 47 S. E. 200, 100 Am. St. Rep. 210; *Rearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 698, 58 S. E. 200.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. §§ 19, 20; \**Contracts*, Dec. Dig. § 10.\*]

**4. NEW TRIAL (§ 27\*)—GROUNDS—OVERRULING DEMURRER.**

If the court erred in refusing to sustain the ground of demurrer complaining that specified allegations were irrelevant, and that other allegations were mere conclusions of the plaintiff as to the meaning of the contract, such error was not such as to require a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 41; *Dec. Dig.* § 27.\*]

**5. EVIDENCE (§ 437\*)—PAROL EVIDENCE—INVALIDITY OF CONTRACT.**

The provision in the contract that "it is fully understood and expressly agreed by the parties to this contract that the same cannot be settled by payment of money, but only by delivery of the actual cotton in square mercantile bales weighing an average of 500 pounds, as aforesaid," did not preclude defendant from showing that the contract was illegal, in that an actual delivery of the cotton was not contemplated by either of the parties, and that it was the intention of both that no such actual delivery should be made, but that at the time fixed in the contract for delivery there should be



a settlement between them, based on the difference between the contract price of the cotton and the actual market value thereof at the time and place of delivery specified in the contract. *Roberts v. Arnall* (Ga. App.) 71 S. E. 590.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2025–2029; Dec. Dig. § 437.\*]

**6. SALES (§ 420\*)—REMEDIES OF PARTIES—DIRECTION OF VERDICT.**

The defendant assumed the burden of proof, and the only testimony was his testimony, which failed to show that the contract was illegal; and the defendant in his plea having admitted that the market value of the cotton at the time and place of delivery specified in the contract was 14½ cents per pound as alleged in the petition, the court did not err in directing a verdict for plaintiff for the amount of the difference between such market value and the contract price of the cotton, with interest on such amount.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 420.\*]

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Action by J. L. Vaughan against W. C. Wright, executor. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error (hereinafter called plaintiff) brought suit against plaintiff in error (hereinafter called the defendant) for damages, making substantially the following allegations: Plaintiff and defendant on June 30, 1909, entered into a written contract, of which the following is a copy:

"6/30/1909. For a consideration of the sum of one dollar to me in hand paid by J. L. Vaughan, as part payment of the cotton herein purchased, the receipt whereof is hereby acknowledged, I hereby agree to sell to J. L. Vaughan 100 bales of cotton, delivered at Carrollton, Ga., between the first and last days of November next. The delivery to be made at such time, at seller's option, in lots of not less than 100 bales, cotton to average 500 pounds per bale. If cotton does not average 500 pounds per bale, I will deliver a sufficient number of bales to bring up the average to 500 pounds per bale. The cotton to be of any grade between strict ordinary and fair, inclusive, at the price of 11 cents per pound for Atlanta 4's, said grade being good, middling, American standard classification, with deduction and addition for other grades according to ruling differences in effect on the day of delivery. It is fully understood and expressly agreed by the parties to this contract that the same cannot be settled by payment of money, but only by delivery of the actual cotton, in square mercantile bales weighing an average of 500 pounds, as aforesaid. B. H. Tompkins.

"We accept the above contract, with its conditions and obligations. J. L. Vaughan."

At the date of the contract plaintiff paid the defendant the \$1 referred to therein. On November 30, 1909, cotton of the grade referred to in the contract was worth 14½ cents per pound at Carrollton, Ga. Defendant refused to deliver any of the cotton. Plaintiff

sues to recover the difference between the contract price and the market value of the cotton at the time and place of delivery of same specified in the contract. A verdict was directed in favor of plaintiff for the amount for which suit was brought, and defendant excepted.

W. C. Wright and Frank S. Loftin, for plaintiff in error. Sidney Holderness and Hall & Jones, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(198 Ga. 357)

**KENT & DOWNS v. WADLEY SOUTHERN RY. CO.**

(Supreme Court of Georgia. Sept. 26, 1911.)

(Syllabus by the Court.)

**1. CARRIERS (§ 45\*)—TRANSPORTATION OF GOODS—DUTY TO FURNISH FACILITIES.**

The court did not err in directing a non-suit in this case.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 45.\*]

(Additional Syllabus by Editorial Staff.)

**2. EVIDENCE (§ 378\*)—DOCUMENTARY EVIDENCE—AUTHENTICATION.**

The mere receipt in due course of mail of letters on paper stamped with the letter head of the parties purporting to sign them, without any proof of the genuineness of the signatures, does not render them admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1648–1655; Dec. Dig. § 378.\*]

Error from Superior Court, Johnson County; B. L. Rawlings, Judge.

Action by Kent & Downs against the Wadley Southern Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Hines & Jordan, for plaintiffs in error. R. L. Gamble, for defendant in error.

BECK, J. The firm of Kent & Downs filed a petition against the Wadley Southern Railway Company to recover the value of 25,000 feet of lumber, which the plaintiffs alleged they were unable to deliver to a customer because of the failure and refusal of the railway company to furnish cars for its transportation. It was alleged that the plaintiffs, on January 10, 1907, offered the lumber for shipment at Kite, Ga., which is one of the places on the defendant's line of road at which it receives such goods for shipment; that the same was to be carried to Wadley, Ga., which is the terminus of said railway, and there to be delivered to a connecting carrier to be carried to Michigan City, Ind., for delivery to the Haskell-Barker Car Company; that the plaintiffs requested the railway company to place at Kite two 40-foot cars on which to load the lumber, such cars being the ordinary and usual cars used

in carrying lumber of the dimensions offered; that the defendant company failed and refused to furnish the cars, and refused to accept the lumber; that the Haskell-Barker Car Company was to pay \$18.50 per 1,000 feet for the lumber, but, owing to the failure of the railway company to furnish cars for its transportation, the car company, on May 10, 1907, canceled its order; and that, the plaintiffs being unable to use or sell the lumber, it became a total loss. On the trial, at the conclusion of the evidence offered on behalf of the plaintiffs, the court granted a nonsuit; and the plaintiff excepted.

[1] The plaintiffs were not entitled to recover in this case without proof of the execution of the letters from Daugherty, Morrison & Co., which contained the orders for the lumber to be shipped to Haskell-Barker Car Company. The basis of their action was their inability to fill these orders, or delay in filling them, which it is alleged resulted from a failure of the defendant railway to furnish cars on which to transport the lumber. It is true that in the record there appears a general statement by a member of the plaintiffs' firm that "he had a verbal order for this lumber," but the terms of the verbal order and from whom it came were unstated; and besides, as remarked above, the suit was predicated upon certain definite, precise orders for a certain number of pieces of lumber of specific dimensions. When the letters referred to above, which contained those orders, were excluded from evidence, there was no evidence before the court and jury of the existence of the orders which it was essential to prove in order to make out the plaintiffs' cause of action. It was shown by the plaintiffs' own testimony that the lumber which was left at the designated station on the defendant's line of railway, and which remained there until it rotted from exposure, had no market value unless it could be used for the purposes indicated in the letters of Daugherty, Morrison & Co., because of the dimensions into which it had been cut. To prove loss it was essential to the plaintiffs' case to show an order for the lumber sawed into such dimensions as this lumber was. The petition set forth all the essential facts. It showed the existence of such an order as that referred to; but, when put to the proof, the case failed because of a lack of evidence to establish the fact of the existence and execution of the orders set forth in the petition.

[2] The plaintiffs attempted to prove the execution of the letters containing the orders, by showing that they were received by due course of mail; but there was no proof whatever of the genuineness of the signatures to the letters. In fact, it appears that the signatures were typewritten, and no witness attempted to identify the signatures as those of the parties whose names were pur-

ported to be signed. The mere fact that these letters were received in due course of mail and upon paper stamped with the letter head of the parties purporting to sign the letters was not sufficient to render them admissible in evidence. *Freeman v. Brewster*, 93 Ga. 649, 21 S. E. 165. In the absence of the letters, as we have pointed out, the plaintiff's case had no foundation and could no longer stand. A nonsuit necessarily followed, and the court did not err in so directing.

Judgment affirmed. All the Justices concur.

(137 Ga. 50)

GEORGIA MILK PRODUCERS' ASS'N v. CRANE.

(Supreme Court of Georgia. Oct. 12, 1911.)

(Syllabus by the Court.)

CORPORATIONS (§ 423\*)—CONDITIONAL SALES—NOTICE TO OFFICER OF CORPORATION.

Crane levied an attachment for the purchase money on certain personalty sold to Crosby. At the time the property was sold Crane took from Crosby a note wherein the title to the property was retained in Crane until the purchase price was paid. The note was not recorded in the county wherein Crosby resided. A corporation filed a claim to the property. The evidence authorized the following findings of fact: Crane sold the property to Crosby individually, and the latter sold it to the claimant while he was general manager and secretary and treasurer thereof. The purchase money was paid by the claimant to Crosby in the issuance of stock to him, and this latter sale was made and the stock issued while the president and other stockholders of the claimant were present. *Held*, under the circumstances named, the fact that Crosby held the offices stated at the time of the sale by him to the corporation would not charge the latter with notice of the retention of title by Crane. *Pursley v. Stahley*, 122 Ga. 362, 50 S. E. 139; *People's Bank v. Exchange Bank*, 116 Ga. 820 (3), 43 S. E. 269, 94 Am. St. Rep. 144, 31 Cyc. 1592.

(a) Under the above ruling, it was error requiring a new trial to charge the jury as follows: "If you believe that this claimant had notice, personal notice to its general officers or agents, that this property was purchased from Mr. Crane, and that he retained title, and had not been paid for it, then they could not acquire a good title to it by subsequently buying it from Mr. Crosby, and they would not be entitled to prevail in this case. If they did not have notice personally, but if Mr. Crosby was the general agent and general manager of this concern, then the fact that he knew that this property had not been paid for would be counted as notice to them; but the fact that he had entered into a contract with them, under seal, would not, of itself, be notice to them, but the question would be: Did he, as the general manager or as the secretary and treasurer of the company, have such charge of the business as would authorize him in the due course of business to have a transaction like this? If he made such a transaction, then the company could not buy from him without paying the balance of this purchase money, so as to defeat the plaintiff of

his right under the reserved title, if you believe he had reserved title."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 423.\*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Attachment proceedings by A. J. Crane against one Crosby, in which the Georgia Milk Producers' Association filed a claim to the property. Judgment for plaintiff, and claimant brings error. Reversed.

J. J. Barge, for plaintiff in error. Willis M. Everett, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur, except BECK, J., absent.

(137 Ga. 23)

**POLLAK BROS. v. NIAL-HERIN CO.**

(Supreme Court of Georgia. Oct. 11, 1911.)

*(Syllabus by the Court.)*

**BANKS AND BANKING (§ 166\*)—COLLECTIONS—INSOLVENCY OF COLLECTING BANK.**

Where a bank sends an accepted draft to a correspondent for collection, who receives in payment the check of the acceptor on itself in the regular course of business, the acceptor being a depositor with the collecting bank and having on deposit a sum in excess of the check, and the collecting bank surrenders the draft to the acceptor and remits its own check to the initial bank, which check is not paid because of the failure of the remitting bank, such transaction constitutes a payment of the draft as between the drawer and the acceptor, although the collecting bank may have been insolvent at the time; its insolvency not being known to its officials or the depositor.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 166.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Pollak Bros. against the Niall-Herlin Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Anderson, Felder, Rountree & Wilson, for plaintiffs in error. Candler, Thomson & Hirsch, for defendant in error.

EVANS, P. J. Pollak Bros. sold to the Niall-Herlin Company, a corporation, a certain quantity of matting, and the action is on account to recover the purchase price. The defendant admitted the purchase of the goods at the price stated and pleaded payment. The case was tried before the judge without a jury, upon an agreed statement of facts, which may be condensed as follows: Plaintiffs drew a draft on the defendant for the purchase price of the matting, payable six months after sight to the order of the Hongkong & Shanghai Banking Corporation. The draft was duly accepted by the defendant on June 21, 1907, and on the day of its maturity, to wit, December 21, 1907, the draft was presented to the defendant by the Neal

Bank, to the order of which bank the draft had been made payable by the indorsement of the Hongkong & Shanghai Banking Corporation. At the time of its presentation the defendant had on deposit with the Neal Bank a sum of money largely in excess of the amount of the draft. Upon the presentation of the draft the defendant gave to the Neal Bank its check on the Neal Bank and against its deposit account therein for the amount of the draft. This check was given in payment of the draft, and the draft was marked "Paid" and surrendered to the defendant. The Neal Bank was the collection agent of the Hongkong & Shanghai Banking Corporation, and immediately upon receiving the check upon itself given by the defendant it passed the amount of the check upon its books to the credit of the Hongkong & Shanghai Banking Corporation. On the same day the Neal Bank received the defendant's check it mailed to the Hongkong & Shanghai Banking Corporation, who were the agents of the plaintiffs, its check for \$2,176.70, drawn on the Fourth National Bank of New York, less its collection charge of \$2.17. Three days later the check was presented to the Fourth National Bank of New York, and payment thereof was refused; the Neal Bank having failed in the meantime, and a receiver having been appointed for it. At the time of the foregoing transaction the Neal Bank was insolvent, but this fact was unknown to the defendant or to the officers of the bank. It was further agreed that the Hongkong & Shanghai Banking Corporation intervened in the receivership case, alleging that the defendant had paid the draft, that the Neal Bank in collecting the draft was acting as its agent, and prayed that the amount collected upon the draft by the Neal Bank be decreed to be trust funds in the hands of the receiver, to be specially accounted for to the Hongkong & Shanghai Banking Corporation. Its intervention, in the light of the answer of the receiver and the admitted facts upon the hearing, was denied, upon the ground that the draft referred to was paid only by the check of the defendant against its own deposit in the Neal Bank, the collecting agent of the Hongkong & Shanghai Banking Corporation. Upon the foregoing facts the court rendered judgment for the defendant, and the plaintiffs except.

The plaintiff in error contends that these facts are insufficient to constitute payment, because an agent to collect can only accept money in payment of his principal's debt. We recognize the general rule that an agent authorized merely to collect a demand or to receive payment of a debt cannot bind his principal by an arrangement short of an actual collection and receipt of the money. *Ward v. Evans*, 2 Ld. Raymond, 928. But we think the circumstances under which the

draft was paid in this case are equivalent to the actual receipt of the money by the agent. Courts should deal with practical problems in a practical way, and give the same sense to a plain and ordinary business transaction which is uniformly attached to it by the business world. As remarked by Justice Field: "We cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seat on the bench we are not struck with blindness and forbidden to know as judges what we see as men." *Ho Ah Kow v. Nunan*, Fed. Cas. No. 6,546. Our Code declares that judicial notice will be taken of the general customs of merchants and similar matters of public knowledge. Civil Code 1910, § 5734. In *British & Amer. Mortgage Company v. Tibballs*, 63 Iowa, 468, 19 N. W. 319, the Supreme Court of that state said that "the system by which nearly all the banks in this country transact monetary affairs by the use of checks, drafts, and certificates of deposit, and without the actual handling of bank notes or coin, is so well known and understood that no business man, much less a company whose sole occupation is loaning money, should be allowed to profit by pleading ignorance of it." We dare say that no depositor who paid a note or draft payable at his own bank ever went through the senseless ceremony of first taking out his money at one window and immediately paying it in at another window. He pays the note or demand which his bank holds against him with his check, and if he has the money to his credit and the bank is a going concern, with money on hand sufficient to cash the check, the payment is equivalent in law and in fact to a payment in money. What sound reason can be advanced to require, as essential to the validity of the payment, the useless formality of the depositor taking his money from the bank officer and immediately restoring it to him. The draft was in the possession of the bank, who had a legal right to receive the money in payment, which was also in its custody, and when the bank accepted its depositor's check in payment of the draft, canceling and delivering it to him, and entered the transaction on its books, thenceforward the draft was paid, and the bank held the money as the agent of the drawer. The bank's failure after the remittance of the collection by check, and the consequent inability of the drawer to realize on the check, did not and could not affect the past transaction. And it has accordingly been held that where the drawer of an accepted draft deposits it with a bank, who sends it to its correspondent bank for collection, and the drawee delivers to the latter bank his check on it, having at the time on deposit a sum in excess of his check, receiving from the bank the accepted draft, and appropriate entries are made on the books of the col-

lecting bank, who remits its own check to the initial bank, such a transaction constitutes a payment of the draft by the drawee to the drawer, notwithstanding the check remitted by the collecting bank is not paid because of its failure; neither the officers of the remitting bank nor the acceptor knowing the bank's insolvency at the time. *Howard v. Walker*, 92 Tenn. 452, 21 S. W. 897; *British & American Mortgage Company v. Tibballs*, 63 Iowa, 468, 19 N. W. 319; *Daniel v. St. Louis National Bank*, 67 Ark. 223, 54 S. W. 214; *Welge v. Batty*, 11 Ill. App. 461; *Scott v. Gilkey*, 153 Ill. 168, 39 N. E. 265; *Nineteenth Ward Bank v. First National Bank of South Weymouth*, 184 Mass. 49, 67 N. E. 670; *Morse on Banks* (4th Ed.) § 248; 2 *Bolles on Modern Law of Banking*, 557.

It is no reply to say that payment of the draft as between drawer and drawee cannot result, unless the facts of the transaction impress a trust in favor of the drawer upon the assets of the collecting bank. Other and additional elements are to be considered in determining the existence or enforceableness of the trust. Some authorities are to the point that, notwithstanding the transfer of the drawee's funds held on deposit by the collecting bank to the credit of the drawer, no trust can arise unless the bank converts the money represented by the check into a specific fund or other assets capable of identification. *People v. M. & M. Bank of Troy*, 78 N. Y. 269, 34 Am. Rep. 532; *Sherwood v. Milford Bank*, 94 Mich. 78, 53 N. W. 923; *Billingsly v. Pollock*, 69 Miss. 759, 13 South. 828, 30 Am. St. Rep. 585; *Anheuser-Busch Brewing Ass'n v. Clayton*, 56 Fed. 759, 6 C. C. A. 108.

Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 38)

WHITE SEWING MACH. CO. et al. v. COBLE et al.

(Supreme Court of Georgia. Oct. 12, 1911.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 200\*)—SETTING APART SUPPORT TO WIDOW—PROCEEDINGS TO SET ASIDE.

Proceedings by creditors of the estate of a decedent to set aside a judgment of the ordinary setting apart a year's support to the widow and minor children of the decedent must be commenced within three years from the rendition of the judgment. Civil Code 1910, § 4358; *Wicker v. Howard*, 126 Ga. 119, 54 S. E. 821.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 200.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 200\*)—ALLOWANCE TO WIDOW—SETTING ASIDE.

If the judgment setting aside the year's support was void in so far as it undertook to set apart the real estate therein referred to, on the ground that it was insufficiently described, the judgment creditors and the mortgage creditor of the estate did not need the aid of a

court of equity in having such property sold to pay such judgments and mortgage.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 200.\*]

### 8. DISMISSAL OF PETITION.

The court did not err in dismissing the petition.

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action between the White Sewing Machine Company and others and Mamie Coble and others. From the judgment, the Sewing Machine Company and others bring error. Affirmed.

Eldridge Cutts and Hal Lawson, for plaintiffs in error. J. L. Bankston and E. D. Graham, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 55)

JARRELL, Sheriff, et al. v. DAVIS et al.

(Supreme Court of Georgia. Oct. 12, 1911.)

(Syllabus by the Court.)

### 1. SCHOOLS AND SCHOOL DISTRICTS (§ 108\*)—TAXATION—SUBMISSION OF QUESTION TO POPULAR VOTE.

On December 21, 1905, the county board of education of Meriwether county laid off that county into school districts. A map of the county thus laid off was filed with the ordinary of the county. On June 12, 1909, an election was held in the Bullochville school district of such county on the question as to whether the funds received from the state public school fund should be supplemented by levying a tax for educational purposes in such district, and on June 23, 1909, the ordinary of the county declared the result of such election to be in favor of local taxation for public schools. In 1910 the secretary of the board of trustees of such district, with the aid of the county school commissioners of the county, made a digest of all property in such district subject to taxation. The trustees determined the amount necessary to be raised by local tax on the property in the district for local taxation for public schools therein. In 1910 the secretary of the board of trustees, with the aid of the county school commissioners, levied a tax of five mills on such property. The trustees had erected a schoolhouse for such district in Bullochville, for which they still owe about \$1,000. Held, where an election was held in June, 1909, in a school district laid off under the act of 1905 (Acts 1905, p. 425), on the question as to whether there should be local taxation to supplement the public school fund for public schools in such district, the fact that the district was laid off under the act of 1905, and before the passage of the act of 1906 (Acts 1906, p. 61), did not render such election invalid. See Griffin v. Brooks, 129 Ga. 693, 59 S. E. 902.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 103.\*]

### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 68\*)—BUILDINGS—LOCATION OF SCHOOL SITES—JURISDICTION.

A controversy arising as to the location of the school site in a particular district in a county which has been laid off into school districts must be determined by the county board

of education, and a court of equity will not entertain jurisdiction of such matter, but will remand the parties to their legal remedy. Meadows v. Board of Education, 71 S. E. 146.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 68.\*]

### 3. SCHOOLS AND SCHOOL DISTRICTS (§ 111\*)—TAXES—RESTRAINING COLLECTION—GROUNDS.

Where a school site has been located in a school district by the proper officials, a school building been erected thereon, and a tax levied by the proper authorities on the property in the district, for the purpose of paying for such building and the maintenance of the school therein for a given year, the collection of such tax will not be enjoined at the instance of a taxpayer of such district, living within three miles of such school site, on the ground that the district contains territory more than three miles distant from the school site, which territory was included in the district without the written consent of two-thirds of the qualified voters thereof.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 111.\*]

### 4. SCHOOLS AND SCHOOL DISTRICTS (§ 111\*)—TAXES—RESTRAINING COLLECTION—GROUNDS.

The failure upon the part of the officials whose duty it is to levy and collect the school tax of a district under the act of 1905, as amended by the act of 1906, to enforce the same against certain property in the district belonging to one whose name was inadvertently, or even purposely, left off the regular digest of the property in the district, affords no reason for restraining the collection of the tax against other taxpayers. Mabry v. Fuller, 133 Ga. 831, 833, 67 S. E. 91.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 111.\*]

### 5. INTERLOCUTORY INJUNCTION—COLLECTION OF SCHOOL TAX.

The judge of the superior court erred in granting an interlocutory injunction.

Error from Superior Court, Meriwether County; R. W. Freeman, Judge.

Action by C. L. Davis and others against J. B. Jarrell, Sheriff, and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Howell & Hatcher and N. F. Culpepper, for plaintiffs in error. McLaughlin, Jones & Jones, for defendants in error.

PER CURIAM. Judgment reversed. All the Justices concur, except BECK, J., absent.

(137 Ga. 89)

PELHAM v. SMITH.

(Supreme Court of Georgia. Oct. 12, 1911.)

(Syllabus by the Court.)

### 1. BOUNDARIES (§ 37\*)—ESTABLISHMENT—SUFFICIENCY OF EVIDENCE.

An owner of land made a deed to a part of it containing the following description: "All that tract or parcel of land lying, situate, and being in the 8th land district of said county of Colquitt, in said state of Georgia, and known and distinguished in the plan of said district as a part of land lot number eighty-five (85).

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the tract of land herein conveyed described by dimensions and bounded as follows: Commencing at a point 558 feet from the corner of land lots 85, 86, 53, and 54, and running east along the land line between 85 and 54 to a stake, the commencing point of this land, and thence east 1,800 feet along said last-mentioned land line to a corner, thence south from said corner, 1,800 feet, thence west 1,260 feet to a stake or corner, thence north thirty degrees east to place of commencing, containing 64 acres." In an action of ejectment, the controlling question was whether this deed conveyed land only on the east side of a public road, or whether it also included a small triangular strip on the west side of such road. The plaintiff testified that he bargained and sold the land only on the east side of the road, showed the defendant, who was his grantee, where the lines would run and about how many acres there would be, and with the consent of the defendant had a surveyor to survey the land along the east side of the road and fix the corner, though the defendant was absent when the survey was made; that the southern line of the tract was not measured, but stepped, and that the defendant remained satisfied for about a year and a half, and then told the plaintiff that the degrees mentioned in the deed would cut him (the defendant) off from the public road; that the plaintiff procured the county surveyor, and with the help of the defendant measured the land and fixed the southwest corner on the east side of the public road, and the defendant agreed thereto and drove a stob there. The evidence of the surveyor was also introduced to show that, if the southern line described in the deed were measured as 1,260 feet, it would extend across the road, but in that event the west line would not run at an angle of 30 degrees; that the two descriptions were inconsistent, and both could not stand; and that to stop the south line on the east side of the public road would make the last line correspond with the degrees mentioned, and make the tract contain about 57 acres on the east side of the road. *Held*, that the verdict in favor of the plaintiff was supported by the evidence.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 37.\*]

## 2. EVIDENCE (§ 460\*)—PAROL EVIDENCE AFFECTING WRITINGS—EXPLANATION OF AMBIGUITY.

The description in the deed was so ambiguous and conflicting that there was no error in admitting the evidence of the plaintiff that "defendant's land was put on the east side of the road, and [he] was satisfied [until] in January, 1906, when defendant told plaintiff that the degrees mentioned in this deed would cut defendant off from the public road, and that plaintiff told the defendant that he would get the county surveyor, J. S. Robinson, and come and run the degrees in said deed to fix his land on the east side of said public road." This evidence was admissible, in connection with the further evidence that the survey was made, the defendant took part in it, fixed and agreed upon the corner, and drove a stob there, and afterwards obtained permission of the plaintiff to get firewood from the strip west of the public road, which is now in dispute.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2116-2122; Dec. Dig. § 460.\*]

Error from Superior Court, Colquitt County; J. H. Merrill, Judge.

Action by J. P. Smith against E. H. Pelham. Judgment for plaintiff, and defendant brings error. Affirmed.

J. D. McKenzie, for plaintiff in error. Shipp & Kline and J. H. Tipton, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(134 Ga. 889)

## WILENSKY v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. Sept. 28, 1911.)

(Syllabus by the Court.)

### CARRIERS (§ 91\*)—TRANSPORTATION OF GOODS—ACTION FOR BREACH OF CONTRACT.

A shipper, who is both consignor and consignee, cannot maintain against a carrier an action *ex contractu* for the value of goods consigned to the carrier for shipment and not delivered, when the carrier tenders the goods at destination in a damaged condition, but refuses to deliver them unless the shipper pays the usual freight charges, notwithstanding the damages to the goods amount to more than the freight charges, and the shipper demands that the damages to the shipment be offset against the freight bill, on the theory that the refusal to deliver under the circumstances is a breach of the contract of carriage.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 91.\*]

Certified Question from Court of Appeals.

Action by H. Wilensky against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Question certified by Court of Appeals to Supreme Court. Answered in favor of defendant in error.

Jesse M. Wood, for plaintiff in error. Payne, Little & Jones and M. F. Goldstein, for defendant in error.

FISH, C. J. The Court of Appeals has certified to the Supreme Court the following question:

"Can a shipper, who is both consignor and consignee, maintain against a carrier an action *ex contractu* for the value of goods consigned to the carrier for shipment and not delivered, when the carrier tenders the goods at destination in a damaged condition, but refuses to deliver them unless the shipper pays the usual freight charges, notwithstanding the damages to the goods amount to more than the freight charges, and the shipper demands that the damages to the shipment be offset against the freight bill, on the theory that the refusal to deliver under the circumstances is a breach of the contract of carriage?"

In *Brown, Shipley & Co. v. Clayton*, 12 Ga. 564 (6), this court held that "a consignee cannot abandon damaged goods, and thereby discharge the liability of the shipper for freight." The point was directly involved in that case, and was learnedly and exhaustively treated by Nisbet, J., who pronounced the opinion of the court. He said: "It has been much mooted whether, when the goods

became greatly deteriorated on the voyage, the consignee is bound to take them and pay the freight, or whether he may not abandon them to the master in discharge of the freight. The better opinion is that he cannot abandon the goods and thereby discharge the freight." The following authorities were cited: 3 Kent's Com. 224, 225; Griswold v. New York Ins. Co., 3 Johns. (N. Y.) 821, 3 Am. Dec. 490; 1 Bell's Com. 570; Jordan v. Warren Ins. Co., 1 Story, 342, 353, 354, Fed. Cas. No. 7,524; Pothier Charte Partic. No. 59. I quote further extracts from the opinion as follows: "The \* \* \* law allows to the carrier his freight when the goods are delivered, irrespective of damage. \* \* \* If the carrier and the owners [of the ship] are liable for damage, the shipper and his consignee must resort to their action to recover them. \* \* \* This obligation to pay freight grows out of the contract. It is entire, and cannot be apportioned. Upon a bill of lading like this, in which freight is agreed to be paid upon delivery, a delivery is a condition precedent to a right to it, and upon delivery or tender the freight is earned, and the shipper is liable for it. The carrier may retain the goods if it is not paid, or he may waive that and rely upon the liability of both the consignee and the shipper (if the shipper is also the owner) for his freight."

It is the contention of counsel for the shipper, who is also the owner, in the case now under consideration, that the doctrine announced in the case in 12 Ga. 564, above cited, was overturned by the adoption by the General Assembly of Civil Code 1895, § 2287, which is as follows: "The carrier has a lien on the goods for his freight, and may retain possession until it is paid, unless this right is waived by special contract or actual delivery. This lien exists only when the carrier has complied with his contract as to transportation." The decision in *Brown v. Clayton*, 12 Ga. 564, was rendered in 1853, prior to the adoption of any Civil Code in this state. By an act of the General Assembly approved December 9, 1858, provision was made for the election of three commissioners "to prepare for the people of Georgia a Code, which should, as near as practicable, embrace in a condensed form the laws of Georgia, whether derived from the common law, the Constitution, the statutes of the state, the decisions of the Supreme Court, or the statutes of England, of force in this state." Laws 1858, p. 95. The Code prepared by the commissioners was adopted by an act of the General Assembly approved December 19, 1860 (Laws 1860, p. 24); but, by an act of 1861 (Laws 1861, p. 28) it did not go into effect until January 1, 1863. That Code contained a section (section 2049) in the identical language of section 2287 of the Code of 1895, and each of the intermediate Codes has contained a section with similar provisions. Section 2741 of the Civil Code of 1910 is the same as section 2287 of the Civil Code of 1895. This section did not have

its origin in a statute of this state. It appears for the first time in the Code of 1863. It has, however, all the binding effect of an original act of the Legislature, because of the adoption by the Legislature of the Code wherein it appears. *Central Ry. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 U. R. A. 518. It has been several times held by this court that a section of the Code, not of original statutory origin, would be construed merely as a codification of the existing law, unless there be words in the section which manifestly demand a construction which would change the rule in force at the time the Code was adopted. *Brandon v. Pritchett*, 128 Ga. 286, 55 S. E. 241; *Mitchell v. Georgia & Alabama Ry.*, 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622, and cases cited.

At the time of the adoption of the Code of 1863, the law on the subject now under discussion was "that a consignee cannot abandon damaged goods, and thereby discharge the liability of the shipper for freight," as has been decided by the Supreme Court in *Brown v. Clayton*, 12 Ga. 564, and one of the sources from which the commissioners appointed to prepare a code of the laws of this state were to seek the existing law was "the decisions of the Supreme Court." Are there any words in the section of the Code now under consideration which manifestly demand the conclusion that the codifiers intended to change the law as it previously existed? There is nothing in the section by which it can be contended that the doctrine announced in 12 Ga. 564, was changed, unless it be the following language: "This lien exists only when the carrier has complied with his contract as to transportation." It certainly cannot be successfully urged that it was ever at any time held that the carrier could not retain goods transported by it until the usual freight charges thereon should be paid. It is contended, in effect, that as the duty of the common carrier is to transport goods received for carriage safely and within a reasonable time, and as this duty, being imposed by law, becomes a part of the contract of carriage, even though not expressed therein, it follows that, if the goods have been damaged by the fault of the carrier before reaching their destination, then the carrier has not complied with his contract as to transportation, and no lien exists on the goods for freight. If this be true, then the carrier would have no lien for freight on the goods if they should be injured in transportation by the carrier's fault to any appreciable extent, as the contract to safely transport, in such a case, would not have been complied with. Now, how can it be logically contended that a carrier has a lien on goods transported which have been damaged by the carrier's fault in transit, when the freight on the goods amounts to more than the damage, but has no lien where the damage amounts to more than the freight? Could it be successfully urged, where the freight amounted to \$100 and the damage by

the carrier to the goods amounted to \$99, that the carrier would have a lien for the entire freight, but, if the damage amounted to \$101, then no lien would exist? As was ruled in *Brown v. Clayton*, 12 Ga. 575, 576: When the goods become greatly deteriorated on the voyage, the consignee is bound to take them and to pay the freight. "He cannot abandon the goods and thereby discharge the freight. \* \* \* This obligation to pay freight grows out of the contract. It is entire, and cannot be apportioned."

Code 1863, § 2045, declared that "the common carrier is bound not only for the safe transportation and delivery of goods, but also that the same be done without unreasonable delay"; and this section has been embodied in all the subsequent Codes. Therefore it is as much the duty of such carrier to transport goods without unreasonable delay as it is to safely transport them, and, as we have said, both of these duties being imposed by law, they became by implication a part of the contract of carriage. Civil Code 1895, § 2319 (Civil Code 1910, § 2773), is in this language: "Where a carrier fails to deliver goods in a reasonable time, the measure of damages is the difference between the market value at the time and place they should have been delivered and the time of actual delivery." This section is a codification of the rulings of this court in *Columbus & Western Railway v. Flournoy*, 75 Ga. 745, Atlanta, etc., R. Co. v. *Texas Grate Co.*, 81 Ga. 602, 9 S. E. 600, and *East Tennessee R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809, wherein it was decided what damages are recoverable against a common carrier for the breach of the contract of carriage in failing to deliver goods within a reasonable time. This measure of damages by delay is exclusive. If the delivery of goods has been unreasonably delayed by the carrier, the owner must sue for the damage prescribed in this section of the Code. He may not abandon the goods and sue for their value. The title to the goods in such a case remains in the owner. Mere delay in delivery does not amount to a conversion by the carrier. Where the goods have been merely damaged, and not destroyed or lost, by the fault of the carrier in transportation, and their identity has not been substantially destroyed, why does not the title to them still remain in the owner? How can such damage amount to a conversion of the goods by the carrier? Why can he abandon them in such a case and sue the carrier for their value, when he could not do so if damage had occurred to him by unreasonable delay in the delivery of the goods? If he must accept the goods when tendered and pay the freight when he has been damaged by an unreasonable delay in their delivery, why should he not be required to do the same thing when he has been damaged by injury to the goods caused by the fault of the carrier in transportation? No satisfactory reason occurs to us for making a dis-

inction in the respects indicated between the two cases. Of course I do not mean to hold that the same rule as to the measure of damages is applicable to the two cases; but what we urge is that, as the Code fixes the measure of damages in case of delay, no action will lie in such a case for the value of the goods, and that unreasonable delay in transportation and delivery is as much a breach of the contract of carriage as damage in transit, and that there can be no valid reason for allowing the owner to abandon the goods in the latter case and sue for their value, when the damage is more than the freight, when he cannot do this in the former case.

The section of the Code declaring that the carrier has a lien on the goods for the freight, and may retain the possession until it is paid, unless this right be waived, and that this lien exists only when the carrier has complied with his contract as to transportation, has never been directly construed by this court since its insertion in the first Code. In *Breed v. Mitchell*, 48 Ga. 533, it was held that "where goods arrive at their point of destination, and the packages or casks are, by the fault of the carrier, in a damaged condition, so that they cannot be handled without loss or further damage, it is the duty of the carrier to repair the casks, if possible, before the owner can be compelled to receive them; and if he refuses to do this the owner may refuse to receive the goods and may recover the value, and this without offering to pay the freights, since the carrier has not completed his undertaking." In the opinion, which was delivered by McCay, J., it was said that "if a carrier has, by his fault, so injured the cask in which a liquid is contained as that it cannot be moved without further damage, [then] he cannot compel the owner to take it in that condition. It is practically a total loss. If left as the carrier has by his fault made it, the loss will be total. This is not like the case of rotting goods, or even of damaged goods. Here the parties have provided a safe barrel to hold their oil, and the carrier has damaged that barrel so that to move it will cause the loss of the oil. It is capable of repair. \* \* \* As the carrier in this case had something more to do, the freight was not demandable." Here there is a clear intimation that where the goods shipped are not practically or totally lost on account of the fault of the carrier, but that they have been merely damaged, the freight, upon the tender of the goods to the owner, would be demandable.

In *Robinson v. Dover, etc., R. Co.*, 99 Ga. 480, 27 S. E. 713, there was one shipment of two carboys of acid. One of them was lost, and the railroad company refused to deliver the other until the freight should be paid on both. It appears from the record in that case on file in this court that the freight on both carboys amounted to \$2.90, and that the



value of each carboy was \$3, so that the damage by the loss of one carboy was more than the freight on both; yet it was said: "Upon the carboy of sulphuric acid actually delivered the carrier was entitled to a lien for the amount of freight charges due, but the lien for freight charges attaches only to the goods upon which the freight is actually due. The consignee tendered the amount of freight charges upon the article of freight actually transported by the defendant, and was therefore entitled to receive it; and inasmuch as no lien for freight due upon other goods attached to the specific article demanded, it could not lawfully withhold from the consignee the possession of such article.

\* \* \* As to the carboy lost, neither it nor the connecting line had completed the contract of carriage, and therefore no lien for freight could arise in favor of either company against the consignee for charges upon the goods which were lost." While the carrier has no lien for freight on goods lost in transportation, for the obvious reason that in such a case the contract of carriage was never completed, a different question arises when goods shipped have not been lost, but merely damaged, and delivery is tendered to the owner in a damaged condition. As this court, in *Breed v. Mitchell* and in *Robinson v. Dover, etc., R. Co.*, supra, has clearly intimated that there is a difference as to the right of a carrier to demand freight on lost goods and goods merely damaged, and as it was held in several decisions of this court, after the codification of the section declaring that the "lien exists only when the carrier has complied with his contract as to transportation," that the measure of damages for delay in transportation and delivery was the difference in the value of the goods at their destination when they should have been delivered and when they were actually delivered, which decisions were subsequently codified, and as there can be no good reason for a rule that would not allow the owner to sue for the value of the goods when he has been damaged by delay in their delivery, but would give him the right to sue for their value when they had been damaged in transit by the carrier's fault, I have reached the conclusion that the section of the Code first appearing as section 2049 in the Code of 1863, containing the language last above quoted, and which has been embodied in all subsequent Civil Codes, was merely a codification of the then existing law as it had been declared by the decision of the Supreme Court in *Brown v. Clayton*, 12 Ga. 564, since, for the reasons above stated, there is nothing in the section which manifestly demands a construction that would change the rule in force at the time that Code was adopted. It follows, therefore, that where property is injured in transportation through the negligence of the carrier, but the substantial identity of the property has not been destroyed by the damage, the owner, upon the ten-

der of the property at its destination by the carrier, cannot decline to pay the usual freight charges, refuse to accept the property, and sue for its value, though the damage may amount to more than the freight. Many good reasons occur to me in support of the soundness of this rule, but I deem it unnecessary to state them, as I am satisfied to rest my conclusion upon the decision of this court in *Brown v. Clayton*, supra, where it was stated that, while it was a much-mooted question, it was decided that the better opinion is that the consignee is bound to take the goods, though deteriorated on the voyage, and pay the freight, and that he could not abandon them to the carrier in discharge of the freight.

Counsel for the consignor, who is also the consignee, ask leave, in the event that the doctrine announced in *Brown v. Clayton*, 12 Ga. 564, was not changed by section 2049 of the Code of 1863, that such case be reviewed and overruled. After an examination of all the authorities I have been able to find on the subject, I am of the opinion that the correct rule was stated in that case, and that it should not be disturbed. The same rule prevails in England, as well as in some of the states of this Union. In 3 *Hutchinson on Carriers* (3d Ed.) § 1365, it is said: "As a general rule, the doctrine that, where goods are injured, the owner may abandon them as for a total loss and sue for their value, does not apply to contracts of affreightment [citing *Silverman v. Railway*, 51 La. Ann. 1785, 26 South. 447]. The fact, therefore, that the goods are injured upon the journey, through causes for which the carrier is responsible, does not in itself justify the consignee in refusing to receive them; but he must accept them and hold the carrier responsible for the injury [citing *Corso v. N. O., etc., R. Co.*, 48 La. Ann. 1286, 20 South. 752; *Brand v. Weir*, 27 Misc. Rep. 212, 57 N. Y. Supp. 731; *Gulf, etc., Ry. Co. v. Pitts*, 37 Tex. Civ. App. 212, 83 S. W. 727; *Gulf, etc., Ry. Co. v. Everett*, 37 Tex. Civ. App. 167, 83 S. W. 257]. Wherever, however, the damage is such that the entire value of the goods is destroyed, the consignee may refuse to receive them and sue the carrier for their value."

From what I have said, the question certified to this court by the Court of Appeals is answered in the negative. I am authorized to say that ATKINSON, J., concurs in the foregoing opinion.

LUMPKIN, J. I concur in the opinion that the question propounded by the Court of Appeals must be answered in the negative. The general trend of authority in the United States is to the effect that where goods are damaged by a common carrier in the course of transit, or where damages arise by reason of delay in transportation, the consignee has a right to demand delivery of the goods without paying the freight, pro-

vided the damages equal or exceed the amount of the freight charge. *Missouri Pacific Ry. Co. v. Peru-Van Zandt Implement Co.*, 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058, 117 Am. St. Rep. 468, 9 Am. & Eng. Ann. Cas. 790, 794, and note. In all, or nearly all, of the cases on this subject, the action involved was one of replevin or trover to recover the goods, or damages for conversion. No case has come to my attention where it has been held that the shipper or consignee could sue, not to recover the property or damages for its conversion, or for a breach of the contract of carriage, but on an implied contract on the part of the carrier to pay him the value of the goods. However it may be in other jurisdictions in the United States, I feel confident that no such action can be brought in this state, under Civil Code 1910, § 2741, which has been brought forward since the original Code of 1863, and the decision, from which it was evidently codified, in *Brown, Shipley & Co. v. Clayton*, 12 Ga. 564. In that case Clayton shipped certain cotton to Brown, Shipley & Co. That firm sold the cotton and sent to him an account of the sales. He was dissatisfied with it, and the suit resulted. One question discussed by the court was whether the consignees were negligent in not abandoning the consignment to the carrier for the freight. It was said that "the better opinion is that he cannot abandon the goods, and thereby discharge the freight." There was a contention that the consignees were negligent in not withholding the freight charge to an amount equivalent to the damage. In fact, the damage was less than the freight. But the decision was not placed upon that ground. In the eleventh headnote it was said: "The owners of the ship and the master are liable for loss, to the shipper or the consignee, happening to goods shipped as common carriers, except so far as that liability is restricted by the terms of the charter party, or bill of lading, or by statute. They have a lien upon the goods for freight, and may detain them for payment, whilst they, at the same time, have recourse personally upon the owner of the goods, unless the lien and the personal liability of the owner are waived or modified, in the contract of shipment." In the opinion it was said (page 575): "But a more serious point was made in the argument, which my duty constrains me to notice. The consignees cannot recover, say the counsel, or rather cannot be allowed to retain the amount of repairs done to the cotton, because they were guilty of negligence in not withholding freight to an equivalent sum. The answer to this proposition is that the law allows the carrier his freight when the goods are delivered, irrespective of damage. The consignee had no legal authority to withhold the freight as a satisfaction for damages. If he receives the goods, the law raises a promise to pay the freight; and

if he does not do so, both he and his principal are liable for it. If the carrier and the owners are liable for damage, the shipper and his consignee must resort to their action to recover them. \* \* \* In *Shields v. Davis* it was ruled that the consignee accepting goods could not defend himself from the payment of freight upon the ground that they were damaged by the master in the transportation. The master, said Gibbs, Chief Justice, is liable to a cross-action. 6 Taunton, 65." The volume cited is not accessible to me. But in 4 Camp. 119, I find what is apparently the same case, sub nomine *Sheels v. Davies*. In the report last cited it appears that the action was one of assumpsit for freight on account of a quantity of butter carried in a ship, and received by the defendant under the bill of lading. The defense proposed to be set up was that the butter had been injured, by bad stowage, to a degree much beyond the amount of the freight. It was stated that "Gibbs, C. J., held that the bad stowage of the goods was the subject of a cross-action, and did not affect the right to the freight." If this is the same case cited from 6 Taunton's Reports as authority in the *Brown, Shipley & Company Case*, it involved damages in excess of the freight charged, and this fact shows clearly that this court was not dealing with the case because the amount of the damage was less than the amount of the freight, but on the ground that the carrier had a right to retain the goods until the freight was paid, unless he waived such right, and that this could not be destroyed by claiming damages for delay or bad stowage. The decision followed what the court considered the English rule on that subject.

We need not stop to consider whether, under our statute in regard to recoupment, this rule has been so far modified as that, if the carrier should bring an action to recover the freight charge against the shipper or consignee, the defendant could recoup the amount of damages arising from failure of duty by the carrier. That is a different proposition from the question whether the carrier, upon every claim that unliquidated damages have arisen to the consignee greater in amount than the freight charges fixed by contract or law, must waive his lien, deliver the goods, and rely upon a suit against the consignee, or else, though he may honestly contest the existence or amount of such damage, become, in effect, a purchaser of the goods, under an implied contract to pay their value, should a jury ultimately find the question of damages against him. I am aware that in some of the American authorities above mentioned the argument is strongly presented that, if the amount of the damages exceeds the amount of the freight, the consignee should be allowed to claim that no freight is due, and that if no freight is due there can be no lien. If this argument be pursued to its logical end, however, and if a

consignee can pay or extinguish freight charges by setting up unliquidated damages equal to them, it would seem that if the damages amount to one-half or some other proportion of the freight charges, he ought to be allowed to extinguish such charges to that extent, tender the balance of the freight in money, and demand the delivery of the goods. If unliquidated damages are good as a payment or discharge in whole, apparently they should be good as a payment or discharge in part, if the balance is tendered in money. The suggestion is not met by the reply that the lien is entire, and not apportionable. If it is discharged in full in damages plus money, this is as much a discharge as if made by setting up damages alone. But no case has come to my attention which holds that this can be done. In view of the decision in the case of *Brown, Shipley & Co.*, the fact that our Code adopts the common law where not changed or modified, that the language of the Code is that the lien exists only when the carrier has complied with the contract "as to transportation," and of the other authorities cited in the opinion of the Chief Justice, I am of the opinion that the decision in the *Brown, Shipley & Co.* case is binding, that what was said on this subject was not obiter dictum, and that the ruling there made has not been changed by the Code. A request was made to review the case of *Brown, Shipley & Co.*, supra; but the requisite number of members of this court do not concur in the opinion that it should be reviewed and reversed, and, under the statute, it must stand.

EVANS, P. J., and HOLDEN, J. We concur that the question propounded by the Court of Appeals should be answered in the negative, but we are unable to give full concurrence to the reasoning of other members of the court by which they arrive at this conclusion. At common law the carrier was entitled to receive his freight, notwithstanding the goods may have been damaged in transit. This resulted from the application of the principle that unliquidated damages could not be set off against liquidated demands. But under the practice in this state, at least since the adoption of the first Code, the defendant was given the right "to have a deduction from the amount of the plaintiff's damages for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract," and such deductions were pleadable "in all actions ex contractu where from any reason the plaintiff under the same contract is in good conscience liable to the defendant." Code of 1863, §§ 2850, 2853. Subsequently, by the act of 1878, the plea of recoupment was enlarged, so that, if the damages of the defendant exceeded in amount those of the plaintiff, the defendant was allowed to recover the excess. The Eng-

lish rule that in a suit for freight the defendant cannot plead damages in reduction of the amount sought to be recovered, or have a judgment for the excess, if the damages exceed the freight, has been changed by our statute, and no reason occurs to us why a rule founded solely upon an artificial rule of pleading should be adhered to, when such rule has been abrogated or repudiated in this state. The right of the carrier to retain the goods depends upon his right to claim the freight. If the consignee owes no freight, then the carrier has no right to the possession of the goods. If the damage occasioned in the performance of the contract of transportation equals or exceeds the freight, then the carrier's lien for freight is lost, and he has no right to the possession of the goods; and an action of trover may be maintained for their recovery, without payment of freight. *Missouri Pacific Ry. Co. v. Peru-Van Zandt Implement Co.*, 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058, 117 Am. St. Rep. 468, 9 Am. & Eng. Ann. Cas. 790; *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350; *Moran v. Northern Pacific R. Co.*, 19 Wash. 266, 53 Pac. 49, 1101; *Boggs v. Martin*, 13 B. Mon. (Ky.) 239; *Cutting v. Grand Trunk R. Co.*, 13 Allen (Mass.) 381; *Miami Powder Co. v. Port Royal, etc., R. Co.*, 47 S. C. 324, 25 S. E. 153, 58 Am. St. Rep. 880. 1 Jones on Liens (2d Ed.) § 331. But it does not follow that, because the consignee or consignor may recover the goods in an action of trover, he is entitled to abandon them to the carrier and sue in assumpsit for their value. The right of the consignee to the possession of the goods, without the payment of freight, where the damage equals or exceeds the freight, is one thing; and the right of the consignee to abandon the goods under such circumstances and bring assumpsit for their value, based on a breach of the contract of carriage, is another thing. *Woodruff v. Zaban*, 133 Ga. 24, 65 S. E. 123, 134 Am. St. Rep. 186.

We do not think any point actually decided in *Brown, Shipley & Co. v. Clayton*, 12 Ga. 564, precludes an action of trover for the recovery of the goods without the payment of freight, where the damage to the goods caused by the carrier equals or exceeds the freight. That case concerned an action between a bailor and his factor, to whom goods had been consigned. The factor claimed credit for the freight which he had paid to the carrier, and the owner of the goods sought to have this claim disallowed because the goods had been damaged by the carrier in transit, contending that the factor was negligent in paying the freight without first adjusting the damage, which was less than the freight; and the ruling of the court was to the point that the factor was not so negligent, and was entitled to a credit to the extent of the freight which he had paid to the carrier.

(157 Ga. 42)

**VAN WINKLE v. HARRIS.****SAME v. PETTY.**

(Supreme Court of Georgia. Oct. 12, 1911.)

*(Syllabus by the Court.)***1. BROKERS (§ 94\*)—AUTHORITY—SCOPE AND EXTENT.**

Where an agent was "authorized and directed" by the owner of a described tract of land to "make sale" of it for \$5,200, "one thousand [dollars] of which was to be paid in cash," the agent under such authority did not have the right to bind the owner by a written contract with the plaintiff wherein it was provided: "This agreement is made subject to right of purchaser to investigate titles to the property and to decline to perform if titles of the vendor be legally insufficient and she fails to perfect the same within a reasonable time. \* \* \* Cash payment to be made when vendor complies with her obligation to make satisfactory showing as to title."

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 94.\*]

**2. BROKERS (§ 94\*)—AUTHORITY—SCOPE AND EXTENT.**

Where the owner of a tract of land employed an agent to find a purchaser for the land upon the "conditions that the purchase price would net" the owner \$5,000, of which \$1,000 "was to be paid cash and the balance to be paid at such time as would suit the purchaser, the time not to exceed five years, and the deferred payments to bear interest at seven per cent. (7%)" and directed the plaintiff to "close contract of sale upon the terms herein named," a written contract made by the agent, having in it the provisions quoted in the preceding note, was not one upon the terms upon which the agent was directed by the owner to close a contract with the purchaser.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 94.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Separate actions by J. L. Harris and by M. L. Petty against Mrs. Mary J. Van Winkle. Judgment for plaintiff in each case, and defendant brings error. Reversed.

In the first case stated, namely Van Winkle v. Harris, J. L. Harris (hereinafter called the plaintiff) brought suit against Mrs. Mary J. Van Winkle, plaintiff in error (hereinafter called the defendant), alleging that the defendant was the owner and in possession of a described tract of land or on before May 16, 1910. The second, third, and fourth paragraphs of the petition are as follows:

"(2) That some time prior to May 16, 1910, the said Mrs. Mary J. Van Winkle placed the above tract or parcel of land in the hands of one M. L. Petty, a real estate agent or broker, in the city of Atlanta, who is engaged in the business of selling property for people who may intrust their property to him for sale. And on or about May 16, 1910, the said M. L. Petty was authorized and directed by the defendant to make sale of said property to your petitioner at and for the sum of fifty-two hundred dollars (\$5,200.00), one thousand of which was to be paid in cash, and the balance to be divided in three install-

ments, of fourteen hundred dollars (\$1,400.00) each, payable, respectively, 24, 42, and 60 months after date, with interest at 7 per cent.; the said defendant then and there authorizing and instructing the said Petty to give to your petitioner such terms on the deferred payments, not exceeding five years, as petitioner might desire.

"(3) That on May 16, 1910, your petitioner agreed with said M. L. Petty, as agent for the defendant, to purchase said property at and for the sum of five thousand two hundred dollars (\$5,200.00), and entered into a written agreement with the said M. L. Petty for the purchase of said property on the day aforesaid, and paid to the said agent the sum of one hundred dollars (\$100.00) earnest money to be applied as a credit on the cash payment to be made as provided in said contract. A copy of said contract is as follows:

"Georgia, Fulton County. Memorandum of agreement between J. L. Harris (as purchaser) and Mrs. Mary J. Van Winkle (as vendor) respecting sale of property described below: This agreement is made subject to right of purchaser to investigate titles to the property, and to decline to perform if titles of the vendor be legally insufficient and she fails to perfect the same within a reasonable time. Subject-matter of sale: House and lot in the city of Atlanta known as #150 Auburn Ave. Terms: Purchase price, \$5,200. Cash payment, \$1,000.00. Balance to be divided into three installments, payable after date fixed for each payment as follows: (1) \$1,400 due 24 months after said date; (2) \$1,400 due 42 months after said date; and (3) \$1,400 due in 60 months, at 7% interest. Cash payment to be made when vendor complies with her obligation to make satisfactory showing as to title. Purchase-money notes for deferred payments to be given at same time, bearing interest from date at the rate of 7 per cent. per annum, falling due as indicated above, and payable at or before maturity. Special stipulations: I assent to the terms of the foregoing agreement. This 16th day of May, 1910. J. L. Harris (Purchaser). M. L. Petty, Agt. for (Vendor).

"Received from the purchaser, as earnest money, \$100.00, the same to be applied as a credit on the cash payment above provided for. This 16th day of May, 1910. M. L. Petty, Agent for the Vendor."

"(4) Your petitioner shows that he contracted for the purchase of said property in good faith, and believed he was paying a fair and reasonable valuation for the same, and that said M. L. Petty, as an agent for the defendant, was authorized by the defendant to make sale of said property to your petitioner upon the terms and conditions named in the foregoing written contract, and that the said Petty acted in good faith in the sale of said property to your petitioner,

and that said defendant was and is bound by the terms of said agreement to carry out the same with your petitioner."

The petition further alleged substantially as follows: Petty promised to procure from defendant the "title deeds" to the property and deliver them to the plaintiff, so that he could have the same examined and comply with the contract. On application by Petty to defendant, she refused to furnish the deeds for examination and "repudiated the contract, and stated that she had received a better offer for the property. And petitioner, after making repeated efforts to get title deeds to have the same examined and to get the defendant to carry out her contract, and failing in each of said efforts, finally had said titles examined without being furnished with the title deeds. Your petitioner shows that on July 12, 1910, your petitioner presented the defendant his three promissory notes, dated July 12, 1910, and due, respectively, on the 12th day of July, 1912, on the 12th day of January, 1914, and on the 12th day of July, 1915, for the sum of \$1,400.00 each, payable to the order of said Mrs. Mary J. Van Winkle, signed by your petitioner, copies of said notes being hereto attached and marked Exhibits A, B, and C, and at the same time your petitioner tendered to said defendant the sum of one thousand dollars (\$1,000.00), the same being a part in cash money, and the balance in checks, your petitioner offering to have the checks cashed and deliver to her the money if she preferred, and at the same time your petitioner presented to the defendant a bond for title, a copy of which is hereto attached marked 'D,' and requested the defendant to accept the money, checks, and notes in payment for said land and to execute the bond for title to your petitioner, it being usual and customary, in all cases where there is a partial payment for land and notes given for the balance, for the vendor to make to the vendee a bond for title, retaining the title to the land as security for the debt. Your petitioner further shows that the defendant, upon the tender of the money, notes, checks, and the bond for title to be signed by her, repudiated the contract of her said agent, stated that she had not authorized him to make sale of her land, that she had been offered more money for the land since the time said Petty claimed to have made the trade with petitioner, to wit, the sum of six thousand dollars (\$6,000.00), and that she would not be bound by any contract made by the said Petty, as agent, with your petitioner. The petitioner's attorney then and there asked her if she desired petitioner to have the checks cashed and present her with the entire one thousand dollars (\$1,000.00) in cash. The defendant said, 'No.' She would not accept the money, and would not sign the bond for title, and would not be bound by the contract made by Petty with your petitioner." Defendant has a good title to the property

and is able to comply with the terms of the contract. "She is acting in bad faith, and that her only reason for not carrying out said contract is the fact that some one offered her more money for the property than the amount she had agreed to receive from your petitioner, before it was possible for your petitioner to have titles examined and the trade consummated."

Attached to the petition was a copy of the bond for title in the usual form and copies of the notes referred to. The notes were payable "on or before" the dates referred to in the petition. The plaintiff prayed that the defendant be required to specifically perform the contract; that she be decreed to execute the bond for titles, or such other bond for titles "as may be reasonable and just"; that she be required to receive the \$1,000 and accept the notes tendered, or such other notes as may be proper in form and substance to carry out the contract; and that the title to the property be decreed to be in the plaintiff upon final payment of all the purchase money. The plaintiff amended the petition, "by adding the words 'by parol' after the word 'authorized' in paragraph 2, and the same words after the word 'directed' in the same paragraph." To the order of the court overruling the defendant's general demurrer to the petition, the defendant excepted.

The facts in the other case will be stated in the second division of the opinion.

L. R. Ray, for plaintiff in error. Simmons & Simmons, for defendants in error.

HOLDEN, J. (after stating the facts as above). [1] The defendant in error, J. L. Harris, filed a petition against the plaintiff in error, Mrs. M. J. Van Winkle, to require her to specifically perform a contract alleged to have been made by her through her agent, M. L. Petty. To the order of the court overruling the general demurrer to the petition, Mrs. Van Winkle excepted. The allegations in the second paragraph of the petition state that Petty was appointed the agent of Mrs. Van Winkle to sell the property, and set forth in detail the terms of the contract of sale he was authorized to make as her agent. The third paragraph, among other things, sets forth a copy of the contract made by Petty, as agent of Mrs. Van Winkle, with Harris, the purchaser of the property. The fourth paragraph alleges that "said M. L. Petty, as an agent for the defendant, was authorized by the defendant to make sale of said property to your petitioner upon the terms and conditions named in the foregoing written contract, and that the said Petty acted in good faith in the sale of said property to your petitioner." The allegations quoted should be construed as the conclusion of the pleader that, under the authority set forth in paragraph 2 of the petition, Petty was authorized to sell the property upon the terms and conditions set forth in the written contract. Whether pa-

rol authority given an agent to sell land of another is sufficient to authorize him to enter into a written contract binding on the latter need not be considered. If the parol authority given Petty by Mrs. Van Winkle was sufficient to authorize the former to make a written contract for the sale of the land binding on the latter, we do not think the petition sets forth a cause of action, and should have been dismissed on demurrer. Paragraph 2 of the petition sets forth the terms of the contract of sale Petty, as the agent of Mrs. Van Winkle, was authorized by the latter to make. It is therein alleged that she authorized Petty to make sale of the property for \$5,200, "one thousand of which was to be paid in cash." The written contract made by Petty, as the agent of Mrs. Van Winkle, with Harris, provided: "This agreement is made subject to right of purchaser to investigate titles to the property and to decline to perform if titles of the vendor be legally insufficient and she fails to perfect the same within a reasonable time. \* \* \* Cash payment to be made when vendor complies with her obligation to make satisfactory showing as to title." In the contract of sale Petty was authorized to make, \$1,000 was to be paid by the purchaser *cash*, and not to be paid "when vendor complies with her obligation to make satisfactory showing as to title." Petty had no authority to impose on Mrs. Van Winkle any obligation to make any "showing" as to her title, and she gave him no authority to make the payment of the \$1,000 conditioned upon her making "satisfactory showing as to title." Nor did she give him authority to make an agreement respecting the sale of the property "subject to right of purchaser to investigate titles to the property, and to decline to perform if the titles of the vendor be legally insufficient and she fails to perfect the same within a reasonable time." When Petty made the contract only \$100 was paid, the balance of the \$1,000 being tendered nearly two months thereafter. Petty had no authority to make a contract for the sale of the property unless \$1,000 of the purchase money was paid *cash*, and he had no authority to make a contract providing for the payment of the whole, or a part of it, upon conditions, or at a future time without conditions. *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855; *Arnett v. Tuller*, 134 Ga. 609, 68 S. E. 330; *Emery v. Atlanta Exchange*, 88 Ga. 321, 326, 14 S. E. 556; *Corcoran v. White*, 117 Ill. 118, 7 N. E. 525, 57 Am. St. Rep. 858; 9 Cyc. 267. The contract made with Harris by Petty as agent of Mrs. Van Winkle not being one Petty was authorized to make, the latter had a right to repudiate it and to refuse to comply with it. Moreover, under the authority given Petty, the deferred payments should have been payable 24, 42, and 60 months after date; whereas the notes provided for in the contract were to be payable "at or before ma-

turity," and the notes tendered were payable "on or before" maturity, thereby giving the right to Harris to pay the note before maturity. If it be conceded that the parol authority of Petty authorized him to make a written contract for the sale of the land of Mrs. Van Winkle binding on her, the written contract he made was not binding on her, as it was not the one he was authorized by parol to make, and the court erred in overruling the general demurrer.

[2] 2. In the second case stated, namely, *Van Winkle v. Petty*, the latter (hereinafter called the plaintiff) brought suit against the former (hereinafter called the defendant), making substantially the following allegations: The defendant owned a described tract of land on May 16, 1910. At that time the plaintiff was a real estate broker engaged in the business of negotiating and effecting sales of real estate. "That on or before the 16th day of May, 1910, the defendant employed the plaintiff to find a purchaser for the above-described property upon the following conditions: That the purchase price would net the defendant \$5,000.00, of which \$1,000.00 was to be paid cash and the balance to be paid at such time as would suit the purchaser, the time not to exceed five years, and the deferred payments to bear interest at seven per cent. (7%), and directed the plaintiff to close contract of sale upon the terms herein named. That the plaintiff, in pursuance of the agreement above mentioned, procured a purchaser in the person of one J. L. Harris, who contracted to purchase the above-described property. A copy of this contract is attached to this petition and marked 'Exhibit A' and made a part thereof. That the said Harris was able and willing to purchase the said property, and that he made a legal tender of the \$1,000.00 required to be paid cash, and presented the notes for the deferred payments and demanded a bond for title, and was in every way bona fide ready to carry out the contract. That the plaintiff was to be paid for his services in bringing the purchaser in touch with the defendant and negotiating said sale. That there was no stipulation between the parties as to what the commission of the plaintiff should be," but there is a universal custom of brokers, known to the defendant, to charge commissions on a specified basis, which in this case would amount to \$180, which was a reasonable value of his services, and for which he prayed judgment. The plaintiff amended his petition by adding the word "orally" after the word "defendant," where it first appears in the quotation from the petition. He further amended the petition by attaching a copy of the notes referred to therein, which were tendered by Harris, and by adding that the \$1,000 and the notes were tendered by Harris on July 12, 1910. The notes and contract referred to in the petition were in every respect like the copy

of the contract set out in the petition in the case referred to in the preceding division of the opinion and the copies of the notes attached thereto. To the order of the court overruling her general demurrer to the petition Mrs. Van Winkle excepted.

According to the allegations of paragraph 4 of the petition, Petty was not only employed to find a purchaser for the property at a price which would net the owner \$5,000, of which \$1,000 was to be paid cash, but he was to "close contract of sale upon" certain terms, one of which was that \$1,000 of the purchase money was to be paid cash. As hereinbefore demonstrated, the contract he made was one wherein the \$1,000 was not to be paid cash, and it was not therefore such a contract as he was authorized and "directed" to make. The written contract had provisions Petty was not authorized to make, two of which are the provisions first copied in this opinion. Petty having violated his instructions and not having "closed contract of sale upon the terms" upon which he was authorized and "directed" to close one, he earned no commissions, and the court erred in not dismissing the petition on general demurrer thereto. This is true, though Harris, after the written contract between him and Petty was signed, offered the \$1,000, as the duty of Petty, under his employment, was not simply to find a purchaser who would pay \$1,000 cash, but also "to close contract of sale upon" certain terms, one of which was the payment of \$1,000 cash, and no such contract was closed. But if it can be said that any "contract of sale" was closed by Petty, the contract closed by him was entirely different from one providing for the payment of \$1,000 cash. The instructions to Petty evidently meant that he was not only to find a purchaser, but was to make a contract with the latter binding on him to pay the \$1,000 cash. No contract with Harris was ever closed binding on him to pay \$1,000 cash. The written contract was made May 16th, and the \$1,000 was tendered July 12th. The petition should have been dismissed on general demurrer.

Judgment reversed in both cases. All the Justices concur, except BECK, J., absent.

(136 Ga. 869)

SOUTHERN PRINTING CO. v. POTTER.  
(Supreme Court of Georgia. Sept. 26, 1911.)

(Syllabus by the Court.)

SALES (§ 483\*)—CONDITIONAL SALES—ASSIGNMENT BY PURCHASER—EFFECT.

The assignee of a bond for title for the conveyance of certain personal property to the obligee when the latter has paid all the notes given for the purchase money as they might fall due upon the respective dates of their maturity, it being provided in the bond that the vendor should have the right to retake possession of the property upon default in payment of any one of the notes, could not maintain

suit against the obligor, who had taken possession of the property upon default in payment of the notes by the obligee according to the terms of the contract of sale, to recover the amount of a loan to the obligee in the bond, although such assignee had taken the assignment of the bond to secure the payment of the loan, and the loan was made with the knowledge of the obligor for the purpose of enabling the payee to meet one of the partial payment notes at the time of its maturity.

(a) Conceding that the assignment of the bond for title would operate as a partial assignment of any amount which the vendor, who had retaken possession of the property under circumstances which rendered such retaking a rescission of the contract of sale, would owe to the vendee on account of payments made by the latter under the contract of sale after making proper deductions from the sum paid by the vendee for rent, etc., a partial assignment is enforceable only in equity in a suit to which the vendor and the assignor and the assignee are all parties.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 483.\*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by Mrs. D. L. Potter against the Southern Printing Company. Judgment for plaintiff, and defendant brings error. Reversed.

H. J. McBride, for plaintiff in error. M. J. Head, for defendant in error.

BECK, J. Mrs. D. L. Potter brought suit against the Southern Printing Company, alleging that the defendant is indebted to her in the sum of \$350 by reason of the following facts: The Southern Printing Company sold to one Burd a newspaper plant and printing outfit, taking a cash payment and notes for the balance, and executing to Burd a bond for title to the property sold. In order to pay off one of the notes, Burd, "at the instance of said printing company," secured a loan of \$350 from petitioner's husband, and paid the same over to the printing company. Her husband took a transfer of the bond for title conditioned to secure this loan, and the printing company "had full knowledge of said loan and transfer of said bond for title." It was stipulated in the bond that Burd should not incur the property without the consent of the printing company. Upon Burd's default in paying one of the notes at maturity, the printing company sued out an action of bail trover against him, and, he failing to replevy the property, the printing company took charge of and sold the same, "thereby depriving petitioner of her security"; it being alleged that petitioner's husband, to whom the transfer of the bond for title had been made, has since died, and petitioner was his sole heir and legatee. The defendant demurred on various grounds, among them that the petition did not set forth a cause of action. To the overruling of this ground of demurrer the defendant excepted.

We do not perceive upon what ground the plaintiff's cause could find standing in a court of law. The defendant had not been guilty of the commission of any tort against the plaintiff. The mere assignment of the bond for title executed by the vendor of the property in controversy to the vendee could scarcely be held to create a lien in favor of the plaintiff against the maker of the bond. Even if the assignment of such a bond as this could ever have the effect of creating a lien in favor of the assignee of the bond, it could hardly do so in the present case, when the bond itself contained an express stipulation that the obligee therein should not create an incumbrance upon the property. The vendor of the property, in taking possession of the same, acted within his rights as stipulated in the bond. The property was taken by the vendor on May 3, 1909, and there had long been default, as appears from the allegations of the petition, in the payment of a part of the note due March 1, 1908.

Nor could the plaintiff maintain this action upon the ground that there was any implied contract on the part of the vendor to pay to her the indebtedness of the purchaser of the property involved in this controversy. It may be that the seizure of the property by the vendor amounted to a rescission by it of the contract of sale to Burd. And, conceding that this is true, then the printing company, the vendor, would be under obligation to repay to the vendee the money which the latter had paid to the printing company, or such portion thereof, if any, as might be due the vendee on a fair settlement between the vendor and the vendee, in which settlement account could be taken of the value of the hire or rent of the property, and any other matter proper in such an accounting. *Wilson v. Burks*, 71 Ga. 862; *Dukes v. Baugh*, 91 Ga. 33, 16 S. E. 219. But the implied contract to restore the status upon a rescission of a contract of sale was a contract affecting the rights of the vendor and the vendee, and not the assignee of the bond. Certainly the assignment of the bond to the plaintiff in the court below could not be treated as an assignment of the entire amount which would be due from the vendor to the vendee after the rescission of the contract of sale, if it should appear that the vendor, upon a settlement between him and his vendee, would be indebted to the latter in a larger sum than the amount of the loan from Potter, to secure which it is alleged the bond was assigned. If the transfer or assignment of the bond for title can be treated as having the effect of assigning only so much of the claim arising in favor of Burd, upon rescission of the contract of sale by the vendors, as would satisfy the obligation of Burd which is evidenced by the note executed to Potter, then Potter—or Mrs. Potter, who is the plaintiff, and who claims to stand in the place of her

husband relatively to the note—would have the right only of an assignee of a portion of a debt and be entitled to the remedies only which could be enforced by the holder of a partial assignment. And while such an assignment is enforceable in equity, it must be enforced in an action to which the assignor is before the court, as well as the assignee and the debtor to the assignor. If the printing company could be proceeded against in a suit like that which is now before the court, and a recovery could be had against it of a part of the amount which it might be shown it owes to Burd, subsequently Burd, or some other assignee of Burd of another part of the indebtedness, might institute other proceedings. Under the law a debtor cannot be subjected to the annoyance of several suits growing out of a single obligation to pay. Conceding that the assignment of the bond for title referred to above operated as an assignment pro tanto of the amount which the printing company should be bound to pay Burd after having rescinded the contract of sale, the only remedy which the plaintiff in the court below had was by a suit in equity, to which Burd as well as the printing company should be made parties, so that the rights and conflicting claims of all can be settled in one suit. See *Rivers v. Wright*, 117 Ga. 81, 43 S. E. 499.

It follows, from what we have said above, that the general demurrer to the petition in this case should have been sustained, and the court erred in refusing to sustain it.

Judgment reversed. All the Justices concur.

(157 Ga. 51)

#### SHEARER v. SHEARER (two cases).

(Supreme Court of Georgia. Oct. 12, 1911.)

(Syllabus by the Court.)

#### 1. ASSIGNMENTS (§ 30\*)—BILLS AND NOTES (§ 310\*)—VALIDITY—PARTIAL ASSIGNMENTS.

The petition, among others, made substantially the following allegations: Prior to August, 1910, the plaintiff had in hand for collection notes in which A. had an interest amounting to more than \$90. On August 12, 1910, A. gave an order on the plaintiff to B., who brought suit at law against the plaintiff on the order, wherein the plaintiff was directed to pay to B. \$90 of the amount collected, and wherein there was made to B. an assignment of the interest of A. in the notes to the extent of \$90. After the order was given, and while plaintiff had in hand money collected on the notes, A. directed the plaintiff not to pay the order for reasons specified. Plaintiff prayed that A. and B. be required to interplead and for injunction. *Held*, a partial assignment of one's interest in a promissory note is not binding on the maker of the note, unless accepted by the latter, who may ignore such assignment and pay the assignor, where there is no suit in equity to which all persons interested are parties. 7 Cyc. 812; 4 Am. & Eng. Enc. of Law, 278 (a). Nor is a partial assignment of one's interest in a fund in the hands of another binding on the latter, unless accepted by him, who may deal with the assignor as if no such



assignment had been made, in the absence of the institution of a suit of the character above indicated. 2 Am. & Eng. Enc. of Law, 1089; 3 Page on Contracts, § 1265; Rivers v. Wright, 117 Ga. 81, 43 S. E. 499; Southern Printing Co. v. Potter, 72 S. E. 427, decided September 26, 1911.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 55-60; Dec. Dig. § 30;\* Bills and Notes, Dec. Dig. § 310.\*]

**2. ASSIGNMENTS (§ 126\*)—RIGHTS OF PARTIES—ACTION TO ENFORCE.**

The plaintiff had a complete defense to the suit pending against him, brought by the payee of the order on the plaintiff.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 126.\*]

**3. INJUNCTION (§ 26\*)—INTERPLEADER (§ 12\*)—RIGHT OF ACTION—EXISTENCE OF CONTROVERSY.**

The above principles of law are well settled, and the allegations of the petition to require A. and B. to interplead did not entitle plaintiff in such petition to an injunction or an order for interpleader.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24-61; Dec. Dig. § 26;\* Interpleader, Dec. Dig. § 12.\*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between Mrs. M. V. Shearer and F. H. Shearer. From the judgment, both parties bring error. Judgment on main bill of exceptions reversed, and judgment on cross bill of exceptions affirmed.

Thomas & King, for plaintiff in error. A. L. Richards and Etheridge & Etheridge, for defendant in error.

HOLDEN, J. Judgment on main bill of exceptions reversed. Judgment on cross bill of exceptions affirmed. All the Justices concur, except BECK, J., absent.

(9 Ga. App. 857)

**PHILLIPS v. STATE. (No. 8,495.)**

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

**INTOXICATING LIQUORS (§ 236\*)—CRIMINAL LAW (§ 1172\*)—ILLEGAL POSSESSION—INSTRUCTIONS.**

The evidence authorized the verdict of guilty. While the charge of the judge, to the effect that if the defendant rented a portion of the store to another person, and knew that whisky was being kept there, he would be guilty, is not abstractly a correct statement of the law, the undisputed testimony so incontrovertibly supports the inference of the defendant's guilt that the error is harmless.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236;\* Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

John W. Phillips was convicted of violating the prohibitory law, and brings error. Affirmed.

Phillips was convicted of a violation of the state prohibition law in keeping on hand

at his place of business liquor. The evidence for the state shows that the police officers entered Phillips' store at 63 South Broad street one afternoon with a search warrant, and found in the rear of the store one full barrel and one half barrel of quart bottles of whisky, and also a portion of a barrel of pint bottles of whisky. There were also about two barrels of empty bottles of the same kind just outside the store, and on the window sill some empty whisky glasses and some spoons. The defense relied on was that the particular portion of the store in which the whisky was found had been sublet by Phillips to one J. H. Payne, who conducted a fish and oyster business therein. The portion thus sublet to Payne was a space about 12 by 14 feet in area, being from the rear of the store up to the fifth post. At this point there was a sign reading "Office J. H. Payne, Fish & Oyster Dealer." This sign was written on a piece of pasteboard from the top of a whisky barrel. The uncontradicted testimony is to the effect that the sole stock of merchandise carried by Payne consisted of the barrels containing whisky referred to above, there being no fish or oysters in the store. There was no partition. There is evidence of a sale of whisky by Payne at his house, but no evidence of a sale at the store by either Payne or Phillips. There was an entry on Phillips' cash book denominated as \$10 rent from Payne. The judge charged the jury that if they believed from the evidence that the whisky was kept, with knowledge of Phillips, in the portion of the store rented to Payne, Phillips would be guilty.

Hewlett & Dennis and Malvern Hill, for plaintiff in error. H. M. Dorsey, Sol. Gen., and Lowry Arnold, Sol., for the State.

RUSSELL, J. We think that the evidence was sufficient to authorize the jury to convict, and the judge's charge referred to in the statement of facts was not prejudicial to the defendant, even though not correct as an abstract proposition of law. In view of the issues made by the evidence and the admissions of the defendant, we think that the renting of a portion of the store under the circumstances we have stated, and with knowledge that whisky was being kept there, would make Phillips particeps criminis. The landlord must hide his knowledge behind something more substantial than a sign made from a piece of pasteboard taken from the top of a whisky barrel, advertising the sale of fish and oysters consisting of quart and pint bottles of whisky. A landlord cannot, under the circumstances shown in this case, say that he did not aid and abet the crime which he knew was being committed by his tenant under his very nose.

Judgment affirmed.

POWELL, J. (specially concurring). My Associates vote for an affirmance on the ground that, while there was error, it was harmless. I vote for the same judgment on the ground that there was no error. The question is as to how far the proprietor of a place of business absolves himself from responsibility as to the keeping of intoxicating liquors in the room where the business is carried on by letting a definite portion of the space to another. We all agree that if the leasing of the space was a mere subterfuge, or was consummated with knowledge that the space would be used for the keeping of liquors, the lessor and the lessee would both be guilty of violating the law. I go further. In my opinion, if one having possession and control of a room, and occupying it as his place of business, lets space therein to another (no matter how free from any subterfuge or illegal intention the letting of the space may be at the time it is made), and thereafter the lessee of the space puts liquor therein, and the proprietor of the business knows of it and allows it, he is guilty of violating the statute. My Associates think that, if the lease of the space is made in good faith, the landlord who operates the business so far loses control of the space as to exempt him from criminal responsibility for such uses as the lessee may make of it.

Penal Code 1910, § 426 (the general prohibition law), among other things, makes it unlawful for any and all persons to "keep on hand at their place of business" any intoxicating liquors. This has been given a settled construction to the effect that the proprietor of the business must not only personally refrain from keeping liquors in the place of business, but he must not knowingly allow others to keep them there. We all agree to this as a general proposition. Now put this case: A. has a room in which he conducts a business. His goods and wares do not fill the whole room. In the rear is a space, say 20 by 25 feet in size. He stores liquors back there. We all agree that he violates the law. Now, say that, instead of personally storing the liquors in this unused space, he permits a friend to store them there, without actually leasing to him the space. We all agree that he violates the law. Again, say that, instead of permitting this friend to put the liquors there, he leases the space to this friend, and the latter uses his leased space to store liquors. We find all the physical conditions the same as in the previously stated propositions (the one room with a business conducted therein, and with the space in it, so far as not used for that business, used for the storage of liquors—manifestly one of those physical situations which the statute was designed to prevent), and yet my Associates seem to hold that unless these conditions come about through a lease made as a sham, or made for the purpose of allowing this condition to come about, no law is violated. The lease,

a mere private contract between the parties, has converted a physical situation normally abhorrent to a public criminal statute into one of innocence. The lessee (the storer of the liquors) cannot be indicted, for the mere storing of liquors is not a business, and his keeping is not a keeping on hand at his place of business. The lessor cannot be indicted, because by leasing the space he has lost control over it, and hence is not responsible for the keeping of the liquors at his place of business. Now, I do not believe that it is this easy to avoid a criminal statute. In my opinion he is just as guilty in the last case as in the first, if he knowingly permits the lessee of the space to keep intoxicating liquors in it. The position of my Associates is, in effect, that the making of the lease affects the situation and changes the operation of the law. My position is that the situation affects the lease, and the law changes its operation.

I realize that the owner of the business must have the power to prevent the keeping of the liquors in the leased space, before he can rightfully be held criminally accountable for their being kept there. If the leasing of the space gives to the lessee such exclusive control over it that, if the lessor should enter upon it and put the liquors out, he would be guilty of a trespass, either civil or criminal, then the law will not hold the owner of the business (the lessor) criminally responsible because the lessee, thus holding the exclusive control, keeps the liquors there. But does the making of the lease give the lessee any such exclusive control as to bring about any such result? Can a lease be made which will have this effect? I say, No. The law will not let the owner of a room in which he himself conducts a business make such a contract as to space in that room as that the lessee of the space may use it in such a way as to bring about a condition which is directly repugnant to the legislative object and policy, as expressed in a public statute. Even if the minds of the parties are free from any thought or contemplation of such a condition at the time the contract is made, so that the contract as made is silent on this subject, the mind of the law, so to speak, is still upon it, and writes into the contract an implied exception; the exception being that this space in this room which is used as a place of business must not be used for the keeping of liquors or for the bringing about of any other situation repugnant to the policy of the law. So that when space in a business room is thus let out the conditions are these: If the parties expressly contract that it may be used for the storage of liquors, the contract is void, and the proprietor of the premises is guilty of violating the law (the proposition as to which we are all agreed). If the parties expressly contract that it shall not be used for the storage of liquors, and the lessee nevertheless so uses

it, the lessor, as a matter of course, may remove the liquors without any trespass; and if they are, under these circumstances, kept there with the lessor's knowledge, they are kept there by his acquiescence and implied consent. Hence he violates the law. If the contract is silent on the subject, the law writes in the exception against the keeping of the liquors in the room where the business is conducted, and the lessor would be equally exempt from an imputation of trespass in removing the liquors, and consequently equally guilty of violating the law if he acquiesces in their remaining there.

There is nothing novel in the proposition that the law will not permit the proprietor of a business so to let out space in his room as that he cannot still exercise such general control over the premises as is necessary to the full observance of all police regulations that attend upon the conduct of that business. For example, under the statute against keeping open a tippling house on the Sabbath, if the proprietor of a barroom should let space in his room to a druggist (who could lawfully open up and sell on Sunday), he could not, when the doors were found open on the Sabbath, excuse himself from liability by saying that they were opened in order to allow the druggist access. It is common to speak of the transaction by which the owner of a room, in which he conducts a business, contracts to allow another to occupy space therein for some purpose as a lease, or as a contract of tenancy. For many purposes it is so, but not for all purposes. It is merely a concession in the nature of a tenancy, and is subject to limitations and implications which do not attend an ordinary tenancy. Such arrangements are not so common in this state as they are in some other parts of the country, where the courts have been more often called upon to define the status of the parties. See Underhill on Landlord and Tenant, §§ 193, 198. The concessioner takes space in a room or building already devoted to business purposes, and from this circumstance the law readily implies limitations upon his occupancy, not to be implied in cases of ordinary tenancy. I think that my Associates fail to see the importance of distinguishing between the case of one who lets out an entire room or building, and one who lets out a mere concession of space in a room already devoted to a business. One who lets out a building or room with knowledge, that it is to be used for the purpose of violating the law does, as my Associates hold, become an accomplice of him who uses it for his unlawful practices; and in such cases knowledge (or such connivance as to be an equivalent of knowledge) is an ingredient of the landlord's offense.

This rule has often been applied to statutes against maintaining places for the sale of in-

toxicating liquors, in other states as well as our own. See, for example, *Commonwealth v. Hayes*, 167 Mass. 176, 45 N. E. 82; also *Commonwealth v. Churchill*, 136 Mass. 148 (noticing in this case, however, that the conclusion reached as to the manner in which the proprietor of the building should be indicted does not hold in this state, when all standing in any accessorial relation to a statutory misdemeanor may be indicted as principals). See, also, *State v. Denton*, 154 N. C. 641, 70 S. E. 839, holding that where the defendant knowingly permitted another to sell liquor in his (the defendant's) house, even though on only a single occasion, the defendant could be convicted as if he himself had sold the liquor, because one who permits liquor to be sold in his house, having the power to prevent it if he would, is an aider and abetter of the seller. But these cases, sound as they are, do not, in my judgment, state the full rule as applied to cases such as the one now before us. In my opinion, no lease or concession of space in a room used as a place of business can be made in such a way as that the concessioner can keep liquors in the space granted, with the knowledge of the proprietor, without rendering the latter subject to the penalties of the law which forbids a person from keeping liquors on hand at his place of business

(9 Ga. App. 857)

**PHILLIPS v. CITY OF ATLANTA.**  
(No. 3,494.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

**ILLEGALLY KEEPING WHISKY.**

The evidence was sufficient to authorize the inference that the whisky was kept for the purpose of illegal sale.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

John W. Phillips was convicted of keeping whisky for illegal purposes, and brings error. Affirmed.

Hewlett & Dennis and Malvern Hill, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

PER CURIAM. Judgment affirmed.

(9 Ga. App. 878)

**DUNCAN v. STATE.** (No. 3,652.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§§ 763, 764\*)—INSTRUCTIONS—INVASION OF PROVINCE OF JURY.**

On the trial of an indictment for assault with intent to murder, the judge, referring to the statutory offense of shooting at another, used the following language: "If you find such a verdict, the form of that verdict should be, 'We, the jury, find the defendant guilty of the offense of shooting at another not in his own

defense,' or under other circumstances of justification according to the principles of the Code. If you find him guilty of that offense, and desire to return such a verdict, and are at a loss to recall the language which the court has given you which is proper to clothe the verdict with, you may, instead of a portion of that language, use the words, 'We, the jury, find the defendant guilty of unlawfully shooting at another, or of shooting at another unlawfully,' and that would be a verdict which would stand in law." The last paragraph of this charge is objected to on the ground that it was an intimation by the court that sufficient evidence had been produced to warrant a verdict for the offense of shooting at another. *Held*, that the excerpt is not justly subject to the objection urged against it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764.\*]

### 2. CRIMINAL LAW (§ 939\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

There was no abuse of discretion in refusing to grant a new trial on the ground of alleged newly discovered evidence, since the affidavit of the witness relied upon to give such evidence clearly shows that it was not in fact newly discovered, but could have been procured on the first trial by the exercise of ordinary diligence. Besides, it was merely cumulative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.\*]

### 3. SUFFICIENCY OF EVIDENCE—NO ERROR.

No error of law appears, and the evidence supports the verdict.

Error from Superior Court, Madison County; D. D. Meadow, Judge.

Asa Duncan was convicted of crime, and he brings error. Affirmed.

Adams & Brown and J. E. Gordon, for plaintiff in error. Thos. J. Brown, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(9 Ga. App. 876)

GREENWOOD v. STATE (No. 3,665.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

#### (Syllabus by the Court.)

### 1. ASSAULT AND BATTERY (§ 57\*)—CRIMINAL PROSECUTION—INSTRUCTION.

It is not error for the court to instruct the jury, as to the statutory offense of shooting at another, not in self-defense or under other circumstances of justification, that the state need not show either malice or an intent to kill.

[Ed. Note.—For other cases, see Assault and Battery, Dec. Dig. § 57.\*]

### 2. CRIMINAL LAW (§ 822\*)—TRIAL—INSTRUCTION—CONSTRUCTION AS A WHOLE.

The other charge complained of was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995; Dec. Dig. § 822.\*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Albert Greenwood was convicted of the statutory offense of shooting at another, and brings error. Affirmed.

Robt. L. Colding, for plaintiff in error. Anton P. Wright and Walter C. Hartridge, Sol. Gen., for the State.

POWELL, J. [1] 1. The instruction dealt with in the first paragraph of the syllabus is as follows: "In considering the offense of shooting at another, it is not necessary to show either malice or the specific intent to kill. It would make no difference, if the defendant shot at the prosecutor, not in his own defense or under circumstances of justification, according to the principles of the Code, with what intent he shot him—whether to kill him or not; and it would make no difference whether he had malice or not."

[2] 2. The other assignments of error complained of are excerpts from the following instruction, which, however, should be considered as a whole for a proper understanding of it: "If the assault made upon him, if you find one was made, did not amount to a felony, but was an assault less than a felony, such as an assault and battery, then he would not have the right to shoot at another, either as a defense for the offense of assault with intent to murder, if you find that element is in it, or as a defense for the offense of shooting at another not in his own defense. If an assault was made upon him, although it was a bare assault, and did not amount to a felony, it would reduce the offense, if one has been committed by the defendant, from assault with intent to murder to shooting at another; but it would not justify him in using a deadly weapon—shooting a pistol. \* \* \* If you find that he shot after an assault had been made upon him, and that assault amounted to a felony, then he would have the right to shoot, and he would be guilty of nothing. If you find that the assault made upon him was less than a felony—assault and battery—then that would reduce the offense, if he is otherwise guilty of one, from assault with intent to murder to shooting at another; but it would not justify shooting at another if it was a bare assault. If you find, however, that the assault made upon him amounted to a felony, or that the surroundings were such as to create apprehension in his mind, as a reasonably courageous man, and not of a coward, that his life was in danger, or that a felony was about to be committed upon him, then he would not be guilty either of assault with intent to murder or of shooting at another not in his own defense."

Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(9 Ga. App. 574)

LOVE v. STATE (No. 3,661.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

*(Syllabus by the Court.)*

## 1. SUFFICIENCY OF EVIDENCE.

The evidence is sufficient to authorize the verdict.

## 2. CRIMINAL LAW (§ 824\*)—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

The conviction does not rest so exclusively on circumstantial evidence as to have required the judge, in the absence of request, to charge the jury the rule that, "to warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1999; Dec. Dig. § 824.\*]

Error from City Court of Miller County; C. C. Bush, Judge.

John Love was convicted of larceny, and brings error. Affirmed.

W. I. Geer, for plaintiff in error. P. D. Rich, Sol., for the State.

POWELL, J. [2] As to the point dealt with in the second paragraph of the syllabus: The charge against the accused is simple larceny. The prosecutor, a physician, laid his watch down on the bed of a patient whom the accused was nursing, and the accused saw it. The prosecutor swore he left the watch there. The accused said that he found the watch lying near a woodpile near where the prosecutor's automobile was standing, and found it soon after the prosecutor left. The accused took the watch and traded it off. That the watch of the prosecutor was lost from his possession, that the accused found it and took it and appropriated it to his own use, knowing that it was somebody else's property, and probably knowing that it was the prosecutor's, are salient facts proved by direct and uncontroverted testimony. The only feature of the case left to inference was whether there was an intent to steal. Intent, in practically all cases, must be shown by the inference arising from the facts shown. We do not think that, from a practical standpoint, it is correct to say that it is "a conviction on circumstantial evidence," where all the salient facts of the case (including the facts on which the inference itself rests) are directly proved, and only the intent with which proved acts were committed is a matter of inference. If so, it would be proper to speak of a conviction for homicide as being "a conviction on circumstantial evidence," where eyewitnesses see the killing, but the jury must infer the malice or heat of passion, as the case may be, from circumstances surrounding the transaction.

Judgment affirmed.

(9 Ga. App. 565)

BERRY v. STATE. (No. 3,628.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

*(Syllabus by the Court.)*

## 1. CRIMINAL LAW (§ 368\*)—EVIDENCE—RES GESTÆ.

The fact that the declarant is a girl of tender years may be taken into consideration in determining whether, under the res gestæ rule, her declarations are so free from the suspicion of device or afterthought as to be admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 806; Dec. Dig. § 368.\*]

## 2. WITNESSES (§ 45\*)—COMPETENCY—AGE.

The competency of the witness whose testimony was objected to was sufficiently evident. The evidence amply warranted the verdict, and none of the grounds of the motion for a new trial present any reason authorizing a reversal of the judgment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 105, 106; Dec. Dig. § 45.\*]

Error from Superior Court, Madison County; D. W. Meadow, Judge.

Henry Berry was convicted of involuntary manslaughter in the commission of an unlawful act, and brings error. Affirmed.

Berry was convicted of involuntary manslaughter in the commission of an unlawful act. He admitted that he shot and killed the deceased, Velma Eberhart, a child not quite 3 years old, but contended it was an accident. The only eyewitness to the shooting was Lillian Lee, a girl 12 years old, who testified for the state. According to her testimony the defendant came into the room where she and the deceased and another baby were. The deceased was standing by the fireplace. The defendant said to her, "Come here, Vel." The child replied, "I am not going to do it." The defendant had a breech-loading gun in his hand, which he had just gotten from behind the bed, and was standing in the doorway. When the child refused to come to him, he placed a shell in the gun, said, "Old lady is going to lay her body cold," took deliberate aim, and emptied the entire load of shot in the child's head. In his statement the defendant claimed that he did not know the gun was loaded; that after he picked up the gun, and while he was looking at it, the hammer slipped out of his hand, and the child was accidentally killed.

John E. Gordon and J. F. L. Bond, for plaintiff in error. Thos. J. Brown, Sol. Gen., for the State.

RUSSELL, J. [1] 1. At the time of the fatality, the deceased child's grandfather was on the front porch, and on hearing the gunshot ran into the house. He was allowed, over objection of the defendant's counsel, to relate the entire conversation, both as to what was said by the defendant and what was said by Lillian Lee, the only other eyewitness. It is contended that the sayings

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of Lillian Lee were inadmissible, because hearsay. We think the conversation was admissible as a part of the *res gestæ*. Declarations of third persons or bystanders, when so connected with the main fact as to be free from the suspicion of device or afterthought, are admitted under this rule. The age of the declarant is a circumstance entitled to some consideration in determining whether sufficient time has elapsed for the return of deliberate reason, so as to change the nature of the declarations from verbal acts, to inadmissible hearsay. When the grandfather ran into the room he asked Lillian Lee what was the matter. She replied, "Henry Berry has shot Velma." She then detailed the tragedy to her grandfather identically as she did on the witness stand the day of the trial. That Berry did shoot Velma is undisputed. The only dispute is as to the manner in which the shooting took place. A child so young, in the presence of such a tragedy, with the excitement which such an occurrence would naturally produce on her mind, could not do any after-thinking in such a brief period of time. Her declarations were spontaneous and almost involuntary acts, just as much so as would be an exclamation of pain if her hand had come in contact with a red-hot iron. This being so, the fundamental requirement of the *res gestæ* rule was complied with. *Mitchum v. State*, 11 Ga. 615; *Flanagan v. State*, 64 Ga. 52.

[2] 2. The competency of the witness Lillian Lee was challenged by the defendant on the ground that she did not have sufficient intelligence to appreciate the sanctity of an oath and did not know right from wrong. It appears that she was 12 years old. She testified that she knew right from wrong, that she knew she ought to do right, and that it was wrong to tell a lie and right to tell the truth. On being asked where she would go after death if she failed to do right, she said she did not know; and stress is laid on this. We are fully convinced that the answer of the child does not make her incompetent as a witness. She could hardly be expected to give a categorical answer to a question which has been from time immemorial, and which still is, puzzling some of the wisest men of all times. Children sometimes display great wisdom both in answering and in asking questions. The writer of this opinion recently read of one of the greatest preachers of the present age relating a conversation which was alleged to have taken place between him and a little girl of the same age as this witness. The child said to him, "Does God want everybody to do right?" and on receiving an affirmative reply from the preacher she continued, "Does the devil want everybody to do wrong?" To this question also the preacher replied in the affirmative. The child then said, "Can God

do anything he wants to do?" The preacher was a firm believer in the omnipotence of the Almighty, and was therefore forced to answer again in the affirmative. Whereupon the child continued the catechism by asking, "Then why doesn't God destroy the devil?" The preacher answered the question somewhat evasively by telling the child to "run along now and play." There are some things which must be accepted on faith, and about which all of us do not yet know. The witness was not asked as to her belief, but as to her knowledge. But, however that may be, we are of the opinion that she showed sufficient intelligence, and sufficient appreciation of the sanctity of an oath, and of the difference between right and wrong, to permit her testimony to go before the jury.

The tragedy was without excuse, and the defendant is not legally blameless. The trial was free from error, and the judgment of the lower court is affirmed.

(9 Ga. App. 845)

WALL v. SCHWARZ. (No. 3,171.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

1. PLEADING (§ 237\*)—AMENDMENT.

As the amendment simply amplified the allegations of the original petition, it should have been allowed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 608-619; Dec. Dig. § 237.\*]

2. SALES (§ 359\*)—ACTION FOR PRICE—NONSUIT.

The evidence introduced by the plaintiff substantially supporting the allegations of the petition and showing *prima facie* a right to recover, a nonsuit was improperly awarded.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 359.\*]

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"LAGNIAPPE."

"Lagniappe" is defined to be a trifling present given to customers by tradesmen; a gratuity.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by A. M. Wall against John Schwarz. Judgment for plaintiff before a justice was reversed on appeal by the superior court, and plaintiff brings error. Reversed.

Wall sued Schwarz in a justice's court for \$100. The petition, in substance, alleged that in May, 1908, he sold to the defendant a mare named "Alcyon" for \$200 in cash; that, as a further consideration, Schwarz agreed to raise two colts from the mare, and to deliver to petitioner the second colt when it reached the age of six months, and that upon this agreement plaintiff accepted the \$200 in cash and delivered the mare to the defendant; that sufficient time had elapsed for the defendant to perform his agreement in reference to the colt, but that he failed to do

so, and absolutely refused to keep and perform this agreement; that it was understood at the time of the trade that the colt would be of the value of \$100 when six months old, and the suit was brought to recover this amount. Judgment was rendered for the plaintiff for the full amount, and the case was appealed to the superior court.

On the trial in the superior court the plaintiff proved, in support of his allegations, that Schwarz, the defendant, desired to buy from him the mare in question, and that he asked Schwarz \$300 for her; that, after some negotiations between the two, it was expressly understood and agreed that the plaintiff would sell the mare for \$200 cash, and, as a further part of the agreement and of the consideration for the sale of the mare, the defendant agreed that he would breed the mare, and would give its second colt, when six months old, to the plaintiff, keeping the first colt for himself. The plaintiff asked for a written agreement to this effect. The defendant said that his word was as good as his bond, and he would do what he said. The plaintiff said, "All right," that the defendant could take the mare for \$200 and deliver to him the second colt when it was six months old. The mare was delivered to Schwarz, and subsequently a colt was bred from her. The plaintiff proved that after waiting for a sufficient time to elapse in which to give ample opportunity for the second colt to be bred from the mare, and notwithstanding the fact that the mare was in condition for breeding a second colt, and that he demanded of the defendant that he comply with his contract and have the colt bred and delivered to him when six months old, the defendant declined to breed the mare further. The plaintiff proved also that a colt bred from the mare in question at six months old would be worth at least \$100. The evidence further showed that the name of the mare was not "Alcyon," but "Ajulai," and was known as "Dr. Duke's mare." There was no question in the evidence, however, as to the identity of the mare sold to the defendant, whatever may have been her name. The plaintiff offered an amendment to the petition, alleging that the mare which he had sold to defendant was a sorrel mare known as "Dr. Duke's mare," and was well known to the defendant; and the refusal to allow the amendment is assigned as error. At the conclusion of the plaintiff's evidence the court sustained a motion to nonsuit, and this judgment is brought here for review.

The motion to nonsuit was based upon the following grounds: First, that the plaintiff had sold a mare named "Alcyon," and it now developed that the mare was named "Ajulai," and that "Alcyon" was the mother of the mare sold. Second, that the promise on the part of Schwarz to give Wall the second colt

was a nudum pactum and without consideration, and was no part of the agreement to purchase the mare. Third, that the burden was upon the plaintiff to prove his damages, and that there was no proof of the value of the colt at six months old. The court sustained the motion to nonsuit on the ground that there was a material variance as to the name of the mare in the petition and the proof; that the colt was not included in the agreement of purchase, but was "something thrown in for good measure; that in New Orleans would be called 'lagniappe,'" and that there was no proof of damages.

Oliver & Oliver, for plaintiff in error. O'Byrne, Hartridge & Wright, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] 1. The proposed amendment should have been allowed. It was simply an amplification of the allegations contained in the original petition, to meet an apparent variance. We can see no reason why the plaintiff should not have been permitted to explain it by giving a full description of the animal. *Murphy v. Peabody*, 63 Ga. 522.

[2] 2. The promise to give a colt to the plaintiff bred by the mare when it was six months old, according to the undisputed evidence, was distinctly a part of the consideration for the sale. The plaintiff refused to sell for \$200 until the agreement to give the colt was expressly made by the defendant. We think that this agreement was not nudum pactum, but was based upon a valuable and valid consideration. No attack is made upon the agreement on the ground that it is indefinite, unreasonable, or impossible of performance; on the contrary, the proof shows that the promise was made a part of the agreement, and there was no contention that the defendant, for any reason, could not have performed this agreement.

[3] We cannot agree with the learned judge that the colt, which the evidence shows would have been worth \$100 when six months old, was not included in the agreement of purchase, but was simply "something thrown in for good measure, that in New Orleans would be called 'lagniappe.'" "Lagniappe" is defined to be "a trifling present given to customers by tradesmen; a gratuity." Whatever it may be called in New Orleans, the agreement in this case called it "a colt," and the proof shows that the colt could have been bred from the mare, and would have been worth, when six months old, at least \$100.

The evidence introduced by the plaintiff substantially proved the allegations of the petition and made out a prima facie right to recover. The judgment awarding a nonsuit was therefore error.

Judgment reversed.

(9 Ga. App. 858)

**STRICKLAND v. STATE.** (No. 3,310.)  
(Court of Appeals of Georgia. Oct. 23, 1911.)

*(Syllabus by the Court.)*

**WEAPONS (§ 3\*)—CARRYING WEAPONS—CONSTITUTIONAL LAW.**

The only question raised by the record in this case was whether the act of the General Assembly approved August 12, 1910 (Pub. Acts 1910, p. 134), regulating the right to bear firearms in this state, was in violation of article 1, § 1, par. 22, of the Constitution of this state, and this question having been certified to the Supreme Court for instruction, and that court having sustained the constitutionality of the act in question, the judgment of the trial court is affirmed.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 3.\*]

Error from City Court of Carrollton; Jas. Beall, Judge.

J. L. Strickland was convicted of carrying concealed weapons, and brings error. Case certified to the Supreme Court. On opinion of the Supreme Court (72 S. E. 260), judgment affirmed.

R. W. Adamson, for plaintiff in error. C. E. Roop, Sol., for the State.

**HILL, C. J.** Judgment affirmed.

(9 Ga. App. 877)

**COOPER v. STATE.** (No. 3,688.)  
(Court of Appeals of Georgia. Oct. 23, 1911.)

*(Syllabus by the Court.)*

**INDICTMENT AND INFORMATION (§ 72\*)—ALTERNATIVE ALLEGATIONS—SUFFICIENCY.**

An accusation which charges, in the alternative, that on a certain day the accused "did play and bet for money, or other thing of value, at a game played with cards," is bad, and should have been quashed on special demurrer. *Haley v. State*, 124 Ga. 216, 52 S. E. 159.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 195-199; Dec. Dig. § 72;\* Gaming, Cent. Dig. § 224.]

Error from City Court of Ocilla; H. E. Oxford, Judge.

Smith Cooper was convicted of gaming, and brings error. Reversed.

Newbern & Meeks, for plaintiff in error. H. J. Quincey, Sol., for the State.

**HILL, C. J.** Judgment reversed.

(9 Ga. App. 879)

**CAIN v. STATE.** (No. 3,731.)  
(Court of Appeals of Georgia. Oct. 23, 1911.)

*(Syllabus by the Court.)*

**SUFFICIENCY OF EVIDENCE.**

The assignments of error of law are manifestly without merit, and the evidence strongly supports the verdict.

Error from City Court of Cordele; E. F. Strozler, Judge.

John Cain was convicted of crime, and brings error. Affirmed.

J. T. Hill and J. W. Dennard, for plaintiff in error. M. M. Eakes and W. F. George, Sol. Gen., for the State.

**HILL, C. J.** Judgment affirmed.

(9 Ga. App. 879)

**JONES v. STATE.** (No. 3,712.)  
(Court of Appeals of Georgia. Oct. 23, 1911.)

*(Syllabus by the Court.)*

**CRIMINAL LAW (§ 1159\*)—APPEAL—SUFFICIENCY OF EVIDENCE.**

The only ground in the motion for a new trial insisted on before this court relates to the sufficiency of the evidence; and, there being some evidence to support the verdict, it must stand.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Error from Superior Court, Campbell County; L. S. Roan, Judge.

Jesse Jones was convicted of crime, and brings error. Affirmed.

Lester C. Dickson, for plaintiff in error. C. S. Reid, Sol. Gen., for the State.

**HILL, C. J.** Judgment affirmed.

(9 Ga. App. 848)

**WEATHERLY LUMBER CO. v. ROBSON & EVANS.** (No. 3,175.)  
(Court of Appeals of Georgia. Oct. 23, 1911.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 78\*)—APPEALABLE ORDER.**

An order overruling demurrer to the defendants' pleas is no such final, or conditionally final, judgment as will support a writ of error. *Hodges v. Case Threshing Machine Co.*, 9 Ga. App. —, 72 S. E. 189; *American Agricultural Chemical Co. v. Shy*, 9 Ga. App. —, 71 S. E. 876, and citations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 467; Dec. Dig. § 78.\*]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action between the Weatherly Lumber Company and Robson & Evans. From the judgment, the Lumber Company brings error. Dismissed.

Allen & Pottle, for plaintiff in error. Hines & Vinson, for defendants in error.

**RUSSELL, J.** Writ of error dismissed.

(9 Ga. App. 878)

**LITTLE v. CITY OF JEFFERSON.**  
(No. 3,708.)  
(Court of Appeals of Georgia. Oct. 23, 1911.)

*(Syllabus by the Court.)*

**1. JUSTICES OF THE PEACE (§ 208\*)—REVIEW OF DECISIONS—CERTIORARI.**

Though one of the assignments of error in a petition for certiorari may be that the verdict



or judgment complained of is contrary to the evidence and without evidence to support it, it is not (so far as this ground is concerned) the duty of the judge of the superior court to sanction it, if there is a legal adequacy of testimony to support the verdict or judgment, and the weight of the testimony is not so strongly against the correctness of the finding as that, if on final hearing the answer supported the petition, the judge would feel that the interests of justice required a new trial. The judge of the superior court, on certiorari, should at the final hearing grant a new trial if he is satisfied that the finding complained of is wrong, because contrary to the weight of the credible testimony in the case; but where, on the case as made by the petition, he sees that the finding is so well supported by evidence that he would not set it aside, even if the answer verified the case as made by the petition, it is proper for him to refuse to sanction the petition.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 816; Dec. Dig. § 208.\*]

### 2. APPEAL AND ERROR (§ 671\*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Attacks upon a municipal ordinance cannot be considered, when a copy of the ordinance does not appear in the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2871; Dec. Dig. § 671.\*]

### 3. APPEAL AND ERROR (§ 724\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Complaint in general terms that illegal rulings were made, without setting out the nature of the rulings, constitutes no sufficient assignment of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2997-3001; Dec. Dig. § 724.\*]

Error from Superior Court, Jackson County; D. W. Meadow, Judge.

Action between Jim Little and the City of Jefferson. From the judgment, Little brings error. Affirmed.

Ray & Ray, for plaintiff in error. C. L. Bryson, for defendant in error.

POWELL, J. Judgment affirmed.

(9 Ga. App. 356)

LAVENDER v. STATE. (No. 3,432.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(*Syllabus by the Court.*)

CRIMINAL LAW (§§ 1036, 1037\*)—OBJECTIONS TO ARGUMENT—WAIVER—OBJECTIONS TO EVIDENCE.

The evidence practically demanded a verdict of guilty, and no error of law appears.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1691, 2645; Dec. Dig. §§ 1036, 1037.\*]

Error from Superior Court, Fulton County; L. S. Roan, Judge.

Dave Lavender was convicted of assault, and brings error. Affirmed.

Thos. L. Bishop, for plaintiff in error. H. M. Dorsey, Sol. Gen., for the State.

RUSSELL, J. Lavender was convicted of assault with intent to rape. The evidence for the state is overwhelming, both as to the assault and as to the identity of the defendant as the guilty party. The defendant relied on an alibi. The state fixed the time at about 2 o'clock p. m. Two or three witnesses testified that at this hour the defendant was at work in a hotel some distance from the scene of the crime. In arguing the case to the jury the solicitor general contended that the apparent conflict in the evidence as to the time of day could be reconciled on the theory that at Atlanta both Central and Eastern time are used, and that there is an hour's difference between the two. The defendant's counsel objected to the argument, on the ground that there was no evidence to support it. The solicitor general argued to the court that judicial cognizance could be taken of the difference in these times; but, on seeing that the court was about to rule to the contrary, he yielded and ceased to argue on the point. The defendant's counsel did not invoke a ruling by the judge. No motion for mistrial was made, nor was the court requested to charge the jury that they should disregard the argument.

We do not deem it necessary to decide whether judicial cognizance can be taken of the difference between Central and Eastern times. This is a fact of such common and universal knowledge that we are inclined to agree with the learned solicitor general that proof thereof can be dispensed with. It is unnecessary to prove that which all men know. But, irrespective of that, the defendant has waived his right for a new trial because of this supposed error. He should have invoked a ruling, or made a motion for a mistrial, or at least have requested the court to instruct the jury to disregard the argument. By acquiescing in the abandonment of the argument by the solicitor general, and in failing to take prompt and immediate action to cure the supposed error, he has precluded himself from complaining thereof. *Ga. Ry. & Elec. Co. v. Dougherty*, 4 Ga. App. 614, 62 S. E. 153.

In the fourth and fifth grounds of the motion for a new trial complaint is made of the admission of certain evidence as to a gun. These grounds are incomplete, in that they fail to state that the plaintiff in error informed the court of his objection thereto at the time the evidence was offered. Furthermore, the evidence was highly relevant for the purpose of identifying the prisoner, and was not inadmissible for any of the reasons here urged. The evidence practically demanded a verdict of guilty, and no error of law appears.

Judgment affirmed.

(9 Ga. App. 871)

**WILLIAMS v. STATE** (No. 3,651.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

*(Syllabus by the Court.)***SUFFICIENCY OF EVIDENCE.**

This case is fully controlled by *Plummer v. State*, 1 Ga. App. 507, 57 S. E. 989.

Error from City Court of Ft. Gaines; J. D. Rambo, Judge.

Ed Williams was convicted of crime, and brings error. Affirmed.

King & Castellow, for plaintiff in error.  
P. C. King, Sol., and B. M. Turnipseed, for the State.

**POWELL, J.** Judgment affirmed.

(9 Ga. App. 842)

**DANIEL v. PERKINS LOGGING CO.**  
(No. 3,167.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

*(Syllabus by the Court.)***1. LANDLORD AND TENANT (§ 133\*)—POSSESSION OF PREMISES—DISTURBANCE BY THIRD PERSON.**

Bare possession alone, either of land or chattels, authorizes the possessor to recover damages from any person who wrongfully in any manner interferes with such possession.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 465-469; Dec. Dig. § 133.\*]

*(Additional Syllabus by Editorial Staff.)***2. LANDLORD AND TENANT (§ 133\*)—POSSESSION OF PREMISES—DISTURBANCE BY THIRD PERSON—MEASURE OF DAMAGES.**

Where an intruder illegally interferes with or evicts a tenant, the tenant can recover the value of the premises for rent during the remainder of the time, this value ordinarily being ascertained by proof of the difference in the market value of the term before and after the trespass; but where the tenancy is at will, or for any other reason has no market value, the actual damages must be ascertained by the jury in the light of the relevant proved facts and circumstances.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 469; Dec. Dig. § 133.\*]

**3. LANDLORD AND TENANT (§ 142\*)—POSSESSION OF PREMISES—DISTURBANCE BY THIRD PERSON—MEASURE OF DAMAGES.**

In an action by a tenant against a third person for trespass, the mere general allegation in the petition that the destruction of a bridge, which was leased to the plaintiff together with farm land, and the consequent deprivation of its use, had caused plaintiff actual damages to the extent of \$25, is insufficient, in the absence of allegations showing why or how the damage accrued.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 509-515; Dec. Dig. § 142.\*]

**4. LANDLORD AND TENANT (§ 142\*)—POSSESSION OF PREMISES—DISTURBANCE BY THIRD PERSON—MEASURE OF DAMAGES.**

A tenant is not entitled to recover of an intruder as damages for the breaking down of a fence, depriving the tenant of the use of a pasture, the expense incurred in feeding the stock for five months; but he may recover the actual

cost of feeding the stock while he was rebuilding or repairing the fence, or the difference between the value of the tenancy before and after the trespass.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 509-515; Dec. Dig. § 142.\*]

**5. LANDLORD AND TENANT (§ 142\*)—POSSESSION OF PREMISES—DISTURBANCE BY THIRD PERSON—MEASURE OF DAMAGES.**

A tenant is not entitled to recover of a third person trespassing on the land the value of the oats crop which he might have grown thereon, if the season had been good, but may recover the difference between the value of the whole tenancy at the date of the trespass and after the trespass.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 509-515; Dec. Dig. § 142.\*]

**6. TRESPASS (§ 56\*)—POSSESSION OF PREMISES—PUNITIVE DAMAGES.**

Civ. Code 1910, § 4503, providing that in the event of aggravating circumstances in a tort, either in the act or the intention, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff, applies to the tort of a trespasser who recklessly, willfully, and wantonly wrongs one whose only property is the bare possession of land.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 144; Dec. Dig. § 56; \* *Damages*, Cent. Dig. § 204.]

**7. LANDLORD AND TENANT (§ 142\*)—POSSESSION OF PREMISES—DISTURBANCE BY THIRD PERSON—PLEADING.**

A petition by a tenant for trespass by a third person, claiming punitive damages, should name some amount as punitive damages.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 142.\*]

Error from City Court of Millen; R. P. Jones, Judge.

Action by James Daniel against the Perkins Logging Company. Judgment for defendant, and plaintiff brings error. Reversed.

The petition alleged substantially the following facts: The plaintiff, James Daniel, was tenant in possession of described farm property, on which there was a bridge across a boggy branch separating a cultivated field from the remainder of the farm. Plaintiff made constant use of the bridge in going to and from the field. The bridge belonged to his landlord, but had been rented to him for use along with the land, all of which was known to the defendant, Perkins Logging Company. Without authority from the plaintiff or from the owner of the land, the Perkins Logging Company tore up said bridge and hauled it away, thus depriving plaintiff of the use of same. It was alleged that this illegal trespass was done recklessly and wantonly, and that the actual damage to the plaintiff in being deprived of the use of the bridge was \$25. It was further alleged that as a part of his tenancy there was a pasture containing sufficient cane and other food supplies to sustain 2 cows and 13 hogs; that there was a fence around said pasture, and

the cows and hogs above named were in said pasture; that the defendant tore down the fence, by pulling logs over the same with skidders, and burst and broke the rails to such an extent that plaintiff was forced to remove said animals from the pasture and shut them up and feed them for five months, at a total expense of \$90. It was alleged that this trespass was likewise wanton and reckless, and was wholly unauthorized either by the plaintiff or his landlord. In addition to the \$90 just referred to, the plaintiff asked for punitive damages in whatever sum might be allowed, but no specific sum was named. It was likewise alleged that on a part of the land of which the plaintiff was tenant the defendant made a log yard, and thus deprived the plaintiff of the use of eight acres; that this land was highly suitable for growing oats, and the illegal trespass of the defendant had prevented the plaintiff from growing an oats crop on said land, and thereby caused damage in the sum of \$50; and since this conduct was reckless and wanton, he likewise asked an unnamed sum as punitive damages. The court sustained a general demurrer to this petition and the plaintiff excepts.

Jas. A. Dixon and Willie Woodrum, for plaintiff in error. E. L. Brinson and A. S. Anderson, for defendant in error.

RUSSELL, J. [1] Bare possession, either of land or a chattel, authorizes the possessor to recover damages from any person who wrongfully in any manner interferes with such possession. Civil Code 1910, §§ 4472, 4482; Connally v. Hall, 84 Ga. 198, 10 S. E. 738. The petition in the present case alleges both possession in the plaintiff and illegal interference therewith by the defendant; and this alone would entitle the plaintiff to the recovery of general damages, so as to make the petition good as against a general demurrer. Civil Code 1910, § 4507.

[2] Where an intruder illegally interferes with or evicts a tenant, the tenant can recover the value of the premises for rent during the remainder of the time. Bass v. West, 110 Ga. 698, 36 S. E. 244. Ordinarily this value is ascertained by proof of the difference in the market value of the term before and after the trespass; but where the tenancy is at will, or for any other reason has no market value, the actual damages must be determined by the jury in the light of the relevant proved facts and circumstances. Hayes v. City of Atlanta, 1 Ga. App. 28 (4), 57 S. E. 1067; Bass v. West, 110 Ga. 698 (4), 36 S. E. 244.

[3] The petition in the present case alleges that the plaintiff was tenant in possession of the property, but fails to allege the nature or duration of the tenancy; nor is there any allegation from which the value of his tenancy can be ascertained, or from which it can be determined legally wherein or how that value was decreased or lessened

by the trespasses of the defendant. The mere general allegation that the destruction of the bridge and the consequent deprivation of its use by the plaintiff had caused him actual damages to the extent of \$25 is insufficient, in the absence of allegations of fact showing why or how that damage accrued. Ordinarily the measure of damage for that trespass would be the difference in the market value of the tenancy, with and without the bridge, during the remainder of the term after its destruction. But if for any reason the tenancy has no market value, then the value before and after the trespass must be determined by the jury, in the light of all the proved relevant facts. The cost of replacing the bridge, the possibility of some other means of access to the field being resorted to with ease, and all other facts and counter facts can be given to the jury. The plaintiff could not, of course, recover for mere inconvenience, nor can the jury guess. The difference in the value of the tenancy before and after the trespass is the proper measure of damage, and this is the issue for the jury, and all evidence legally illustrating that issue is admissible.

[4] The same general principles apply to the other items of damage alleged. The plaintiff could not recover the expense he incurred in feeding the stock for five months; but he could recover the actual reasonable cost of feeding the stock while he was rebuilding or repairing the fence, or he could recover the difference between the value of the tenancy before and after the trespass, this difference to be determined as stated above.

[5] Likewise as to the eight acres of land used as a log yard. The value of the oats crop which the plaintiff might have grown on the land, if seasons had been good, or the other usual hazards of agriculture had been successfully passed, is not ordinarily the proper measure of damage. The value of the eight acres can be best ascertained by taking the value of the whole tenancy at the date of the trespass, and then determining how much that value has been lessened or diminished by the illegal trespass of the defendant; or the rental value of the eight acres may be shown. This is compensation for the injury done, and ordinarily this is the measure of damage.

[6, 7] As to punitive damages, it is only necessary to say that in every tort there may be aggravating circumstances either in the act or in the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. Civil Code 1910, § 4508. This principle applies to the tort of a trespasser who recklessly, willfully, and wantonly wrongs one whose only property is the bare possession of land. The petition should, however, name some amount as punitive damages.

It appears that the petition is good in substance, but subject to a multitude of special demurrers. The judgment sustaining the general demurrer is reversed, and direction is given that the plaintiff be permitted a reasonable time to amend his allegations as to the recovery of damages in conformity with this opinion. On the allegations made the plaintiff can recover only general damages. If he seeks other damages, he should amend by alleging facts as to the kind and duration of his tenancy, or any other fact showing that he had property which was lessened in value by the wrongful acts of the defendant. Judgment reversed.

(9 Ga. App. 365)

**IRVIN v. STATE.** (No. 3,610.)  
(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

**1. HOMICIDE (§ 62\*) — MANSLAUGHTER — INVOLUNTARY MANSLAUGHTER.**

Where one intentionally pointed and aimed a pistol at another, in violation of section 349 of the Penal Code of 1910, and, believing that the pistol was unloaded, pulled the trigger, and the pistol unexpectedly exploded, causing the death of the person at whom it was pointed, a verdict of involuntary manslaughter in the commission of an unlawful act was authorized.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 85; Dec. Dig. § 62.\*]

**2. CRIMINAL LAW (§ 761\*) — INSTRUCTIONS — INVADING PROVINCE OF JURY.**

The excerpt from the charge is not justly subject to the criticism that it was in violation of section 4863 of the Civil Code of 1910.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1771; Dec. Dig. § 761.\*]

(Additional Syllabus by Editorial Staff.)

**3. CRIMINAL LAW (§ 772\*) — INSTRUCTIONS — DUTY OF JURY — "DETERMINE."**

In an instruction in a prosecution for homicide that the jury are not only to find and determine the physical facts, but also the intention, the word "determine" means to find out or ascertain the truth about the occurrence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 772.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2038-2040.]

Error from Superior Court, Burke County;  
H. C. Hammond, Judge.

Len Irvin was convicted of involuntary manslaughter in the commission of an unlawful act, and brings error. Affirmed.

C. B. Garlick, for plaintiff in error. J. S. Reynolds, Sol. Gen., and John M. Graham, for the State.

**HILL, C. J.** 1. On an indictment for murder the plaintiff in error was convicted of involuntary manslaughter in the commission of an unlawful act, and the judge overruled his motion for a new trial. The record raises only two questions: (1) Is there any evidence in support of the finding that the

homicide was involuntary in the commission of an unlawful act? (2) Did the trial judge, in a certain instruction to the jury complained of, express or intimate any opinion as to what had been proved?

[1] A brief statement of the facts will elucidate the first proposition. According to the evidence of the state's witnesses, the killing was the result of an unlawful act, to wit, intentionally pointing a pistol at the person killed. Penal Code 1910, § 349. Under the evidence the jury were fully authorized to find that when the accused pointed the pistol at the decedent he did not know it was loaded. It seems that just previous to the homicide the accused had fired his pistol several times in the yard of the house where the homicide took place, and thought he had shot every cartridge. After shooting his pistol he went into the house and began a playful scuffle with the decedent, a young girl. During the scuffle he playfully pointed the pistol at the girl, snapping it several times, until, reaching a loaded cartridge still remaining in the pistol, it fired; the ball going through her body, killing her almost instantly. There was no manifestation of temper or ill will between the two. It appears simply to have been a frolic between them, without any intention on the part of the accused to injure the girl in any manner. According to the witnesses for the accused, and the statement of the accused, the pistol was discharged accidentally, while he and the girl were engaged in a playful struggle for its possession. The girl when shot, called out: "Oh, Len; you have shot me!" And the accused exclaimed: "Oh, I would not have shot you for anything in the world!" He ran out to hitch a mule to a buggy to go for a doctor, and, on being told that the girl was dead, "turned a nail keg upside down, and sat there until 2 or 3 o'clock in the afternoon."

It will thus be seen that the evidence was in conflict as to how the decedent was shot. Did the accused point the pistol at her and snap it several times, until it fired and killed her? Or did the two playfully struggle for its possession, and did it go off accidentally, there being nothing to show which one had pulled the trigger? If the first, the case was one of involuntary manslaughter; if the second, an accidental killing by misadventure. The jury were the exclusive arbiters of this issue, and they decided that it was involuntary manslaughter in the commission of an unlawful act. The question of law arises: Where one points a pistol at another, in violation of section 349 of the Penal Code of 1910, and, thinking that it is not loaded, pulls the trigger, and the pistol unexpectedly explodes, killing the person at whom it is pointed, is the act of homicide thus caused involuntary manslaughter in the commission of an unlawful act? We see only one answer

to this question. Section 349 of the Penal Code expressly declares that "any person who shall intentionally point or aim a gun or pistol, whether loaded or unloaded, at another, not in a sham battle by the military, and not in self-defense or in defense of habitation, property, or person, or other instances standing upon like footing of reason and justice, shall be guilty of a misdemeanor." Under this statute the accused was guilty of the unlawful act of intentionally pointing a pistol at the girl, although he believed it was unloaded at the time. But, as he did not intend to kill her, the homicide was involuntary, and therefore his offense, under the law, was involuntary manslaughter in the commission of an unlawful act. The very purpose of the statute just quoted is to protect life and limb from the reckless and careless pointing of guns or pistols at another; and, in view of the many unintentional homicides from such conduct, the statute in question would seem to be a wise one. A case clearly analogous to the one under consideration is that of *Cook v. State*, 93 Ga. 200, 18 S. E. 823. The trial judge very properly submitted to the jury the law of involuntary manslaughter in the commission of an unlawful act, and, as illustrating the question, in also charging section 349 of the Penal Code of 1910.

[2] 2. The following excerpt from the charge is excepted to on the ground that it was an expression of an opinion that certain facts which were contested had been proved: "Gentlemen of the jury, you are not only to find and determine in the case the physical facts that force put in motion by the defendant, namely, the pulling of a trigger of a pistol and sending a ball into the body of the deceased, causing her death—not only that physical fact is to be determined by you, but also the intention, the purpose, the motive, the heart, the spirit, with which the defendant acted when he committed the deed are for your consideration and determination." It is insisted that this was telling the jury that the defendant pulled the trigger and sent a bullet into the body of the decedent, thereby causing her death, and that this was the vital question at issue; the accused denying that he either pointed the pistol at the girl or pulled the trigger, and contending that the pistol was accidentally discharged in the struggle for its possession, not by him, but by the girl herself. We do not think this criticism is well founded. The judge had just stated the contentions of both the prosecution and the defense, and then he told them in this instruction that they must "find and determine," first, the physical facts; and, secondly, the intention with which these facts were put in motion.

[3] The meaning of the word "determine" is to "find out or ascertain the truth" about

an occurrence. If the judge meant to state that the physical facts he mentioned were proved, then these facts were not to be "found and determined" by the jury. In other words, the language expressly refutes the construction attempted to be given to it, for it leaves to the "consideration and determination" of the jury the existence of both fact and intention.

Judgment affirmed.

(9 Ga. App. 871)

RAGAN v. STATE. (No. 3,638.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

No error of law appears, and the evidence supports the verdict.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 236.\*]

(Additional Syllabus by Editorial Staff.)

2. INTOXICATING LIQUORS (§ 223\*)—CRIMINAL PROSECUTION—ISSUES AND PROOF.

Where an indictment alleged the sale of liquor between certain buildings in a town, though the allegation was needlessly specific, the evidence of the offense should be confined to the limits alleged in the indictment.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 266; Dec. Dig. § 223.\*]

3. INTOXICATING LIQUORS (§ 233\*)—CRIMINAL PROSECUTION—ADMISSIBILITY OF EVIDENCE.

In a prosecution for violation of the prohibition law, the court properly allowed testimony as to a conversation between the accused and the witness, prior to a preceding sale, as to where the witness might obtain liquor, to remain in evidence, as tending to prove defendant was dealing in liquors and the subsequent sale by the accused to the witness.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 233.\*]

Error from Superior Court, Mitchell County; Frank Park, Judge.

G. W. Ragan was convicted of a violation of the prohibition law, and brings error. Affirmed.

E. E. Cox, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

HILL, C. J. Ragan was convicted of a violation of the prohibition law, and his motion for a new trial was overruled.

The indictment against him (omitting the mere formal parts) charged that the defendant did "unlawfully, \* \* \* between the Moye Building and De Witt's stables, in the town of Sale City, in said county and state, barter and sell, for valuable consideration, to one C. J. Merritt, alcoholic, spirituous, malt, and intoxicating liquors," etc. In support of this allegation the state proved by C. J. Merritt that he went to the accused and asked him for whisky, and in reply the accused stated that he did not have any,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

but he thought he knew where he could get him some. "I went on, and directly he came to me and told me I might find it on the stair steps going up in Dr. Branch's office. That was not the only transaction I had with him. That same evening I went to him again, and he told me the same thing. \* \* \* And after a while he came to me and told me to go look in a buggy and I would find it. The buggy was out at De Witt's stables, between the Moye Building and De Witt's stables. He did not tell me where he was going to get it. I told him I wanted a half pint. I did not give him the money then. He told me to go and look in the buggy and I might find it; and I went and looked in the buggy and found it, and left the money there. I found a half pint of Cotton Blossom whisky in the buggy. It was rye whisky. I left a dollar in lawful silver money in the buggy."

This was in substance the only evidence, and it is insisted that it is insufficient to show guilt. A motion was made to exclude that part of the testimony which referred to the first transaction between the witness and the accused, on the ground that the evidence did not show that this transaction took place between the Moye Building and De Witt's stables, as alleged in the indictment, and thus the state's evidence must be confined to a sale, or sales, in the county and in the town of Sale City between the Moye Building and De Witt's stables. The trial judge refused to exclude this evidence, and error is assigned on this ruling.

[1] The evidence was sufficient to support the verdict. It comes squarely up to the repeated rulings of the Supreme Court and of this court as to what would make out a prima facie case against the accused, either as the seller or as being interested in the sale, in the absence of any proof that he had no interest in the sale, but was acting exclusively as agent for the purchaser. *Holt v. State*, 7 Ga. App. 77, 66 S. E. 279; *Highsmith v. City of Waycross*, 7 Ga. App. 611, 67 S. E. 677, and cases there cited.

[2] The allegation in the indictment that the sale took place between the Moye Building and De Witt's stables in the town of Sale City was needlessly specific, unless the purpose of the plea was to limit the locus of the offense in such manner as to prevent a plea of former jeopardy for another offense of a similar character committed by the accused in the same county. Having made the unnecessary allegation, however, it would seem that the evidence of the commission of the offense should be confined between the limits of the two places alleged in the indictment, in order that the accused might not be taken unawares, and not prepared to make his defense; for the general principle of law is that all circumstances of person, place or thing which are described in the in-

dictment with extreme or unnecessary particularity must be proved strictly. And the evidence in behalf of the prosecution, in so far as the consummated act of sale is concerned, does prove strictly the specific allegation in the indictment that the sale was between the Moye Building and De Witt's stables. There was no other sale shown. The other transaction did not show a completed sale. It simply goes to the extent of showing that the accused told the state's witness that he might find some whisky on the stair steps going up into Dr. Branch's office, and it failed to show that the witness ever went to get the whisky on the stair steps, or that he left any money there in payment for the whisky. The only place where he got the whisky, and where he left the money in payment for the whisky, was in the buggy between the Moye Building and De Witt's stables.

[3] The court properly allowed the testimony, however, of the first conversation between the accused and the witness to remain in evidence for the reason that it tended to show that the accused was dealing in whisky. It was not evidence of another transaction, but, in so far as it had any probative value at all, it tended to prove the subsequent consummated sale by the accused to the witness.

Judgment affirmed.

(9 Ga. App. 351)

FORD v. STATE. (No. 3,234.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1159\*)—APPEAL—CONCLUSIVENESS OF VERDICT—SUCCESSIVE VERDICTS.

Considered separately and apart from the evidence and the charge as a whole, some of the excerpts quoted in the motion for a new trial contain slight abstract inaccuracies of expression, but no material error appears which would authorize the setting aside of a second successive verdict of guilty of the same offense, on conflicting evidence largely preponderating against the plaintiff in error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Error from Superior Court, Worth County; Frank Park, Judge.

George Ford was convicted of voluntary manslaughter, and brings error. Affirmed.

Tison & Cause, Forehand & Son, and Claude Payton, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

RUSSELL, J. The verdict now under review is the second successive conviction of the defendant of voluntary manslaughter. The first conviction was set aside by this court for the reasons shown in the opinion as published in the previous report of the

case. See *Ford v. State*, 2 Ga. App. 834, 59 S. E. 88. The evidence on the second trial is substantially the same as formerly, and would have authorized a verdict of deliberate murder, or any grade of manslaughter, or an acquittal on the theory of self-defense. The motion for a new trial is based solely on alleged errors in the court's charge, with the exception of some alleged newly discovered evidence, which is merely impeaching and cumulative, and which would not, in the absence of other harmful error, justify a reversal of the judgment. The ability and skill of learned and astute counsel are fully evinced in the 20 grounds of the amended motion, all based on alleged errors in the judge's charge. After a very careful and painstaking consideration of every ground, and an examination of the authorities cited by counsel and the arguments presented, we have concluded that the ends of justice have been attained, and that a new trial ought not to be granted.

This being a second successive verdict of guilty, on conflicting evidence largely preponderating in favor of the verdict rendered, a new trial should not be granted, except for harmful error. Taken as a whole, the charge was fair and full, and was notably free from error. By quoting excerpts from various portions of the charge, learned counsel have been able to find inaccuracies in the abstract, which, when considered in the light of the charge as a whole, manifestly appear not to have harmed the defendant. In fact, so skillfully has the charge been riddled in an effort to find some portion of it which contains error, that we are reminded of the ingenuity of England's Attorney General in drafting the information against Stockdale, the Piccadilly bookseller, who published the book of Rev. Mr. Logan containing a defense of Warren Hastings, and which the government claimed contained libelous observations on the House of Commons. The Attorney General included in the information only excerpts from the book, selected at random, and which, when read successively and apart from the book as a whole, were colorably libelous. In arguing the case for Stockdale, the brilliant Lord Erskine called attention to the fact that the book as a whole would have to be read before any part of it could be called libelous. To illustrate his point, he said that by the method adopted the Attorney General could prove by the Bible itself that there is no God. Whereupon he picked up the Bible and turned to the first verse of the fourteenth Psalm and read the following: "There is no God." He then read the verse as a whole, as follows: "The fool hath said in his heart there is no God." So, oftentimes in determining whether an excerpt from a judge's charge is harmfully erroneous, it must be considered in the light of the charge as a whole, and also in the light of the evidence and the whole case as developed on

the trial. We have so considered the alleged errors in the excerpts from the charge in the present case, and are fully convinced that no reason appears why a new trial should be granted.

Judgment affirmed.

(3 Ga. App. 840)

GEORGIA, F. & A. RY. CO. v. F. R. PENN TOBACCO CO. (No. 3,164.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 390\*)—AMENDMENT OF BOND.

An appeal bond may be amended by correcting a misnomer in the initials of the appellee, and by inserting the name of the usee in the body of the bond after the name of the formal party to the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2077-2088; Dec. Dig. § 390.\*]

2. JUSTICES OF THE PEACE (§ 164\*)—APPEAL—SUFFICIENCY.

Where an appeal from a justice's court shows that a judgment has been rendered therein with which the appellant is dissatisfied, Civil Code 1910, § 4738, is substantially complied with. The appeal need not set forth the judgment.

[Ed. Note.—For other cases, see *Justices of the Peace*, Dec. Dig. § 164.\*]

Error from Superior Court, Calhoun County; Frank Park, Judge.

Action by the F. R. Penn Tobacco Company, for the use of the Eufaula Grocery Company, against the Georgia, Florida & Alabama Railway Company. From a judgment dismissing the appeal, defendant brings error. Reversed.

Calhoun & Rambo, for plaintiff in error. Smith & Miller, for defendant in error.

RUSSELL, J. The only question in this case is whether or not an appeal from a justice's court to a jury in the superior court should have been dismissed for alleged defects in the bond. The bond is as follows:

"Georgia, Calhoun County. R. J. Penn Tobacco Co., for the Use of Eufaula Gro. Co., v. Georgia, Florida & Alabama Railway Company. In Justice Court, 1,316th District, G. M., Calhoun County. The above-named defendant, Georgia, Florida & Alabama Railway Company, being dissatisfied with said judgment and having paid the cost, now, within the time allowed by law, enters an appeal from said judgment to a jury in the superior court of said county, and tenders B. H. Askew as his security upon this appeal bond. And thereupon said Georgia, Florida & Alabama Railway Company, and said B. H. Askew as security, hereby acknowledge themselves jointly and severally bound, and bind their heirs, executors, administrators, and assigns, to said R. J. Penn Tobacco Co., for the eventual condemnation money

in said case, whatever it may be. Witness our hands and seals, this 12th day of October, 1910. Georgia, Florida & Alabama Railway Company [L. S.], by its Attorneys at Law, Calhoun & Rambo. [L. S.]. B. H. Askew, Sr., Security. [L. S.]"

"Attested and approved by James R. Strickland, J. P."

[1] The tobacco company moved to dismiss the appeal because it was named in the bond as the "R. J. Penn Tobacco Co.," whereas its right name is the "F. R. Penn Tobacco Co.," as appears from the original summons in the case, and also because the usee was not named in the body of the bond. The clerical error in the initials was a mere misnomer and was amendable. Civil Code 1910, §§ 5686, 5687; *Watkins v. Smith*, 17 Ga. 68; *Murphy v. Peabody*, 63 Ga. 522. The usee not being a formal party to the case, it would seem to be unnecessary to insert its name in the body of the bond; but, irrespective of that, this defect was amendable. See *Smith v. Jackson*, 122 Ga. 857, 50 S. E. 930; *Hayes v. Eubanks*, 125 Ga. 349, 54 S. E. 174.

[2] It is further contended that the appeal was rightly dismissed, because it does not appear that any judgment had been rendered from which an appeal could be entered. It appears, from the recitals of the appeal and bond, that a judgment had been rendered in the justice's court, with which the appellant was dissatisfied, and we think this is sufficient. Civil Code 1910, § 4738.

Judgment reversed.

(9 Ga. App. 848)

MORRIS v. JACKSON. (No. 3,178.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

BROKERS (§ 50\*)—SALE OF REALTY—RIGHT TO COMMISSIONS.

There being no evidence of bad faith or fraud on the part of the owner in selling the property, after the expiration of the agency contract, to a person with whom the agent had been negotiating prior thereto, and it further appearing that the sale was made for a sum less than that named in the agency contract, as to which time was of the essence, the agent was not entitled to commissions on the transaction, even though the sale was made by the owner to the same person and at the price offered by him prior to the expiration of the agency contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 68; Dec. Dig. § 50.\*]

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by T. W. Jackson against J. M. Morris. Judgment for plaintiff, and defendant brings error. Reversed.

A real estate agent sued the owner of a farm for \$300, commission on a sale of the farm. The jury returned a verdict for \$250, and the defendant moved for a new trial, on the general grounds, also assigning error on

one excerpt from the judge's charge. The material facts as settled by the verdict are that the owner listed the farm with the agent, agreeing to give him exclusive control of the property for 120 days, to pay him a commission of 5 per cent. on the purchase price, and further providing that if the owner "should, after the expiration of the 120 days, sell said property to the [agent's] customer or client, direct or through any one else," the agent should nevertheless have his commission. The contract was renewed successively, so as to make it expire on January 1, 1909. The agent put a "For Sale" sign on the property. One Maddox saw the sign and went to Haynes, the tenant in possession, found out the name of the owner, and went directly to him. The owner then went with Maddox to see the property, but no trade was consummated. About 60 days later the agent called on Maddox and again interested him in the property, and finally obtained from him an offer to give a piece of city property and \$1,000 "to boot" for the farm. This offer was communicated to the owner of the farm, and was by him declined. This happened in December, 1908. Subsequently the owner notified the agent that the property would be taken out of his hands on January 1, 1909, which was done, and during February, 1909, the owner sold the farm to Maddox on the same terms which he had declined when dealing through the agent, to wit, for the city property and \$1,000. The price at which the farm was originally listed was \$6,000, \$3,000 cash, and the remainder in deferred payments, with interest at the rate of 7 per cent. per annum. The value of the city property, which, in addition to the \$1,000 cash, the owner received, was estimated at \$4,000; so that he obtained only the equivalent of \$5,000 for his farm, or \$1,000 less than the price at which he authorized the agent to consummate the sale.

Jas. L. Key and Nathan Coplan, for plaintiff in error. Hill & Wright, for defendant in error.

RUSSELL, J. (after stating the facts as above). There is no evidence that in declining to accept the offer made prior to January 1, 1909, as to the exchange of the properties, the owner did so with the concealed intention at the time to accept the offer after the expiration of the agency contract, simply for the purpose of evading the payment of the agent's commission. The relation of principal and agent requires good faith inter sese, and the law will not tolerate one taking an unfair advantage of the other. *Williams v. Moore-Gaunt Co.*, 3 Ga. App. 756, 60 S. E. 372; *Emery v. Atlanta Real Estate Exchange*, 88 Ga. 321, 14 S. E. 556. It is evident that the parties considered time of the essence of the contract. Where an owner gives to an agent exclusive control of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



his property for a named number of days or specified time, the time named is such a material part of the contract as to go to its essence. *Emery v. Atlanta Real Estate Exchange*, supra. The mere fact that after the expiration of the agency contract the owner sells the property for a lesser sum than therein named, when taken alone, indicates nothing so far as the agent's right to commissions is concerned; nor is the fact that the sale is made to a person with whom the agent had been negotiating to be considered, otherwise than as it bears on the words, agent's "client or customer," as used in the agency contract. *Doonan v. Ives*, 73 Ga. 295 (1, a).

These words, as used in the contract in the instant case, must receive a reasonable construction. Certainly it was not the intention of the parties that every person to whom the agent had offered the property should afterwards be considered the agent's client or customer. They were intended to prevent a sale by the owner after the expiration of the agency contract to a purchaser procured prior thereto on the terms therein authorized. The terms authorized in the agency contract in the instant case were \$6,000. The agent did not procure a purchaser at that figure, for the undisputed evidence is that the city property offered was worth only \$4,000. The owner had a right to stand on his contract with the agent, and refused to sell for less than the sum therein named, and subsequently to change his mind and sell to the same person for a less sum. In the absence of bad faith or fraud, any other rule would be manifestly unjust to the owner, who, after the expiration of the contract with his agent, is absolute owner of his property, to do with it as he sees fit.

There being no evidence of any bad faith or fraud, and the parties having made their own contract, according to the terms of which the agent failed to earn his commission, the verdict is contrary to law and without evidence to support it.

Judgment reversed.

(9 Ga. App. 879)

**BRASWELL v. STATE.** (No. 3,716.)  
(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

**INTOXICATING LIQUORS (§ 224\*)—ILLEGAL SALE—BURDEN OF PROOF.**

The only question raised in this case is fully controlled by the repeated decisions of this court and of the Supreme Court to the effect that where it is proved that money was given to the accused to buy intoxicating liquor, and subsequently he delivered the liquor to the person who gave him the money with which to buy it, a prima facie case of guilt is established, and the burden is cast upon him to prove that he was not the seller, had no interest in the sale, and acted solely as the agent of the pur-

chaser. *Holt v. State*, 7 Ga. App. 77, 66 S. E. 279; *Highsmith v. City of Waycross*, 7 Ga. App. 611, 67 S. E. 877, and cases there cited. Whether this burden is successfully carried is a question of fact to be determined by the jury. Where more than one transaction is proved by the state, this burden relates to all of them.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 275-281; Dec. Dig. § 224.\*]

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Cleve Braswell was convicted of crime, and brings error. Affirmed.

Jerre M. Moore, for plaintiff in error. Jule Felton, Sol., for the State.

**HILL, C. J.** Judgment affirmed.

(9 Ga. App. 876)

**MAXWELL v. STATE.** (No. 3,862.)  
(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

**ROBBERY (§ 17\*)—INDICTMENT AND INFORMATION (§ 61\*)—SUFFICIENCY—"DOLLAR."**

An indictment for robbery (omitting formal parts) charged that the accused "did unlawfully, fraudulently, and violently take from the person of W. Archer fifty dollars in money, of the value of fifty dollars, the personal property of him, the said W. Archer, by force." Held, that the description of the property alleged to have been forcibly taken was sufficient, and the court properly overruled a special demurrer to the indictment, on the ground that it was not alleged whether the \$50 in money was in gold, silver, or paper money, and the denominations thereof were not given. *Berry v. State*, 10 Ga. 518; *Watson v. State*, 64 Ga. 61.

It was also sufficient on the question of value, to allege that the "fifty dollars in money" was "of the value of fifty dollars," as the courts will judicially recognize that the word "dollar" is the money unit of the United States and is of the value of 100 cents. *McDonald v. State*, 2 Ga. App. 633, 58 S. E. 1067.

[Ed. Note.—For other cases, see *Robbery*, Cent. Dig. §§ 16-26; Dec. Dig. § 17.\* *Indictment and Information*, Cent. Dig. § 183; Dec. Dig. § 61.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2160-2164.]

Error from Superior Court, Floyd County; John W. Maddox, Judge.

Irwin Maxwell was convicted of robbery, and brings error. Affirmed.

Eubanks & Mebane, for plaintiff in error. John W. Bale, Sol. Gen., for the State.

**HILL, C. J.** Judgment affirmed.

(9 Ga. App. 878)

**BUTLER v. STATE.** (No. 3,702.)  
(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

**CRIMINAL LAW (§ 563\*)—CORPUS DELICTI—SUFFICIENCY OF EVIDENCE.**

The evidence relied upon to support the verdict consists only of incriminatory statements by the accused, and there is no evidence

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

whatever, allunde these statements, tending to prove the corpus delicti. The verdict is therefore contrary to law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 563.\*]

Error from City Court of Americus; J. A. Hixon, Judge.

Charlie Butler was convicted of crime, and brings error. Reversed.

Hollis Fort, for plaintiff in error. Zach Childers, Sol., for the State.

HILL, C. J. Judgment reversed.

(9 Ga. App. 855)

MCBRIDE v. STATE. (No. 3,312.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1159\*)—APPEAL—EVIDENCE.

The evidence, though very weak and entirely circumstantial, is sufficient to authorize the verdict of guilty, and this court is without power to interfere.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Walter McBride was convicted of crime, and brings error. Affirmed.

Anderson & Speer, for plaintiff in error. Alfred Herrington, Sol. Gen., Hines & Jordan, and A. M. Deal, for the State.

RUSSELL, J. Judgment affirmed.

(9 Ga. App. 871)

PERRY v. STATE. (No. 3,637.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

REVIEW OF EVIDENCE.

The evidence, though circumstantial, fully supports the verdict.

Error from Superior Court, Mitchell County; Frank Park, Judge.

Bubber Perry was convicted of crime, and brings error. Affirmed.

E. E. Cox, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 877)

WHITE v. STATE. (No. 3,691.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE.

Only a question of fact is presented. The jury has conclusively settled that. Plummer v. State, 1 Ga. App. 507, 57 S. E. 969.

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Homer White was convicted of crime, and brings error. Affirmed.

Clay & Morris, for plaintiff in error. J. P. Brooke, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

(9 Ga. App. 883)

WALKER v. STATE. (No. 3,521.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

1. LARCENY (§ 15\*)—WHAT CONSTITUTES.

When one person hands to another money for the purpose of having it changed, neither the title nor the legal possession passes; and if the person to whom the money is thus handed takes and carries it away with intent to steal, formed either at the time when the money is handed him or subsequently when it is in his charge, he is guilty of simple larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 39-42; Dec. Dig. § 15.\*]

2. CRIMINAL LAW (§ 55\*)—INTOXICATION AS A DEFENSE.

While drunkenness may be a circumstance from which the jury may infer that one who has taken and carried away another's property did not intend to steal it, still, if the intention to steal is present, drunkenness is no excuse for the crime, even though the intent to steal be caused by the drunkenness itself.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 87; Dec. Dig. § 55.\*]

3. LARCENY (§ 55\*)—EVIDENCE—SUFFICIENCY.

The evidence, though weak, is legally sufficient to support the verdict.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 55.\*]

Error from City Court of Polk County; F. A. Irwin, Judge.

Edward Walker was convicted of larceny, and brings error. Affirmed.

Wm. H. Trawick, for plaintiff in error. J. A. Wright, Sol., and E. S. Ault, for the State.

POWELL, J. The prosecutrix asked the defendant to change a \$5 bill. He took it, and stepped into a store as if to get the change, and then disappeared. Next morning, after a warrant had been sworn out for his arrest, he came to the prosecutrix and told her that he was drunk on the day before, and that for that reason he failed to come back with the change, and he gave her the money in silver dollars. The judge charged the jury that if the defendant took the money, and intended to steal it at the time, or if afterward, while he had it, he formed the intention to steal it, and carried it away and appropriated it to his own use, he would be guilty of simple larceny.

[1] It is well settled in this state that, when one person hands another money for the purpose of making change, the title does not pass, and the possession of the person to whom the money is handed is the possession of the owner thereof until the change has been made, and that, if a person to

whom money has thus been handed takes it and carries it away with an intent to steal it, he is guilty of simple larceny. *Finkelstein v. State*, 105 Ga. 617, 31 S. E. 589. A question is here presented which was not presented in that case, however. Suppose that the person to whom the bill is handed for the purpose of changing it takes it without intending to steal it at the time, and then subsequently forms the intention to steal it, is the offense simple larceny? Some of the language used in the course of the opinion in the case of *Buckine v. State*, 121 Ga. 337, 49 S. E. 257, suggests that the court had this question in mind, but did not decide it. In *Abrams v. State*, 121 Ga. 170, 48 S. E. 965, it was held that where one borrows another's property, with no intention, at the time, of converting it to his own use, a conversion thereafter, pursuant to a subsequently formed intent, is not simple larceny. As pointed out in *Rice v. State*, 6 Ga. App. 160, 64 S. E. 575, there is a difference between the cases wherein the defendant obtains the property as a result of a bailment, and where he merely gains physical control over it without there being any change of legal possession. As was pointed out in the *Finkelstein Case* above, there is no bailment and no change of legal possession, where one person merely hands money to another to be changed; consequently in cases of this character it is immaterial whether the intention to steal was formed at the moment the money was handed over, or formed later. If the defendant, having the money in his temporary control, but not in his legal possession, and not having it for the purpose of any bailment, forms an intention to steal it, and takes and carries it away for that purpose, his crime is simple larceny. There are similar cases in which the crime may be both simple larceny and larceny after trust; but in these cases there must be a change of possession in the nature of a bailment. *Bryant v. State*, 8 Ga. App. 389, 69 S. E. 121.

[2] 2. The court charged the jury that, though they should find that the defendant was drunk, this would be no excuse for the crime, if he really intended to steal the money. Chief Justice Jackson, in *Bernhard v. State*, 76 Ga. 613 (a prosecution for cotton stealing), says: "Cotton making, ginning, and packing would be a poor business in Georgia, if drunkenness excused a man for stealing it, unless the prohibition of selling intoxicating liquors prevailed everywhere in the state; and if it did, plenty of rogues would get drunk on cider and domestic wines in order to steal." We think that counsel for the plaintiff in error is correct when he asserts that a jury may consider the intoxication of the accused, for the purpose of explaining his conduct and determining whether he carried the money away with an intent to steal it, or with mere lack of inten-

tion. A drunken man, coming into possession of another's money, might put it in his pocket and fail to return it to the owner simply because he was too drunk to act as a normal man would under the circumstances. He might even spend it, thinking in his drunkenness that it was his own, when a sober man would have known that it was another's; and in such cases the drunken man's conduct might be entirely exempt from any *animus furandi*. A drunken man might handle another's property in such a way as that, if he were sober, the jury would believe he intended to steal it, and yet the jury, taking into consideration his drunkenness, might believe that he did not intend to steal it. As thoroughly as we agree with counsel in his assertion as to these principles, we do not agree with him that the court erred in charging the jury that, if the defendant did intend to steal it, his drunkenness would be no excuse for his crime. If the instructions of the court were not full enough upon this subject to satisfy counsel, he should have made a request for further instructions.

[3] 3. The evidence of the defendant's intention to steal the money, in the light of his well-proved drunken condition, is somewhat weak and unsatisfactory; but it is not legally insufficient to support the verdict.

Judgment affirmed.

(9 Ga. App. 853)

#### NORFLETT v. STATE. (No. 3,305.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

#### LARCENY (§ 32\*)—LARCENY AFTER TRUST—INDICTMENT.

Where, under section 192 or section 194 of the Penal Code of 1910, it is sought to charge a violation of a trust, in that the accused failed to apply the property to the use or benefit of one other than the person delivering it, the indictment should allege ownership of the property.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 81-92; Dec. Dig. § 32; \* *Indictment and Information*, Cent. Dig. § 281.]

Error from Superior Court, Warren County; B. F. Walker, Judge.

John R. Norflett was convicted of larceny after trust, and brings error. Reversed.

L. D. McGregor and E. P. Davis, for plaintiff in error. Thos. J. Brown, Sol. Gen., for the State.

RUSSELL, J. Norflett was indicted for larceny after trust, the indictment being in two counts. The jury found him guilty on the first count, and he was sentenced to three years' imprisonment. The bill of exceptions complains of the overruling of a demurrer to the indictment, and also of the court's refusal to grant the motion for a new trial filed by the defendant in the court

below. Inasmuch as we have concluded that the court erred in overruling the demurrer to the indictment, it is unnecessary to consider any other assignment of error.

The material part of the first count of the indictment is as follows: "In the name and behalf of the citizens of Georgia, charge and accuse John R. Norflett with the offense of larceny after trust, for that the said John R. Norflett, on the 20th day of October, 1908, in the county aforesaid, was intrusted with thirty-five dollars in money, of the value of thirty-five dollars, by T. T. Thomas, for the use and benefit of Laborers' Mercantile & Investment Co., a corporation of said state, and for the purpose of having the said John R. Norflett to deliver and pay said sum of thirty-five dollars to said Laborers' Mercantile & Investment Co.; and said John R. Norflett did, on the day and year aforesaid, in the county aforesaid, fraudulently convert the said thirty-five dollars to his own use, to the injury and without the consent of said T. T. Thomas, and to the injury and without the consent of said Laborers' Mercantile & Investment Co., and without paying to either said T. T. Thomas or said Laborers' Mercantile & Investment Co. the said thirty-five dollars, or any part thereof." The defendant demurred to the indictment, because the ownership of the money alleged to have been converted was not set forth. We think this demurrer well taken. It is necessary that the indictment should aver every material fact necessary to make the crime complete.

An examination of the definitions of the various classes of embezzlements and larcenies after trust, as contained in the Penal Code of 1910, discloses that the indictment fails to charge all the elements necessary to

make a complete crime under any of them. It may not be necessary in every case to allege ownership of the goods claimed to have been fraudulently converted by the defendant. In fact, under section 189, one who wrongfully converts goods intrusted to him by a mere bailor thereof violates the law, provided he fails, on demand, to make proper restitution. But it is evident that the pleader was not proceeding under this section, for the reason, among others, that no demand is alleged. If the indictment can stand at all, it must be under section 192 or section 194. An examination of those sections, however, shows that one of the necessary elements of the crimes therein defined is that the property shall have been delivered to the accused on trust to be applied to the use and benefit either of the owner or of the person delivering it.

The indictment in the present case expressly negatives the idea that the property was to be applied to the use and benefit of Thomas, the person delivering it; for the allegation is that it was to be applied to the use and benefit of the Laborers' Mercantile & Investment Company. But nowhere is it alleged that that company was the owner of the money. Under the sections named, where the violation of the trust is the failure to apply the property to the use and benefit of one other than the person delivering it, the indictment must allege that the other is the owner of the property; otherwise it is fatally defective. Penal Code 1910, § 192; *Keys v. State*, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63; *Smith v. State*, 121 Ga. 618, 49 S. E. 677; *Jackson v. State*, 76 Ga. 551; *Hagood v. State*, 5 Ga. App. 80, 62 S. E. 641; *Birt v. State*, 1 Ga. App. 150, 57 S. E. 965.

Judgment reversed.

(156 N. C. 412)

## FIELDS v. BYNUM.

(Supreme Court of North Carolina. Oct. 25, 1911.)

## 1. TRIAL (§ 350\*)—SPECIAL INTERROGATORIES.

In slander, in which the answer merely alleged that the allegations of the complaint as to the utterance of slanderous words were untrue, and denied any damage to plaintiff, the court submitted three special issues, to wit, whether defendant spoke to plaintiff in the hearing of others the words alleged in paragraphs 3 and 4 of the complaint, or such words in substance, and what damage, if any, plaintiff was entitled to recover. *Held*, that the special issues submitted were proper; defendant being entitled thereunder to offer evidence of any defense alleged by him.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 350.\*]

## 2. LIBEL AND SLANDER (§ 50\*)—PRIVILEGED COMMUNICATIONS.

The alleged slander was a charge that plaintiff burned a sawmill; plaintiff claiming that defendant called him out of his residence, and, in the presence of several others, charged that plaintiff burned a mill the night before, and also burned a mill on the same site in June past. Defendant's version was that he asked plaintiff about trying to convey timber to others after he had sold it to defendant, and then stated that he believed that plaintiff had burned the mill, and that his neighbors also believed it. *Held*, that it could not be said that the communication to plaintiff was fairly made on a proper occasion, and in a proper manner, so as to be privileged, on the ground that he made the statement as to the burning of the mill to further his own interests, because he was having timber sawed at it; to make the communication privileged, it being necessary that defendant should have made it on a proper occasion, and under a sense of duty, with the bona fide purpose of ascertaining the origin of the fire.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 149, 150; Dec. Dig. § 50.\*]

## 3. LIBEL AND SLANDER (§ 41\*)—PRIVILEGED COMMUNICATIONS—PRESENCE OF THIRD PERSON.

While the accidental presence of a third person will not always prevent a statement from being a privileged communication, so as not to be actionable slander, it is deprived of its privileged character if defendant intentionally makes the statement in the presence of a number of others.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 127-129; Dec. Dig. § 41.\*]

## 4. LIBEL AND SLANDER (§ 50½\*)—PRIVILEGED COMMUNICATIONS.

While answers to questions asked by plaintiff will be privileged communications if otherwise so, though made in the presence of third persons, any privileged character which the words would otherwise have is lost by their repetition by defendant in the presence of third persons.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 50½.\*]

## 5. LIBEL AND SLANDER (§ 113\*)—DAMAGES—“GENERAL DAMAGES.”

“General damages” include actual or compensatory damages, and the injuries which the law presumes to have naturally and necessarily resulted from the utterance of words slanderous per se, such as a charge of arson, including

injury to the feelings and resulting mental suffering, and may also include punitive damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 842; Dec. Dig. § 113.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3059, 3060; vol. 8, p. 7669.]

## 6. LIBEL AND SLANDER (§ 33\*)—DAMAGES—PLEADING—GENERAL DAMAGES.

General damages need not be pleaded or proved in an action for damages resulting from words slanderous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 112; Dec. Dig. § 33.\*]

## 7. LIBEL AND SLANDER (§ 5\*)—DAMAGES—COMPENSATORY DAMAGES—MALICE—NECESSITY.

Malice by defendant in uttering words slanderous per se is not essential to authorize the recovery of compensatory damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 5.\*]

## 8. LIBEL AND SLANDER (§ 120\*)—DAMAGES—PUNITIVE DAMAGES.

The jury may award punitive damages in a slander action, if the slanderous words were uttered from personal malice, with intent to injure plaintiff, or with a wanton and reckless disregard of his rights; but, if the defendant was not actuated by malice, only compensatory damages may be allowed.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350-351; Dec. Dig. § 120.\*]

## 9. LIBEL AND SLANDER (§ 123\*)—DAMAGES—PUNITIVE DAMAGES.

The issue of punitive damages was properly submitted to the jury, in an action for slander in charging the burning of a mill, where plaintiff testified that defendant came to his residence and called him out, and stated in the presence of others, “You burned the mill up last night,” and further stated that he would blow plaintiff's brains out if he opened his mouth, and that plaintiff was the man who also burned the mill in June.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.\*]

Appeal from Superior Court, Chatham County; Allen, Judge.

Action by Henry T. Fields against Thomas M. Bynum. From a judgment for plaintiff, defendant appeals. Affirmed.

These issues were submitted to the jury. “(1) Did the defendant speak to the plaintiff, in the presence and hearing of Willie J. Bright and others, the words set out in paragraph 3 of the complaint, or words of the same substance? Answer: Yes. (2) Did the defendant speak to the plaintiff, in the presence and hearing of Willie J. Bright and others, the words set out in paragraph 4 of the complaint, or words of the same substance and meaning? Answer: Yes. (3) What damage, if any, is plaintiff entitled to recover? Answer: \$500 (five hundred dollars).” From the judgment rendered, the defendant appealed.

W. P. Bynum, Hayes & Bynum, and Robert C. Strudwick, for appellant. H. A. London & Son, for appellee.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

BROWN, J. [1] 1. The defendant excepted to the issues, and tendered two others. Those submitted have been practically approved by this court in several cases. *McCurry v. McCurry*, 82 N. C. 296; *Wozelka v. Hettrick*, 98 N. C. 10; *Rice v. McAdams*, 149 N. C. 29, 62 S. E. 774. Under the issues submitted, the defendant had opportunity to present evidence of any defense set up in his answer. *Deaver v. Deaver*, 137 N. C. 246, 49 S. E. 118.

[2] 2. The defendant contends that the occasion when the words were uttered was a privileged one, exempting him from civil liability for their utterance. Defendant tendered certain prayers for instruction, presenting that view, which were refused. We are of opinion that the occasion was not privileged, and that the prayers were properly refused. The contention of the defendant is that he had a direct personal interest in the burning of the mill, although it belonged to Bule, as he was engaged in sawing defendant's timber with it, and another mill had been burned on the same site the June previous; that he sought the plaintiff in good faith, to ascertain who burned the mill, and in the discharge of a private duty in the prosecution of his own interests.

We do not differ with the learned counsel as to the law, but only in its application to the facts of this case. The plaintiff's version of the facts is that the defendant came to his residence and called him out, saying, "You burnt the mill up last night." "I told him I did not. Jim Campbell, Norfus Barber, and Willie Bright were present. Defendant said he would blow my brains out if I opened my mouth; said I was the man that burnt it in June, and, 'I know you did it.' I did not burn either mill." Several witnesses testified to plaintiff's good character. There was no evidence that his character was bad. Defendant testifies: "I then asked him [the plaintiff] about trying to deed the timber to other parties after he had sold it to me; that I believed he had burned the mill and that his neighbors believed it. I never charged him with burning the mill, only as above stated." In order to bring himself within the protection which attaches to communications made in the fulfillment of a duty, the defendant must show something more than an honest belief in the truth of his utterance. He must show that what he said was a communication, made in a sense of duty, with the bona fide purpose of ascertaining the origin of the fire, and that it was made on an occasion which justified the making of it. *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 102; *Newell on Slander*, p. 477.

[3] Then, again, where the expressions employed are allowable in all respects, the manner in which they are made public may take them out of the privilege. In the case of spoken words, the defendant must be careful in whose presence he speaks. While the ac-

cidental presence of a third person will not always take the case out of the privilege, it is otherwise if the defendant purposely selects an occasion where a number of persons are present. *Odgers on Libel and Slander*, 199.

[4] It is generally held that answers to questions put by the plaintiff himself will in general be privileged, though made in the presence of third persons. *Palmer v. Hammerstone*, 1 Cab. & El. 36; *Billings v. Fairbanks*, 139 Mass. 66, 29 N. E. 544. But even in reply to plaintiff's questions the defendant is not protected by privilege, if he repeats, in presence of third persons, charges of a slanderous character which he has previously made. *Griffiths v. Lewis*, 53 E. C. L. 61; *Sanborn v. Fickett*, 91 Me. 364, 40 Atl. 66; 18 Am. & Eng. 1032. Assuming the communication to have been made in manner and form as testified by the plaintiff, it is manifestly not privileged. And we think, taking the defendant's version of the occurrence, it was not a privileged occasion. The response was not elicited in reply to questions asked by plaintiff. Nor is the inference justified that the defendant sought the plaintiff for the sole purpose of ascertaining the origin of the fire. Defendant put no questions to the plaintiff, and asked for no information. According to defendant's own testimony, he did not ask plaintiff if he burned the mill, but at once charged plaintiff with attempting to sell timber which he had already sold plaintiff, and then substantially charged him with burning the mill. "I believe you burned the mill, and your neighbors believe it." "You know you burned the mill," etc. These are words of accusation, and not those which should be used in an inquiry intended only to elicit the truth. The defendant did not seek the plaintiff in privacy, and demand to know what plaintiff had to say concerning the burning of the mill, but made the accusation openly, in the presence of three persons. "Confidential communications," says Mr. Newell, "must not be shouted across the street for all passersby to hear." "He should choose a time when no one else is by, except those to whom it is his duty to make the statement." Page 477. From all the evidence it cannot be inferred that the communication was fairly and impartially made on a proper occasion, in a proper manner, and without other defamatory matter. These are essentials to a privileged communication, especially where the matter communicated charges, as in this case, a felony. *Newell*, p. 477.

The cases strongly relied upon by the learned counsel for the defendant are *Adcock v. Marsh*, 30 N. C. 360, and *Brown v. Hathaway*, 13 Allen (Mass.) 239. In the former, the communication was in private, and was in the strictest sense privileged; made, as held by this court, in the performance of a high moral duty. In the latter, the com-

munication was made in the house of the plaintiff, and *in reply to inquiries* put by plaintiff, in presence of a police officer, who accompanied the defendant for the purpose of searching the house for stolen goods. The Supreme Court of Massachusetts held that the circumstances surrounding it made the communication privileged.

[5-§] 3. Upon the issue of damage, the defendant contended that there is no evidence upon which damages can be awarded, and further requested the court to charge: "It is incumbent on the plaintiff to show to the jury evidence that he has suffered damage, before he can ask you to award any to him." His honor refused to give the instruction, and the defendant excepted. The plaintiff asked for general damages and pleaded no special damages. General damages include actual or compensatory damages, and embrace compensation for those injuries which the law will presume must naturally, proximately, and necessarily result from the utterance of words which are actionable *per se*, such as the charge made in this case. Such damages include injury to the feelings, and mental suffering endured in consequence. General damages need not be pleaded or proved. 18 Am. & Eng. 1081, 1082, 1083, and cases cited in notes. General damages are sometimes called substantial damages, and are based upon the theory that it is competent for the jury to award, where the words are actionable *per se*, a figure which will fairly compensate the plaintiff for the injury sustained. Newell, p. 841. The right to recover compensatory damage is in no way dependent on the existence of malice upon the part of the defendant. 18 Am. & Eng. Enc. p. 1089. General damages also include punitive damages, which a jury in proper cases may exercise their discretion in awarding. His honor charged the jury: "That if, after considering this view of the evidence, the jury are satisfied by the greater weight of the evidence that the charge was made from personal malice, with the design and purpose to injure the plaintiff, or that the charge was made in such a manner that it showed a wanton and reckless disregard of the plaintiff's rights, the jury may, in addition to compensation, give exemplary or punitive damages, which is allowed as a kind of punishment, with a view of preventing similar wrongs in the future." His honor further charged that if the defendant was not actuated by malice the plaintiff can recover only compensatory damage. This is a clear and correct statement of the law. Odger, p. 291; 18 Am. & Eng. Enc. p. 1091, and cases cited; Newell, p. 842.

[§] The version of the occurrence given by plaintiff is sufficient evidence to be submitted to the jury as a basis for punitive damages.

No error.

(156 N. C. 353)

# DALRYMPLE v. COLE

(Supreme Court of North Carolina. Oct. 25, 1911.)

## 1. PLEADING (§ 216\*)—DEMURRER.

A demurrer points out the defects in the pleading demurred to, and extraneous matters cannot be called in aid to supply deficiencies, but the demurrer must stand or fall by the face of the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 535-539; Dec. Dig. § 219.\*]

## 2. SPECIFIC PERFORMANCE (§ 114\*)—COMPLAINT—SUFFICIENCY.

A complaint by a purchaser for specific performance, which shows that the vendor was married and that his wife did not join in the contract, but which does not show the existence of a judgment lien on the property at the date of the contract, or any prior mortgage reserving the homestead, or that the contract was void as to creditors and no homestead allotted in other land, is not demurrable; but defendants must answer, so that the facts may be disclosed and the vendor establish, if he can, the facts rendering the contract invalid under Const. art. 10, § 8, forbidding any disposition of the homestead except by deed signed by the owner and his wife.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-372; Dec. Dig. § 114.\*]

Appeal from Superior Court, Moore County; Cooke, Judge.

Action by M. G. Dalrymple against T. W. Cole. From a judgment of dismissal, rendered on sustaining a demurrer *ore tenus*, plaintiff appeals. Reversed.

This action was brought to compel the specific performance of a contract to convey land, and was heard below upon a demurrer to the complaint, which alleged: That on the 15th day of October, 1910, the defendant for a valuable consideration, contracted and agreed in writing with the plaintiff to make, execute, and deliver to the plaintiff, his heirs and assigns, a good and sufficient deed of conveyance to the tract of land described in the complaint, with covenants of warranty, upon the payment to the defendant of the sum of \$1,400, the purchase price agreed upon, within 90 days from the date of the contract; that the contract was duly recorded, and within the 90 days fixed in the contract the plaintiff notified the defendant that he elected to take and purchase the land in accordance with the terms of the contract, and would tender the \$1,400 within the 90 days, and that he did actually tender said sum within the 90 days and demanded that the defendant make, execute, and deliver a deed in accordance with the terms of the contract, but that the defendant neglected, failed, and refused to execute and deliver the deed; and that the plaintiff is still ready, able, and willing to comply with the terms of the contract and pay the purchase money, upon the execution and delivery of the deed. That after the execution of said contract, the plaintiff actually paid or assumed the payment of \$133.65 for the benefit of the defend-

ant, which sum, it was agreed by the defendant, should be applied pro tanto to the purchase price of the lands under the contract. It was further alleged in the complaint that, at the time of the tender of the purchase money and the demand that the defendant execute and deliver the deed, there were mortgages executed by the defendant and his wife to certain parties named in the complaint and duly recorded in Moore county, which were and are liens on the land, and also a judgment docketed against the defendant, which was also a lien on said land, in favor of Mrs. S. D. Cole, the plaintiff in the judgment, and against the defendant, for the sum of \$100, with interest and costs. The case on appeal states: "The court finds as a fact that the judgment referred to in the complaint was docketed May 6, 1910."

The defendant demurred upon the following ground: "That a cause of action is not alleged in the complaint, in that it appears upon the face of the complaint that the defendant is, and was at the time of the execution of the alleged contract referred to in the complaint, a married man, and that defendant's wife did not join in the execution of said alleged contract, and at the time of the execution of said alleged contract there was a docketed judgment, as well as recorded mortgages, both liens thereon, and that execution could have been issued upon said docketed judgment, and the alleged contract is therefore void and inoperative." It was admitted upon the argument of the demurrer that the defendant was at the time of the execution of the contract, and still is, a married man. That admission also appears upon the face of the complaint. At the hearing, and upon consideration of the demurrer, which was ore tenus, the court sustained the same, and dismissed the action of the plaintiff, and he appealed.

U. L. Spence and G. W. McNeill, for appellant. H. F. Seawell and R. L. Burns, for appellee.

WALKER, J. (after stating the facts as above). The defendant demurred to the complaint, upon the ground that it appeared therefrom that the plaintiff was a married man at the time the contract was made, that his wife is living, and that at said time there was a judgment against him which was duly docketed in the superior court and constituted a lien on his real estate, and that, as execution could have been issued on the judgment at any time after it was docketed, the contract was void, for the reason that it was an executory agreement to convey his land, and this could not be done, as he was entitled to a homestead, and his wife had not joined in the execution of the contract with privy examination, relying upon the provision of the Constitution (article 10, § 8) forbidding any disposition of the homestead, except by deed of the homesteader and "the

voluntary signature and assent of his wife [thereto, which shall be] signified on her private examination, according to law."

It was said by Justice Avery in *Hughes v. Hodges*, 102 N. C. 250, 9 S. E. 441: "As between the creditor having a lien on the one side, and the debtor and his family on the other, the Constitution does create a right to a home for the benefit of the debtor's family in his lands—a home that may never be marked out by metes and bounds. The debts may be discharged before the homestead is allotted, and then the inchoate right, as applied to the debtor's land, no longer exists. But when the creditor reduces his claim to judgment, the law places him and the debtor at arm's length, and frustrates every effort of either to evade the section of the Constitution that gives the wife the veto power, by requiring an allotment of the homestead as antecedent to any sale, and her assent, with privy examination, before the improvident husband can dispose of it; so, if the debtor sells to defraud his creditor, when the latter moves in the court to set aside his deed and subject the land to his claim, the Constitution gives first the right to an undefined homestead, and the law, made in pursuance of the Constitution, ascertains its bounds as soon as he seeks to sell." He further says: "Until the owner contracts debts, there can be no undefined homestead right attaching to his land, and, unless his homestead has already been allotted, section 8, art. 10, of the Constitution, does not restrict his power to convey. If, however, the homestead has once been laid off at the instance of creditors, though the debts may be discharged, the restriction remains, and renders the joinder of the wife essential to a valid conveyance of it. The definition given in *Adrian v. Shaw* [82 N. C. 474] must be considered as modified and restricted in its application, so as to conform to the views we have expressed in this opinion." In the defendant's appeal in *Hughes v. Hodges*, at page 262 of 102 N. C., and page 441 of 9 S. E., Justice Avery, for the court, thus sums up the law: "The presumption of law is in favor of the validity of this and every other deed executed in due form. If the defendant seeks to have it declared void, because it was made in disregard of the requirements of section 8, art. 10, of the Constitution, the burden is upon him to show that the homestead right attached to the land and vitiated the conveyance, for the want of the joinder of the wife, with privy examination, for one of the three following reasons: (1) That a homestead had been allotted to him in the land described in the mortgage deed, either on his own petition or by an officer in accordance with law. (2) That there was an unsatisfied judgment or judgments that constituted a lien upon the land, when conveyed, and upon which execution might still issue, and make it necessary to have his homestead allotted, or a mortgage reserving an unde-



fined homestead, and constituting a lien on the land that could not be foreclosed without allotting a homestead to the mortgagor in the land. (3) That the mortgage deed was void, because executed with intent to defraud the defendant's creditors, and that the mortgagor did not have a homestead allotted already in other lands. In order to rebut the presumption of validity by bringing the deed under the prohibition contained in section 8, art. 10, of the Constitution, one of these grounds of objection mentioned must be made to appear by any person who would raise a question as to the effect of the conveyance."

It is this construction of the Constitution upon which the defendant relies to invalidate the contract of sale or option. Justice Merrimon dissented from the judgment and opinion of the court, and held the view that the homestead right, and the protection guaranteed by the Constitution against a transfer thereof, without the assent and privy examination of the wife, does not depend upon any state of indebtedness, nor is it required that the homestead should have been actually allotted, or that a judgment lien or other conditions indicated in the opinion of the court, should exist before the provision of article 10, § 8, of the Constitution, which forbids a conveyance of the homestead without such assent and privy examination, would become operative. He also thought that the opinion of the court in *Hughes v. Hodges* was in conflict with prior decisions of this court in *Jenkins v. Bobbitt*, 77 N. C. 335, *Lambert v. Kinnery*, 74 N. C. 348, *Beayan v. Speed*, 74 N. C. 544, and *Adrian v. Shaw*, 82 N. C. 474, which he contended had settled the law to be that, without regard to any indebtedness of the husband, the homestead could not be conveyed without the assent and privy examination of the wife, but that the husband's deed was effectual to pass title to the land subject to the homestead. In *Hughes v. Hodges* the mortgage was executed January 8, 1876, when defendant's first wife, who did not join in the deed, was living. She died in 1881, and he was again married in 1882. There was no reservation of the homestead in the mortgage, and no judgment docketed against the mortgagor, nor was there any question of fraud involved. The suit was to foreclose the mortgage. The court below held that the land should be sold subject to the homestead, or only the "reversionary interest," as it was termed inaptly, but perhaps for the sake of convenient description, in the absence of a better word. This court, in an opinion by Justice Avery (with a dissenting opinion by Justice Merrimon, as already stated), reversed that decision and held that the deed passed the entire interest in the land to the mortgagee, incumbered only by the dower right of the first Mrs. Hodges, which expired at her death, and ordered a sale to be made accordingly.

In *Joyner v. Sugg*, 132 N. C. 580, 44 S. E.

122, it appeared that there was no judgment or other debt than those secured by the deed of trust, and no question of fraud, but the homestead right of Blaney Joyner was reserved in the deed. We held that J. A. E. Joyner, who bought at the sale under the deed of trust, acquired a good title in the land, subject to the homestead right of Blaney Joyner, as that was expressly retained in the deed, and that, as he had died, and the exemption right had ceased, a full and unincumbered title passed to her. It was further said, in arguendo, that the *right* to the homestead always exists and is guaranteed by the Constitution, but the homestead itself cannot come into existence until it has been "selected by the owner" of the land and actually allotted, and thereby identified, as decided in *Mayho v. Cotton*, 69 N. C. 294, and *Hager v. Nixon*, 69 N. C. 108, and as strongly intimated in *Hughes v. Hodges*, supra; but this expression, of course, must be viewed with due reference to the facts then under consideration, there being no judgment or other debt, no fraud, and no prior conveyance in which the homestead right had been reserved. In such a case the homestead could only be allotted upon application of the party entitled thereto. What is said in that case, therefore, is not at all in conflict with the decision in *Hughes v. Hodges*, supra. It was approved by this court recently, in *Davenport v. Fleming*, 154 N. C. 291, 70 S. E. 472, in which we held (in a concise and clear-cut opinion by Justice Hoke) that the constitutional provision against conveying the homestead without the joinder or assent of the wife, evidenced as therein presented, applied only and exclusively to the "homestead right," and, quoting from *Joyner v. Sugg*, it was further said: "A deed in trust by the husband, in which the wife does not join, reserving the homestead of the grantor therein, conveys the entire land contained in the deed of trust, subject only to the determinable exemption in \$1,000 thereof from the payment of the debts of the grantor during his life," to which the learned justice added, "That case throughout is an apt authority in support of the present ruling."

[1] We have thus reviewed two of the recent cases upon this subject, not for the purpose of testing the relative strength or value of the different, and in some respects apparently conflicting, views to be found in some of the decisions upon the subject, but rather for the purpose of clearly defining the proposition, upon which Mr. Spence relied, in his able argument before us, to sustain the demurrer. He urged that the allegations of the complaint, with the finding of the judge as to the date of the judgment and the admission as to the marriage of the plaintiff at the time of the contract, showed that sufficient facts existed to invalidate the contract, under the decision in *Hughes v. Hodges*, supra, and *Fleming v. Graham*, 110 N. C. 374, 14 S. E. 922. But the weak-

ness of this position appears when we consider that the office of a demurrer is to point out defects in the pleading, which is the object of attack, and it must stand or fall by the facts therein alleged, and extraneous matters cannot be called in aid to supply deficiencies, which is necessary to be done in order to show that the cause of action is bad. The doctrine of alder does not apply to such a case. "It is a fundamental rule of pleading that a demurrer will only lie for defects which appear upon the face of the pleading to which it is opposed, and must be decided without evidence aliunde, unless by consent of the parties. A speaking demurrer—that is, a demurrer which is founded on matter collateral to the pleading against which it is directed—is bad, and as such will be overruled. It is also a well-settled principle that, when a pleading is demurred to, resort cannot be had to other pleadings for the purpose of supporting or resisting the demurrer; but the demurrer must prevail or fall by the face of the pleading to which it is directed." 6 Enc. of Pl. & Pr. 297, 298. If the new or additional facts, which are required to point the objection, are contained in the demurrer, it is called a "speaking demurrer," and is not good pleading. Nor can the judge find facts to aid the defective pleading. It must be considered by itself and upon its own merits. The recent cases of *Miller v. Railroad*, 154 N. C. 441, 70 S. E. 838, and *Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947, furnish illustrations of the rule.

[2] There was no consent given by the plaintiff to the finding as to the date of the judgment; but he distinctly excepted to the judge's ruling, which is sufficient to include the said finding of fact. It does not appear, therefore, by the complaint, whether there was a judgment which was a lien upon the property at the date of the contract, nor that there was a prior mortgage or deed of trust reserving the homestead, nor that the contract was void as to creditors, and no homestead had been allotted in other land, so as to bring the case within one of the categories stated in *Hughes v. Hodges*; the presumption being in favor of the validity of the contract, and the burden being upon the defendant to show the contrary. It may also be remarked that the complaint does not allege that a homestead had not already been allotted to the defendant, nor is the value of the land stated. These allegations, which are omitted, may become material in certain phases of the question.

We must not be understood as passing upon the soundness of the objection to the complaint, even if any one or all of said facts had been alleged therein. We merely decide that, in the present state of the pleadings, the demurrer should have been overruled, and the defendant allowed to answer.

The facts may then be fully disclosed, no injustice will be done the plaintiff by assuming the existence of facts which do not clearly appear, and we may the better and the more safely consider and solve the interesting questions, as to the homestead right, which were argued before us. There was error in the respect indicated.

Error.

(156 N. C. 360)

**LA ROQUE et ux. v. KENNEDY.**

(Supreme Court of North Carolina. Oct. 25, 1911.)

**1. EVIDENCE (§ 474\*)—OPINION EVIDENCE—HANDWRITING.**

A clerk of court, who had seen many instances of the handwriting of a register of deeds certifying to copies of deeds registered by him, could testify that a certificate, verifying copies of a deed, was in the register's handwriting.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.\*]

**2. APPEAL AND ERROR (§ 274\*)—GROUNDS OF REVIEW—RESERVATION BELOW—ADMISSION OF EVIDENCE.**

An objection that no evidence was introduced to locate the land covered by a deed cannot be considered on appeal, under an exception to the admissibility of a certified copy of the deed, on the ground that the authenticity of the certificate was not established.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1631-1645; Dec. Dig. § 274.\*]

**3. BOUNDARIES (§ 37\*)—DEEDS—LOCATION OF LANDS.**

Evidence of the location of land covered by a deed, offered to establish the ownership of land, need not come from living witnesses, but its location may be shown by the description of the deeds, or by evidence aliunde.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 37.\*]

**4. WATERS AND WATER COURSES (§ 179\*)—FLOWING LANDS—ACTIONS—EVIDENCE.**

In an action for damages caused by flowing plaintiff's land by raising a milldam, in which plaintiff claimed title to the land, and a prescriptive right to flow the lands was involved, a witness testified that he cut some timber up the millpond some 15 years ago, and floated it down to the millpond. *Held*, that the evidence was admissible to show the height of the water where the timber was floated.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 179.\*]

**5. APPEAL AND ERROR (§ 216\*)—PRESENTATION BELOW—INSTRUCTIONS—NECESSITY OF REQUEST.**

If the trial court did not correctly state the admissions of the parties in his instructions, his attention should have been called to his mistake at the time, and it cannot be first raised on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 216; \* *Trial*, Cent. Dig. §§ 627-641.]

**6. WATERS AND WATER COURSES (§ 179\*)—MILLDAM—PRESCRIPTIVE RIGHTS—EVIDENCE.**

In an action for damages for overflowing plaintiff's land by increasing the height of a milldam, in which defendant claimed a prescriptive right to flow the land, *held*, that there was some evidence as to the location of the high-wa-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ter mark in 1844, so as to authorize the submission of that question in instructions.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 179.\*]

**7. WATERS AND WATER COURSES (§ 179\*)—JURY QUESTION—MILLDAM—FLOWAGE—PRESCRIPTION.**

In an action for damages for overflowing land by increasing the height of a milldam, in which defendant claimed a prescriptive right to flow the lands, *held*, that there was evidence of a user by defendant long enough to give him an easement in the land overflowed, so as to authorize the submission of that question.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 179.\*]

**8. TRIAL (§ 139\*)—JURY QUESTION—CONSIDERATION OF EVIDENCE.**

In determining whether there was any evidence of a contention by defendant authorizing its submission to the jury, defendant's evidence must be taken as true.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332-341; Dec. Dig. § 139.\*]

**9. ADVERSE POSSESSION (§ 16\*)—OVERFLOWING LAND.**

An overflowing by water of land claimed under a deed by the person causing the overflow may be an act of adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 16.\*]

**10. BOUNDARIES (§ 54\*)—SURVEYS—COSTS—DISCRETION OF COURT.**

While under Revisal 1905, § 1504, permitting the court to order a survey when boundaries are brought into question, and to make an allowance therefor, to be taxed as costs of the suit, the amount of the allowance is within the court's discretion, after considering evidence as to the survey, but the court cannot decline to make an allowance because it thinks that the surveyor's charges are exorbitant.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 268-277; Dec. Dig. § 54.\*]

**11. BOUNDARIES (§ 54\*)—SURVEYS—COSTS.**

In view of Revisal 1905, § 1504, permitting the court to order a survey where boundaries are disputed, and to make a proper allowance therefor, to be taxed as costs, payments made by the parties to the surveyor, without an order of court, are at their peril, and cannot control the allowance made by the court.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 268-277; Dec. Dig. § 54.\*]

**12. HUSBAND AND WIFE (§ 244\*)—ACTIONS—COSTS—SEPARATE ESTATE OF WIFE.**

Upon judgment for defendant, in an action brought by a husband and wife for injury to her land, a judgment for costs should not be charged against the wife's separate estate, though the ordinary judgment for costs against her was proper.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 244.\*]

Appeal from Superior Court, Lenoir County; Justice, Judge.

Action by O. K. La Roque and wife against W. L. Kennedy. From a judgment for defendant, plaintiffs appealed, and defendant also appealed from rulings of the court as to costs. Affirmed on plaintiffs' appeal, and reversed and remanded on defendant's appeal, with instructions.

The plaintiff brings this action to recover damages for ponding water on her land, located on Southwest creek. She alleges in

her complaint, among other things: "That the defendant is the owner of a mill site known as 'Kennedy's Mill' in said Southwest township, which said mill is built across Southwest creek below plaintiff's lands, and the defendant makes use of the waters of said Southwest creek to supply power for the operation of said mill. That on or about — day of March, 1906, the defendant wrongfully, unlawfully, and without any rightful authority raised the dam of said mill about three feet or more over and above the height which he and the former owners of the said mill had maintained it before, and thereby raised the water in said creek, and caused same to overflow upon the feme plaintiff's lands hereinbefore mentioned, to her great damage and injury."

The plaintiff admitted on the trial that the defendant was entitled to maintain his dam at 10 feet 6 inches, and the controversy between them was as to the land between the watermark with the dam at 10 feet 6 inches, and the watermark with the dam at 12 feet 2 inches. The defendant contended that he was the owner of the land beyond the watermark with the dam at 12 feet 2 inches high, and, if not the owner, that he had acquired the right to pond the water by prescription.

The plaintiff offered evidence tending to prove that, prior to 1906, the dam was 10 feet 6 inches high, and that in that year it was raised to 12 feet 6 inches, and that water was thereby ponded on the land claimed by the plaintiff. The plaintiff also offered a chain of title, extending to 1869, and evidence that this title covered the land in controversy, and of adverse possession for a length of time sufficient to ripen color of title. It was admitted that the records of Lenoir county, except two old index books, were destroyed by fire in 1880.

The defendant offered in evidence deeds and other evidences of title, which, if admissible, traced his title to 1769. Among other evidences of title, the defendant introduced a paper, purporting to be a deed from Major Croom to Richard Caswell, of date 1772. The following certificate was on this paper: "I certify the above deed, probate and enrollment to be true copies from the records of Lenoir county, this 12th March, 1851. Stephen White, Register."

Plato Collins was examined in reference to this paper, and testified as follows: "Q. How long have you been clerk of the court? A. 11 years. Q. It is in evidence that Stephen White was register of deeds; have you ever seen any of his handwriting in his official capacity as register of deeds? A. I haven't seen the original records; they were destroyed. I have seen papers with Caswell's and White's signatures in a good many instances, certifying to the records when he

was register of deeds. Q. Have you seen that handwriting in his official capacity, purported and accepted as his handwriting? A. Yes, sir. Q. You mean you accepted it as clerk? A. It has been presented to me as his handwriting, and we accepted it as such; I have seen a good many of them. Q. From what you have seen, can you form an opinion satisfactory to yourself whether these papers are in Stephen White's handwriting? A. Yes, sir; I have seen it frequently; it is the same handwriting. Q. Will you look at that paper and say whether the certificate is in the handwriting of Stephen White? A. I think it is."

Cross-examined: "Q. Have you seen any of his writing that has been questioned before? A. No, sir. Q. That was seen by people and accepted as his handwriting? A. Yes; they were presented to me by parties who held them, and accepted by me as his handwriting. Q. In fact, you never saw any public records admitted to be in his handwriting? A. That matter was never brought in question by anybody. Q. The papers were accepted by you and put on the public records? A. Yes, sir."

Redirect examination: "Q. Look at that paper and see what you think about it? [Hands witness paper.] Is that the same as that? A. Yes, sir; that purports to be Major Croom to Richard Caswell, certified March 12, 1851. Q. Will you look at that deed from Richard Caswell to Jesse Cobb, certified April, 1855? Look at his signature? A. That doesn't look as much like it as the other; the characteristics of it are the same. Q. In your opinion, are the handwriting on those two papers in his handwriting? A. They have the same characteristics; I say it is the same handwriting that was purported to me to be in his handwriting. Q. Also Jesse Cobb to John Cobb, certified 16 April, 1855; is that the same handwriting? A. Yes, sir. Q. You have said you had seen the writing of White when he was register of deeds in 1851; have you seen other writings of his? A. When I was a boy, I saw receipts my father got when he used to trade with White, and we had been getting receipts; they got burned up when my father's house burned up; they were in the same handwriting as these. Q. From your recollection of the handwriting of Stephen White, are you able to form an opinion satisfactory to yourself that the signatures submitted to you are the handwriting of Stephen White? A. Yes."

Two other papers were admitted on the same evidence. The plaintiff excepted.

In the chain of title introduced, there was a deed from Jesse Cobb to John Cobb, of date March 10, 1800, and the division of the John Cobb lands, of date December 16, 1844. In this division, under which the defendant claims, the land covered by the mill "to the high-water mark of the mill pond" is allot-

ted. The deed to Richard Caswell and others called for land on Southwest creek.

E. P. Loftin, for the defendant, testified, among other things, that he had known the Cobb mill about 65 years; had lived about a mile or a mile and a half from the mill house. That when he first knew the mill old man Cobb was in charge, and after his death his son, Jesse Cobb. It was known as Cobb's mill. Johnny Jackson had charge next; then Kennedy and Wooten; then Mr. Kelly. That he had known the boundaries of this land, known as the Cobb mill land for fully 65 years. That he knows the present boundary of the high-water mark of the mill property, and that it is lower now than when the Cobbs had it. That he saw trees there above the island when he was a boy, and the water is about the same thing now. That there is a holly, and the water does not come up as close as when he used to fish there; also a gum there that has high-water marks on it, made with an axe, that are 12 or 14 inches above the present high-water mark. That the holly has marks or bruises on it, and that he had chained his boat to the holly, when fishing, at the time Kelly had the mill. That the water now does not quite cover the island in the pond, and that he had seen it covered by water in times past. That the dam was old and worn down in 1851 and 1852, and that he does not think the water is as high now as it was then.

The defendant testified, among other things, as follows: That he bought the mill from J. J. Jackson, and rented it to J. C. Kennedy from year to year for five years. At the expiration of the time, he sold it to J. P. Kelly, and delivered it to him in January, 1885. Kelly kept the mill for 18 years; then he bought it from Jackson, commissioner. J. C. Kennedy bought the half interest from J. C. Wooten, and the property was sold under that mortgage to pay that debt. Bought it from Jackson. Both J. C. Kennedy and J. C. Wooten are dead; J. C. Kennedy died about 16 or 18 years ago; Wooten died about the same time. That he has the deed to him from Mr. Jackson. That he was put in possession of what is known as the Cobb mills—the same property he owns now. That at that time the water of the pond was higher than it is now, and not as high as he has seen it. At the time, the west end of the dam and the road, in his judgment, was about as it was then—the Kinston end. Some of the papers refer to it as the north side; it is a little northwest. On that end the road is about like it was then; the dam doesn't extend quite as far as the pond. This road on the Kinston side of the dam stops before it gets to the rim of the pond and the public road, and the natural level of the land for his part of the water of the pond. At that time the pond was about level with the road, but it was not running over. Then further down, where Cheney shows on the maps the little island, there are several

projections—hummocks or tussocks. That is the point he has designated as a little island; the top of that shows, but the smaller ones do not show. They all show now. That he commenced to repair in the summer of 1905, and completed about the 1st of March, 1906. The water is lower than when he took charge. The Strawberry Branch run is in the center of Strawberry swamp. At this point it turns towards the island at right angles. When it reaches the upland, there is a natural embankment there, fourteen inches or two feet. All along the run of Strawberry swamp down to where you can see it on the swamp side of the embankment is cypress, gum, and such growth that grows in water on La Roque's side of the run. On the embankment there is a growth that usually grows on uplands. That he saw only one dead pine; that looked to be dead 10 or 12 years to him; it is rotten. There is one small pine standing in water, about 15 or 20 steps from the rim of high-water mark. The high-water mark seems to be along the bank of the stream. There is a slight line that runs along there, which would indicate water has been there; and from the observation he made, and the growth, the high-water mark used to be at least 12 inches higher. The holly and dogwood are right on the edge of the embankment; they are about 10 or 12 feet from the rim of the water. It slopes there gradually, and a boat could not go within 20 or 30 feet of them now. That he noticed the bark of the trees; they looked like old bruises on them. Observed a gum; it is in the same locality, but 25 feet from them. The gum is farther to the water. The water would have to raise a foot and a half to reach that. On the island they speak about, he only saw one small pine that lies almost to the water; it didn't seem to be thrifty.

Jesse Evans, for the defendant, testified as follows: "Q. Where do you live? A. Dover. Q. Are you acquainted with the Cobb mill? A. Yes, sir; I have known it all my life; when I first knew it, it was Cobb's mill. I am 55 years old. Q. Will you state whether you have had any business relations there, and if so, what? A. I cut some timber (cypress) up the pond under Mr. Kelly's instructions; that was 15 years ago. I made arrangements with Kelly on what they call Strawberry branch, and floated it down to the pond and put it at the pond—this end of the pond. (Objected to; objection overruled; exception.) The Court: I am admitting it to show the condition of the water up there. Q. You say you floated it down on this end of the pond? What is that end of the pond? A. I claim it is right along the road, where the waters come; what you might say is an open place."

There was other evidence on the part of the defendant as to marks on the land and trees, tending to show an old water line beyond the present one, and that the water had been ponded on the land continuously

since 1850 or 1860, by the defendant and those under whom he claims, as far or further than at this time, and there was evidence to the contrary by the plaintiff.

His honor charged the jury fully, to which there was no exception except as follows: (a) "The plaintiff admits that the defendant is entitled to pond water on the land covered by water by a dam of 10 feet 6 inches, but that he is not entitled to pond water on the land covered by water between that height and the height of the water when maintained at 12 feet 2 inches." The plaintiffs excepted to the foregoing portion of the court's charge.

(b) "The defendant introduces a deed in partition dated 1844, which calls in the high-water mark of the mill pond, but the deed does not state the height of water in the mill pond in 1844. The defendant claims title by possession, but does not show a grant from the state, but claims the same character of title that the plaintiff does. The defendant claims that the high-water mark mentioned in those proceedings of the Cobb mill, in partition proceedings, fixes the boundaries under which the defendant and those under whom he claims claim their title. Now, if you find the plaintiff has ripened her title, then you inquire where the defendant has a right and title, or where he has been in possession. The defendant claims he has been in possession of the land up to the boundary known as the high-water mark. Now, the burden upon that question would be upon the defendant to show you by the greater weight of the evidence, or at least to your satisfaction, where that high-water mark is, either by the deed of partition or by some other deed, that the boundary is fixed and determined in some way." The plaintiffs excepted to the foregoing portion of the charge.

(c) "So, then, it is a question for you to ascertain whether the defendant has shown where the high-water mark is, either by showing you the height of the dam at the time the deed was made or where the high-water mark actually was." The plaintiffs excepted to the foregoing part of the court's charge.

(d) "The defendant claims that you should answer the issue, 'No'; that the plaintiff is not the owner of any part of the land covered by water at the height of 12 feet 2 inches at the dam, nor any part of it; that he has proven to your satisfaction that he is entitled to the land covered by water at the height of 14 feet." The plaintiffs excepted to the foregoing portion of the court's charge.

(e) "Now, the right of the defendant to pond the water back on this land might arise from two grounds: First, if the defendant owns the land covered by water by a dam up to 12 feet 2 inches, he has the right to pond the water back, and if you find that he owns it, then the question for

you is, Has the defendant exercised the right continuously for 20 years to keep the water at 12 feet 2 inches? The defendant claims that he has the right to keep it back to where it is, and even higher, by reason of so keeping it for 20 years continuously, and that if he has that right he has what is known as a prescriptive right, and is entitled to the easement of 12 feet 2 inches. The defendant claims he has the right to maintain a dam at 14 feet, and that the dam has been maintained at 14 feet for more than 20 years, or at least it has been ponded as high as it is now for 20 years continuously." The plaintiffs excepted to the foregoing portion of the court's charge.

(f) "The court charges you that, if you find by the greater weight of the evidence that the defendant owned the land, then he would have the right to pond the water back as often as he pleased; also the court charges you if he had the right to pond the water upon the land, and that right was acquired by prescription, then, if he did it for 20 years continuously, and ponded it back at a point at or above what it is now, and acquired that easement by 20 years continuous use, he would still be entitled to maintain it." The plaintiffs excepted to the foregoing portion of the court's charge.

The jury returned the following verdict:

"(1) Is feme plaintiff the owner and in possession of any part of the tract of land described in the complaint not covered by water ponded back by a dam at the height of 12 feet and 2 inches? If so, what part thereof? Answer: Yes; all above water at 12—2.

"(2) Is feme plaintiff the owner and entitled to possession of any part of the land described in the complaint covered by water ponded back by a dam at the height of 12 feet and 2 inches? If so, what part thereof? Answer: No.

"(3) Has defendant wrongfully injured plaintiff's land by unlawfully ponding water on plaintiff's land? Answer: No.

"(4) What damages, if any, is plaintiff entitled to recover of defendant? Answer: None."

A judgment was rendered upon the verdict, and the plaintiffs appealed.

Loftin & Dawson, G. V. Cowper, and McLean, Varner & McLean, for plaintiffs. George Rountree, W. D. Pollock, and Rouse & Land, for defendant.

ALLEN, J. (after stating the facts as above). The plaintiff objects to the admissibility of the deed to Richard Caswell on two grounds:

[1] (1) That the evidence of the clerk, Plato Collins, as to the handwriting of Stephen White, who was register of deeds of Lenoir county in 1855, is incompetent. This objection is fully met by the interesting and valuable opinion of Justice Hoke, at this term,

in *Nicholson v. Lumber Co.*, 72 S. E. 86. In that case, a certificate of survey of a land warrant, dated in 1841, and signed by Ruel Windley, surveyor, was admitted in evidence on the testimony of John B. Respass, Jr., which was as follows: "Q. Do you know Ruel Windley's handwriting? A. I know it in this way: He raised my father, and was very devoted to him, and often in looking over his papers, which I have now, my father would show me, and say, 'This is grandfather's signature.' Q. Have you seen a great deal of that writing? A. Yes, sir. Since I have been surveying, I have seen quite a lot of it. By family reputation, my great-grandfather was a surveyor, and my father was a surveyor." A small map, marked "A," was handed to witness, and he was asked: "Q. Whose handwriting is this, if you know? A. That is Ruel Windley's from the source of information I have. By the Court: Q. Do you mean to say that somebody told you that that identical paper was in Ruel Windley's own handwriting? A. Not this one. By counsel for defendant: Q. From the writing you have seen, purporting to have been written by Ruel Windley, is that, or is it not, his handwriting? A. Yes, sir; that is his handwriting." And the court, in speaking of this evidence, says: "On these facts and accompanying testimony, we are of opinion that the plat with the certificate was properly received in evidence, being admissible as an ancient document, and also by reason of competent testimony tending to show that the certificate just below the plat, and giving the corners of same, was signed or subscribed in the handwriting of Ruel Windley, deceased. \* \* \* The means of requiring the requisite knowledge, to enable one to form and express an opinion as to handwriting, has, in case of ancient documents, and of necessity, been extended to include a witness who, in the course of his duty, has had full opportunity and frequent occasion to observe and note the handwriting in other ancient documents, entirely free from suspicion, and states that he has thus been enabled to form a satisfactory opinion as to the handwriting of the ancient document in question. 3 Taylor's Evidence, Ames' Notes, 1229, 21; Chamberlayne, Best on Evidence, p. 231; Starkie on Evidence, § 521."

[2] (2) That no evidence was introduced to locate this and other deeds. This objection cannot be considered under an exception to the admissibility of the deed. If the defendant offered a certified copy of the deed, and identified the handwriting of the officer who made the certificate, it was competent evidence, and if afterwards he failed to locate the land the defendant should have called the matter to the attention of the court by a motion to withdraw the deeds, or by a request for a special instruction.

[3] It is not, however, essential that evidence of location should come from witnesses for the defendant, or from living witnesses

es. The deeds may contain descriptions, which, without the aid of extrinsic proof, may indicate where the property is situate. In this case, the witnesses described the locality minutely, and according to all the evidence there was an ancient mill on the land claimed by the defendant, and on Southwest creek. In the deed to Caswell, and in the other deeds, the land is particularly described, and is said to be on Southwest creek, and to include the gristmill on said creek. We think the deeds were properly admitted.

[4] We also think the evidence of Jesse Evans was competent, restricted as it was by his honor.

[5] The first exception to the charge cannot be sustained. We must assume that the judge correctly stated the admission of the parties, and if by inadvertence he did not it ought to have been called to his attention at the time, and cannot be made the subject of exception for the first time in the case on appeal.

[6, 7] The other exceptions to the charge are upon the ground: (1) That there is no evidence where high-water mark was in 1844. (2) That there is no evidence of an adverse possession by the defendant. (3) That there is no evidence of a user by the defendant that will confer an easement. In our opinion, there was some evidence as to the location of the high-water mark in 1844, and of a user by the defendant for a sufficient length of time to confer an easement. A fair interpretation of the evidence of the witness Loftin is that in 1851 the water was maintained higher than now, and that at that time the dam was old and worn down; and there is other evidence of marks on the trees and land, and of the changes in the land, which were properly left to the jury.

[8] If the evidence of the defendant is accepted as true, and we must do so in considering the question whether there is evidence, there can be no doubt of a user under a claim of right for more than 20 years, which would be necessary to confer an easement.

[9] The objection that there is no evidence of an adverse possession is based on the following statement of Chief Justice Ruffin, in *Green v. Harmon*, 15 N. C. 161: "The overflowing of land by an act not done on it, but by stopping a water course below, on one's own land, is not an ouster of the owner from the land overflowed. There is no entry, which is necessary to make a disseisin. The remedy for the injury is not trespass, but an action on the case for the consequential damages. *Howard v. Bankes*, 2 Bur. 1113. Hence, however long it may continue, it affords, of itself, only a presumption of a grant of the easement, and not of the conveyance of the land." The principle declared is not applicable to the facts in this case, as, according to all the evidence here, the dam was on the land of the defendant, and the water does not extend beyond the claim of

the defendant. It is, however, manifest from an examination of the whole case that it was not the purpose of the court to declare that overflowing land, claimed under a deed, is not an act of adverse possession, as is shown by the concluding language of the opinion: "Although cutting of timber and overflowing the land do not amount, of themselves, to an ouster, yet, being done without the leave of the owner, they give character to the entry into another part, and also furnish evidence of it to the owner. The jury might fairly infer from it, not only that the defendant did claim the land, but that the lessor of the plaintiff knew he claimed it and was not a mere wrongdoer without color of title."

The case involves, almost entirely, questions of fact, and having been fairly tried we cannot disturb the judgment.

No error.

#### Defendant's Appeal.

The defendant's appeal presents two questions. Upon the coming in of the verdict, the defendant moved the court for judgment for the entire cost of the action, including the cost of the survey. The court declined to tax the cost of the survey against the plaintiffs, on the ground that one-half had been paid by each party as the survey proceeded, and the court stated that in his opinion the bill was exorbitant, and declined to allow it to be taxed in the bill of costs. Defendant excepted. The defendant then moved the court to adjudge the cost of the action to be charged upon the separate real and personal estate of the feme plaintiff, Nora A. La Roque. The court declined to grant the motion, and the defendant excepted.

The record discloses that the cost and expense of the survey were advanced equally by the plaintiffs and defendant upon the demand of the surveyor, as the survey progressed, and at the time of the trial one-half of the cost of the survey had been paid by the plaintiffs and one-half by the defendant. The entire cost of the survey was about \$750.

[10] It is provided in section 1504 of the Revisal that the court may order a survey when the boundaries of land shall be drawn in question in any pending action, "and for such surveys the court shall make a proper allowance, to be taxed as among the costs of the suit." The amount of the allowance is within the discretion of the court, after considering the evidence as to the work done, but the judge cannot decline to act because he thinks the charges made by the surveyor are exorbitant. The statute requires him to fix the allowance, and directs that it shall be taxed as costs.

[11] The payments to the surveyor, without an order, were made by the parties at their own peril, and cannot control the action of the judge.

[12] The defendant was not entitled to have the judgment for costs made a charge against the separate estate of the feme plain-

tiff. The ordinary judgment for costs was rendered against her, which was proper.

The cause is remanded to the end that the allowance to the surveyor be fixed, and that it be taxed as costs, to the use of the defendant, provided that in no event shall such amount, to the use of the defendant, exceed the amount he has paid.

Reversed.

(156 N. C. 402)

**TOWN OF MURPHY v. C. A. WEBB & CO.**  
(Supreme Court of North Carolina. Oct. 25, 1911.)

**1. MUNICIPAL CORPORATIONS (§ 918\*)—PUBLIC IMPROVEMENTS—CONSTITUTIONAL PROVISIONS—"NECESSARY EXPENSES."**

In the absence of legislative restriction, there is no objection to the issuance of bonds for the expenses of a town, without a popular vote, and bonds issued by a town to extend its water and sewerage system and make street improvements fall within the class of "necessary expenses."

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 918.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4715, 4716.]

**2. MUNICIPAL CORPORATIONS (§ 72\*)—LEGISLATIVE CONTROL—MUNICIPAL DEBTS AND BONDS.**

Under Const. art. 8, § 4, which makes it the duty of the Legislature to provide for the organization of municipal corporations, and to restrict their power of taxation and borrowing money, the Legislature may require a popular vote as a condition to the issue of municipal bonds, even for necessary purposes, and may otherwise limit the power of cities and incorporated villages to tax or to contract debts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 176; Dec. Dig. § 72.\*]

**3. MUNICIPAL CORPORATIONS (§ 64\*)—LEGISLATIVE CONTROL IN GENERAL.**

Cities and towns are but instrumentalities of the state for the administration of local government, and their authority as such may be enlarged, abridged, or withdrawn by the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 64.\*]

**4. CONSTITUTIONAL LAW (§ 70\*)—JUDICIAL FUNCTIONS—WISDOM OF LEGISLATION.**

The policy and wisdom of statute law is a matter for the Legislature, and courts must apply the law as they find it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70.\*]

**5. STATUTES (§ 154\*)—REPEAL—REFERENCE TO AND IDENTITY OF ACT REPEALED.**

The charter of the town of Murphy (Priv. Laws 1889, c. 239) § 17, prohibited the town from borrowing money or issuing bonds, unless authorized by the qualified voters of the town. Priv. Laws 1911, c. 387, entitled "An act to extend the corporate limits of the town of Murphy," by section 1, amended section 1 of the charter, and, by section 2, in terms repealed section 17 of chapter 239 of the "Public" Laws of 1889; that chapter of the Public Laws being a railroad incorporation act, in no way referring to the town of Murphy. Held that, as the chapter and section repealed corresponded with the only chapter and section of the Laws of 1889, public or private, that related to the same subject-matter, the word "public" in the reference might be treated as a clerical error, which would

not defeat the intention to repeal section 17 of the charter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 221; Dec. Dig. § 154.\*]

**6. STATUTES (§§ 47, 214\*)—CONSTRUCTION—MISNOMER OR MISDESCRIPTION.**

A misdescription in a statute will not vitiate the enactment, provided the means of identifying the thing intended, are clear, and in aid of construction the court may call in anything in the act itself, or even the erroneous description, though the reference to the extraneous matter may not in itself be full and accurate.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 47, 290; Dec. Dig. §§ 47, 214.\*]

**7. MUNICIPAL CORPORATIONS (§ 918\*)—PUBLIC IMPROVEMENTS—STATUTORY PROVISIONS.**

Section 17 of the charter of the town of Murphy (Priv. Laws 1889, c. 239), was repealed by Priv. Laws 1911, c. 387, § 2, Revisal 1905, § 2918, concerning the incorporation and powers of towns, which provided that "this chapter shall apply to all incorporated cities and towns where the same shall not be inconsistent with special acts of incorporation or special laws in reference thereto," and section 2916, specifying the powers of towns, was amended by Pub. Laws 1911, c. 86, ratified two days before the amendment to the charter by Priv. Laws 1911, c. 387, § 2. Held, that Pub. Laws 1911, c. 86, was not intended to affect the power to issue bonds without a vote given the town of Murphy.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

Appeal from Superior Court, Cherokee County; Webb, Judge.

Action by the Town of Murphy against C. A. Webb & Co. On a case agreed there was judgment for the plaintiff, and the defendants appeal. Affirmed.

This case was brought to test the validity of certain bonds, issued by the plaintiff, for the purpose of extending or enlarging its water and sewerage system and of making street improvements, and was heard in the court below upon the following case agreed:

(1) The plaintiff is a municipal corporation, chartered by the name aforesaid, and organized under and by virtue of chapter 239 of the Private Laws of 1889, and the acts amendatory thereof, and especially chapter 387 of the Private Laws of North Carolina of 1911.

(2) On the 31st day of August, A. D. 1911, the plaintiff contracted with the defendants to pay, of the par value of \$25,000, which are to draw interest at the rate of 6 per cent., and to run for a period of 30 years, and the proceeds of which are to be used for extending the water and sewerage system of the town of Murphy, and for making certain necessary street improvements.

(3) The plaintiff claims that it has the right to issue the bonds under and by virtue of its charter, to wit, chapter 239 of the Private Laws of 1889, as amended by chapter 387 of the Private Laws of 1911, and of a resolution which was adopted by the board of commissioners of said town, on the 6th day of September, 1911, and that no vote of the people is required.

(4) The defendants have refused to carry out said contract, by receiving and paying for the said bonds, for the reason that section 17 of said chapter 239 of the Private Laws of 1889 does not permit the said town to borrow money or issue bonds, unless authorized by the qualified voters of said town.

(5) The plaintiff claims that section 2 of said chapter 387 of the Private Laws of North Carolina of 1911 repeals said section 17, and permits and authorizes the town to issue the bonds



without submitting the question of their issue to a vote of the qualified voters of the town. The defendants contend that said chapter 387, Private Laws 1911, does not repeal said section 17.

(6) It is also agreed that chapter 239 of the Private Laws of 1889 is the charter of the town of Murphy, and that chapter 239 of the Public Laws of 1889 is "an act to incorporate the Fayetteville & Albemarle Railroad Company."

(7) It is agreed between the plaintiff and the defendants that the superior and the Supreme Courts be requested to pass upon the question herein raised, and that judgment be entered according to the final decision which may be given, and, if the court is of the opinion that the bonds are valid, that the defendants be required to receive and pay for the bonds; but, if the court is of the opinion that the bonds are invalid, then the defendants shall not be required to pay for said bonds.

The court, after hearing argument and upon consideration of the facts, rendered judgment for the plaintiff, and the defendants appealed.

Chas. A. Webb, for appellant. E. B. Norvell, for appellee.

WALKER, J. (after stating the facts as above). [1, 2] It is thoroughly well settled by our own decisions that for the necessary expenses of a county or town bonds may be issued without a vote of the people authorizing the same, and the purposes for which the bonds in question were issued fall within the class of necessary expenses. *Fawcett v. Mount Airy*, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825; *Wadsworth v. Concord*, 133 N. C. 587, 45 S. E. 948; *Robinson v. Goldsboro*, 135 N. C. 382, 47 S. E. 462; *Commissioners v. Webb*, 148 N. C. 122, 61 S. E. 670; *Bradshaw v. High Point*, 151 N. C. 517, 66 S. E. 601; *Ellison v. Williamston*, 152 N. C. 147, 67 S. E. 255. But while this power which resides in the municipal body is not restricted by the Constitution, it was provided by that instrument, with reference thereto, as follows: "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations." Const. art. 8, § 4. It has therefore been held by this court that the Legislature may require a favorable popular vote, as preliminary to the valid issue of municipal bonds, even for necessary expenses, and may otherwise restrict or limit the power of cities and incorporated villages (or towns) to tax or contract debts, either directly or indirectly, and when the Legislature has exercised the power thus conferred upon it the local authorities must heed its mandate and proceed accordingly. *Evans v. Commissioners*, 89 N. C. 154; *Wadsworth v. Concord*, supra; *Robinson v. Goldsboro*, supra; *Perry v. Commissioners*, 148 N. C. 521, 62 S. E. 608; *Burgin v. Smith*, 151 N. C. 566, 66 S. E. 607; *Jones v. Newbern*, 152 N. C. 64, 67 S. E. 173; *Ellison v. Williamston*, supra. For this reason, we held, in *Wharton v. Greensboro*,

146 N. C. 356, 59 S. E. 1043, that the act of 1889, c. 486 (Revisal, § 2977), was a constitutional enactment and that under it, where other provision had not been made by subsequent legislation, no city or town could contract a debt, pledge its faith, or loan its credit for the maintenance of internal improvements, or for any special purpose whatsoever, to an extent exceeding in the aggregate 10 per cent. of the assessed value of the real and personal property situated therein, and that any levy of taxes above that limit would be null and void.

[3] While in respect to cities and towns, it is said that the power of the Legislature to control them, in the exercise of their municipal powers, is somewhat more restricted than in the case of counties, yet both are but instrumentalities of the state for the administration of local government, and their authority as such may be enlarged, abridged, or withdrawn entirely at the will or pleasure of the Legislature. *Lilly v. Taylor*, 88 N. C. 490; *Jones v. Commissioners*, 137 N. C. 592, 50 S. E. 291; *Wharton v. Commissioners*, 146 N. C. 356, 59 S. E. 1043; *Burgin v. Smith*, 151 N. C. 562, 66 S. E. 607.

[4] Whether these provisions of law to be found in the Constitution and statutes, and as construed by this court, are in accordance with a sound and wise public policy, and whether some additional curb should not be placed upon the power vested in municipalities to tax, so as to prevent the present tendency towards extravagance and the other evils in the administration of their affairs, is a matter which is assigned, under our form of government, to the good sense and wisdom of the Legislature. We must apply the law as we find it to be, not as we think it should be.

[5] Having stated these general principles, it must be admitted, in consideration thereof, that the plaintiff in this case, the town of Murphy, had the power to issue the bonds for the purpose of making the improvements described in the resolution of its board of commissioners, without any vote of the people therein, unless restrained by some act of the Legislature from so doing. It is conceded that by Private Laws of 1889, c. 239, § 17, such a restraint was imposed, and that if that section is still in force the bonds cannot be lawfully issued without the sanction of the people, to be signified at the polls by a majority vote of the qualified registered voters of the town. But it is contended that section 17 of that act was repealed by Private Laws of 1911, c. 387, § 2. The latter section provides for the repeal of section 17 of chapter 239 of the *Public* Laws of 1889; whereas that chapter incorporates the *Fayetteville & Albemarle Railroad Company*, and makes no reference whatsoever to the town of Murphy, or to its corporate affairs. The original charter of the town of Murphy is chapter 239 of the *Private* Laws of 1889, and section 17 thereof is the one which relates

to the power of the town to create a public debt, and places a restriction upon that power by requiring the approval of the people at the polls, before any such debt is contracted. Section 1, c. 387, of the Private Laws of 1911, amends section 1, c. 239, of the Public Laws of 1889, the two sections referring to the same subject-matter, viz., the territorial limits of the town; the later act extending the same. A bare statement of the facts is sufficient to convince any reasonable mind that a clerical mistake was committed in referring to section 17, c. 239, of the Laws of 1889 as being a part of the Public Laws of that year; it being manifest that the Private Laws were intended, as the two acts relate to the town of Murphy, and chapter 239 of the Public Laws of 1889 to the incorporation of a railroad company in another part of the state.

[6] The very question presented here was discussed and decided in *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950, wherein we said: "One difficulty in construing the act, and an insuperable obstacle, as the plaintiff's counsel contend, in the way of enforcing the provision which we have quoted, is that there is no reference therein to any particular chapter of the Laws of 1905. It is argued that this is a patent ambiguity which defeats the operation of that clause. 'A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain, and convincing.' Black, *Int. of Laws*, § 58. Under this rule, we may call to our aid anything in the act itself, or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description shall be altogether rejected in making the search for the true meaning; but it may be used in connection with anything outside of the statute to which it refers, and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. Black, *supra*, § 38. But ours is not so much an erroneous, as an inaccurate, description, and the question is whether its words are adequate to express with sufficient certainty the intention of the Legislature. It has been held that if a later act expressly refers to a designated section of an earlier one, to which it can have no application, but there is another section of the prior act to which, and to which alone, in view of the subject-matter, the later act can properly refer, it will be read according to the manifest purpose of the Legislature, and the misdescription will not prevent the reasonable construction that the Legislature intended to refer to the lat-

ter section. *School Directors v. School Directors*, 73 Ill. 249; *Plank Road Co. v. Reynolds*, 3 Wis. 287; Black, *supra*, § 28." That decision clearly covers this case in principle, and it has been approved in the following cases: *Commissioners v. Stedman*, 141 N. C. 448, 54 S. E. 269; *McLeod v. Commissioners*, 148 N. C. 77, 61 S. E. 605; *Pullen v. Corporation Commission*, 152 N. C. 548, 68 S. E. 155. As said in the *Fortune Case*: "We have no doubt as to the intention, and conclude that the mere designation of the section was sufficient, under the circumstances, for us to identify with certainty the chapter and section to which the reference was made."

We may add thereto, so as to emphasize the striking similarity between the two cases, that the reference in this case by chapter and section, corresponding as it does with the only chapter and section of the Laws of 1889, public or private, that relate to the subject-matter, is fully sufficient to show the purpose of the Legislature, and the word "public" in the reference may be treated as a misprision of the draftsman or copyist, and the error should not be allowed to defeat the otherwise plainly and accurately expressed will of that body. The case of *Improvement Co. v. Commissioners*, 146 N. C. 353, 59 S. E. 1014, is also directly in point. There "Washington county" was inserted in the House Journal for "Robeson county," in recording the passage of the bill in that body, but the number of the bill corresponded with the number of a bill to authorize the issue of bonds by Robeson county. This and other "pointers" and "earmarks" were held sufficient to show that Robeson county was intended, instead of Washington county, in the House record; the reference in the latter to Washington county being manifestly a mere clerical error, which was held insufficient to defeat the plain legislative purpose.

Since this opinion was prepared, our attention has been called to an act of the Legislature entitled, "An act to amend ch. 73, section 2916, of the Revisal, concerning towns, so as to confer upon cities, towns and municipalities power to construct and maintain waterworks, sewerage systems and other public utilities," being chapter 86 of the Public Laws of 1911. This act is not mentioned in the case agreed, nor is there any reference to it in the brief of counsel, and it seems to have been overlooked, but we are now asked to consider it, and determine whether it has any application to the facts of this case. This is a most reasonable request of counsel, as it is important that the validity of the bonds in question should be free from all doubt or uncertainty.

[7] We do not think after a careful reading of the statute that it was intended to affect bonds issued by the town of Murphy, under its charter and the amendments thereto. If the general act of 1911 applies to any municipality which has special provisions upon the same subject, and this we are not now

required to decide, it does not apply to this case, as we have virtually held at this term in *Red Springs Hotel Co. v. Town of Red Springs*, 72 S. E. 887, since the statute was called to our notice. If it did not apply to that case, it certainly does not to this one. There the amendment to the charter of the town was passed at the session of 1911, a few days before the general law was enacted, while in this case the charter was amended, so as to authorize the issue of bonds without a vote of the people, two days after the general act was ratified, showing very clearly that the said act was not intended to apply to the town of Murphy. Besides, the act of 1911 is an amendment of chapter 73 of the Revisal and section 2916 thereof. It is provided by section 2918 as follows: "This chapter shall apply to all incorporated cities and towns where the same shall not be inconsistent with special acts of incorporation, or special laws in reference thereto." This section shows that this case is not affected by the act of 1911, for the issuing of the bonds without an election is specially provided for in the amended charter of the town.

We find no error in the case or record, and therefore affirm the judgment.

Affirmed.

(89 S. C. 547)

**GRIFFIN v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of South Carolina. Nov. 1, 1911.)

**1. CARRIERS (§ 113\*)—INJURY TO GOODS—LIABILITY—ACCEPTANCE FOR SHIPMENT.**

Where goods are accepted for shipment, the placing of the goods upon its platform renders a carrier responsible for any damages from fire originating within its right of way, unless released from liability by the shipper.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 113.\*]

**2. CARRIERS (§ 113\*)—LOSS OF GOODS—LIABILITY—WAIVER—"CONSENT."**

Where a carrier accepts cotton intended for shipment at some future time, the cotton will be upon its platform with the carrier's "consent," under Civ. Code 1902, § 2135, making a carrier responsible for loss by fire originating on its right of way, except for property which has been placed upon its right of way illegally or without its consent.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 113.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1437-1441; vol. 8, p. 7612.]

**3. CARRIERS (§ 136\*)—ACTION FOR LOSS—QUESTION FOR JURY.**

In an action for the loss of cotton destroyed by fire while on defendant's platform, the question whether it had been placed there by defendant's consent as cotton tendered for immediate shipment, notwithstanding a rule that the carrier assumed no risk for cotton put upon its platform, unless tendered for immediate shipment, held for the jury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 136.\*]

Appeal from Common Pleas Circuit Court of Sumter County; George E. Prince, Judge.

"To be officially reported."

Action by T. N. Griffin against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mark Reynolds and Lucian W. McLemore, for appellant. Thos. G. McLeod, for respondent.

JONES, C. J. This action was for the recovery of damages for the destruction by fire of certain cotton belonging to plaintiff, while upon the platform of the defendant company within the limits of its right of way. There was evidence to the effect that notice had been given to the plaintiff that the defendant assumed no risk for cotton so placed, unless same was tendered for immediate shipment, but that such cotton would be entirely at the owner's risk. The evidence also showed that the cotton in question was placed upon such platform, subsequent to the giving of such notice and without any tender thereof for immediate shipment, and was subsequently destroyed by fire originating within the limits of defendant's right of way. There was also testimony which is claimed by plaintiff as tending to show that, notwithstanding such notice, the cotton in question was placed upon said platform "with the consent" of the defendant, within the meaning of section 2135 of the Civil Code.

At the conclusion of the entire testimony in the case, the defendant moved for a direction of a verdict in its favor, upon the ground that the evidence admitted of no other inference but that the cotton was placed upon the defendant's platform, either without its consent, or if with its consent, then upon the understanding between the parties that it was so placed at the entire risk of the plaintiff himself. This motion was refused by the presiding judge, it being held by him that, while the evidence showed that the cotton was so placed upon the platform after such notice given by the defendant, there was still testimony to go to the jury upon the question of waiver by the defendant of the terms and requirements of such notice. The appeal questions the correctness of this refusal to direct a verdict in favor of the defendant. Substantially the question presented for determination is whether there was evidence to go to the jury upon the issue as to the defendant's consent to placing of the cotton upon the platform as cotton intended for shipment.

[1, 2] If the cotton was accepted for shipment, whether such shipment was intended to be immediate or remote, the placing of the same upon the platform would render the defendant responsible for any damage thereto from any fire originating within the right of way, unless the plaintiff had released the defendant from such liability. The defendant could waive its own rule that

it would not accept cotton upon its platform or right of way unless intended for immediate shipment, and could, notwithstanding its rule, accept the same intended for shipment, not immediately, but at some future time, in which case the cotton would clearly be upon the right of way with the consent of the defendant, within the meaning of the word "consent" as used in the statute. *Yarborough v. Railway*, 78 S. C. 103, 58 S. E. 936. It is not questioned that the fire originated within the right of way of the defendant company, and that defendant would be responsible for the damage to the cotton, if the same had been placed on the platform for immediate shipment; and the case just cited shows that the defendant would be liable for such damage, if the cotton was accepted for shipment, though such shipment was not intended to be immediate, notwithstanding its stipulation by notice that it would not accept cotton, unless for immediate shipment. The notice given in this case was substantially the same as that which was shown in the case of *Yarborough v. Railway*, 78 S. C. 103, 58 S. E. 936. In that case the notice was in substance to the effect that the railroad company would not be responsible for cotton placed on the platform until the same was "tendered to and accepted by the company for shipment." In the case at bar the notice was to the effect that the defendant would not be responsible for cotton placed on its platform until the cotton "is placed for immediate shipment."

[3] There was testimony tending to show that, subsequent to the service of the notice already mentioned, plaintiff's agent was informed by the same agent of the defendant through whom such notice had been given that the same was not intended to apply to plaintiff; and there was also testimony to the effect that, after plaintiff had been procuring, in compliance with such notice, the issuance by defendant of bills of lading for small lots of cotton at brief intervals, he or his agent was informed by defendant's agent that bills of lading need not be procured for contemplated shipments until the entire shipment was ready; such testimony tending to show the resumption of a previously existing course of dealing between the parties by which cotton was placed for shipment upon defendant's platform in small lots from day to day, and bills of lading therefor were issued from time to time when any lot was completed for shipment. The evidence of the plaintiff's agent was that the defendant's agent instructed him to "go ahead and complete the lots in a reasonable time," and that this instruction was given with reference to the matter of the lot of cotton intended for shipment, and had relation to the time when bills of lading should be procured for the same; and there was testimony tending to show

that this instruction was given to save the necessity for issuing daily bills of lading for small lots of cotton. There was also testimony from which the inference might be drawn that the cotton here in question, and which was destroyed by fire while upon the defendant's platform, was so intended for ultimate shipment, and was so placed in pursuance of the instructions of defendant's agent.

The judgment of the circuit court is therefore affirmed.

GARY, A. J., and HYDRICK, J., concur.  
WOODS, J., did not sit.

(89 S. C. 535)

ROBERT R. SIZER & CO. v. DOPSON et al.  
(Supreme Court of South Carolina. Oct. 25, 1911.)

1. REPLEVIN (§ 88\*)—CLAIM AND DELIVERY—TRIAL—QUESTION FOR JURY.

On evidence in an action of claim and delivery, in which plaintiff took possession of lumber consigned by defendant to third parties, *held*, that the issue whether defendant's act in shipping the lumber was a conversion of plaintiff's property was for the jury.

[Ed. Note.—For other cases, see *Replevin*, Dec. Dig. § 88.\*]

2. REPLEVIN (§ 11\*)—CONDITIONS PRECEDENT—DEMAND.

Where property of plaintiff has been converted, a demand for its possession is not necessary before an action of claim and delivery.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 85-97; Dec. Dig. § 11.\*]

3. REPLEVIN (§ 63\*)—CLAIM AND DELIVERY—ANSWER—DAMAGES.

An answer, in an action of claim and delivery in which plaintiff has taken possession of lumber consigned by defendant to third parties, which denies plaintiff's allegations of ownership, alleges the value of the lumber to be \$300, and sets up a claim of \$1,000 damages by reason of plaintiff's having seized and withheld the property "carelessly, willfully, recklessly, and maliciously," is a sufficient basis for proof of both actual and punitive damages.

[Ed. Note.—For other cases, see *Replevin*, Dec. Dig. § 63.\*]

4. TROVER AND CONVERSION (§ 44\*)—VALUE OF PROPERTY—MEASURE OF DAMAGES IN GENERAL.

In actions for conversion or for the taking and detention of personal property, the general rule is that the measure of damages is the value of the property with interest thereon, and the jury may give the highest value up to the time of the trial, and may take into account any benefits therefrom received by the party wrongfully in possession.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 260, 261; Dec. Dig. § 44.\*]

5. TRIAL (§ 337\*)—VERDICT—DISREGARD OF INSTRUCTIONS.

A verdict of \$500 damages for the defendant in an action of claim and delivery, where lumber shipped by him to third parties had been seized by plaintiff, cannot be sustained as a finding of punitive damages, expressly recoverable in such actions under Act Feb. 13, 1907 (25 St. at Large, p. 483), where it is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

contrary to an instruction that the evidence did not warrant punitive damages.

[Ed. Note.—For other cases, see *Trial, Cent. Dig. § 790*; *Dec. Dig. § 337.\**]

**6. REPLEVIN (§ 63\*)—SPECIAL DAMAGES—NECESSITY OF PLEADING.**

In an action of claim and delivery, in which the plaintiff has seized lumber shipped by defendant to third parties, damages to the defendant because the seizure of the lumber prevented him from getting money to pay his men, made it necessary for him to mortgage his house to get money for that purpose, and so crippled him financially that he was obliged to suspend his business of sawing lumber and turn over his property to the plaintiff, who had a mortgage on it, are "special damages," not recoverable unless specially alleged.

[Ed. Note.—For other cases, see *Replevin, Dec. Dig. § 63.\**]

**7. REPLEVIN (§ 62\*)—CLAIM AND DELIVERY—"GENERAL DAMAGES."**

"General damages" in actions for conversion or for the taking and detention of personal property, provable under a general allegation, are those inferred by the law itself because the immediate, direct, and proximate result of the act complained of, as an injury to the property itself, or to its value by detention.

[Ed. Note.—For other cases, see *Replevin, Cent. Dig. § 224*; *Dec. Dig. § 62.\**]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3059, 3060; vol. 8, p. 7669.]

**8. REPLEVIN (§ 62\*)—CLAIM AND DELIVERY—"SPECIAL DAMAGES."**

"Special damages" in actions for conversion, or for the taking and detention of personal property, not provable without special allegation thereof, are those which, although the natural, are not the necessary, consequences of the act; being outside of the costs and disbursements allowed by law, and consequential in their nature.

[Ed. Note.—For other cases, see *Replevin, Cent. Dig. § 224*; *Dec. Dig. § 62.\**]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6572, 6573; vol. 8, p. 7802.]

Appeal from Common Pleas Circuit Court of Hampton County; R. W. Memminger, Judge.

"To be officially reported."

Action by Robert R. Sizer & Company against B. H. Dopson and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

E. F. Warren (B. A. Hagood and A. R. Young, of counsel), for appellant. B. R. Hiers and W. S. Tillinghast, for respondents.

WOODS, J. Robert R. Sizer & Co., a corporation, brought this action of claim and delivery against B. H. Dopson and the Charleston & Western Carolina Railroad Company, and thereunder took from the railroad company a lot of lumber loaded on cars consigned by Dopson to A. B. Sykes and Jackson Lumber Company, Savannah, Ga. The railroad company, being a mere carrier in possession, has no interest in the cause. Dopson answered, denying the plaintiff's allegation of ownership, alleging the value of the lumber to be \$300, and setting up a claim of \$1,000 damages by reason of the plaintiff's having seized and withheld the proper-

ty "carelessly, willfully, recklessly, and maliciously." On the trial the circuit court instructed the jury that there was no evidence warranting a verdict for punitive damages. The verdict was in favor of the defendant for the return of the property, or its value, \$300, and \$500 damages. The court refused a motion for a new trial made on the ground, as appears from the order of the court, that the verdict was "excessive and unsupported by the evidence."

Error is assigned in the instruction given to the jury that the verdict must be in favor of the defendant Dopson if they found that the plaintiff had not demanded possession of the lumber before bringing the action. There was no demurrer to the complaint, and the correctness of the instruction depends upon the issue made by the evidence.

The defendant was the owner of a saw-mill and was largely indebted to the plaintiff for advances for the purchase of timber and for other purposes. The evidence on the part of the plaintiff tended to prove that the defendant had agreed that all the lumber manufactured by him except boards should be the property of the plaintiff corporation and consigned to it to be sold, and that the plaintiff was to sell the lumber and apply the proceeds to the defendant's debt. The evidence on the part of the defendant was to the effect that there was no such agreement, and that the plaintiff had no right to the possession of the lumber in dispute. The defendant repudiated the claim of the plaintiff by loading the lumber on cars and consigning and shipping it to other persons.

[1] If the plaintiff was the owner of the property at defendant's mill, the defendant's act in shipping it to other persons was a distinct conversion of it. The issue whether there had been a conversion of plaintiff's property by the defendant was thus clearly made by the evidence; and this issue could be decided only by the jury.

[2] It was error to disregard the conflict thus made by the testimony, and instruct the jury as a proposition of law that the plaintiff could not recover unless the jury found that it had demanded the possession from the defendant before bringing the action; for, if defendant had converted the property of the plaintiff, demand for possession before action was not necessary. *Jones v. Dugan*, 1 McCord, 428; *Harris v. Saunders*, 2 Strob. Eq. 370, note; *McPherson v. Neuffer*, 11 Rich. 267; *Ladson v. Mostowitz*, 45 S. C. 388, 23 S. E. 49; *Girardeau v. Sou. Express Co.*, 48 S. C. 421, 26 S. E. 711; *Holliday v. Poston*, 60 S. C. 103, 38 S. E. 449.

[3] The answer was a sufficient basis for proof of both actual and punitive damages. On the subject of damages the jury were instructed: "I have not been able to discover any evidence here which would warrant you in finding punitive damages. So I am

\*For other cases see same topic and section NUMBER in *Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes*

going to charge you in this case that you can only find actual damages, in case you find that he (the defendant) is entitled to damages. Such actual damages as he suffered from the taking and detention. That means such actual damages as he suffered, as was reasonably consequent upon the taking and withholding of the property from the defendant's possession by Sizer & Co. You cannot go into remote and speculative elements of damages, such as what he might have lost by way of profits on the mill, but get down to exactly what he lost, as a reasonable consequence, as a proximate result, of the taking and withholding of the property." The plaintiff's contention is that under this charge there was no support in the evidence for a recovery of \$500 damages, and that the refusal to grant a new trial on this ground was error of law.

[4] In actions for conversion or for the taking and detention of personal property, the general rule is that the measure of damages is the value of the property with interest thereon, and the jury may give the highest value up to the time of the trial. *Rogers v. Randall*, 2 Speers, 38; *Gregg v. Bank of Columbia*, 72 S. C. 458, 52 S. E. 195, 110 Am. St. Rep. 633. And if the party wrongfully in possession has received any benefit therefrom the jury may take that into account. *Buford v. Fannen*, 1 Bay, 273, 1 Am. Dec. 615.

[5] Punitive damages may now be recovered under the act of 1907 (25 Stat. 483); but the verdict of \$500 could not be sustained as a finding of punitive damages because the presiding judge instructed the jury that the evidence did not warrant punitive damages. The instruction was also given that remote or speculative damages must be excluded, and that a verdict for defendant should embrace only such damages as were a proximate result of the taking and withholding of the property.

[6] The defendant estimated his losses due to the taking and detention of the lumber at \$1,500 to \$2,000. This estimate was based upon the statement that the seizure of the lumber prevented him from getting the money to pay his men, made it necessary for him to mortgage his house to get the money for that purpose, and finally so crippled him financially that he was obliged to suspend his business of sawing lumber and turn over his property to the plaintiff corporation, which had a mortgage on it. These damages were all special and remote—such as would not ordinarily result from the taking of \$300 worth of lumber. It was not alleged in the answer, nor was there any evidence offered tending to prove, that the plaintiff had notice that such far-reaching consequences would result from taking by process of law under a claim of right three car loads of lumber. This being so, it seems clear that such damages were not recoverable.

[7, 8] In *Loeb v. Mann*, 39 S. C. 465, 18 S. E. 1, the court thus states the rule: "The complaint does not make any claim for special damage, and the circuit judge charged that the case was not one for vindictive damages, so that it must be considered as a plain and ordinary case for the recovery of personal property, and damages for its detention. 'To recover damages for the detention of personal property (the property having been delivered), special damage cannot be recovered unless expressly alleged.' *Lipscomb v. Tanner*, 31 S. C. 49 [9 S. E. 733]. What is this special damage which cannot be proved without being specifically alleged? There is certainly a lack of clearness in the authorities on the subject; but it seems to us that what are called 'general damages,' as contradistinguished from 'special damages,' are admitted in evidence under a general allegation—indeed, are inferred by the law itself—for the reason that they are the immediate, direct, and proximate result of the act complained of, as, for instance, an injury to the property itself, or its value, by detention, etc.; while damages which, although the natural, are not the necessary, consequence of the act, being outside of the 'costs and disbursements' allowed by law, and consequential in their nature, are not admissible in evidence without special notice of the claim in the allegations of the complaint, and are therefore called 'special damages.' It is elementary that damages, in the ordinary sense, must be the immediate result of the act complained of." The same rule was laid down by the Supreme Court of the United States in *Vance v. Vandercook*, 170 U. S. 468, 18 Sup. Ct. 645, 42 L. Ed. 1111, where it was held that the damages contemplated in such actions are those which result directly from the taking and detention, and cannot include the destruction of business.

The verdict of \$500 was not supported by the evidence and was contrary to the charge of the presiding judge, and for this reason the motion for a new trial should have been granted.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause be remanded to that court for a new trial.

JONES, C. J., and GARY, A. J., and HYDRICK, J., concur.

(39 S. C. 551)

#### MULDROW v. MIXSON.

(Supreme Court of South Carolina. Nov. 1, 1911.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 303\*)—DISTRIBUTION OF PERSONALTY—VALIDITY.

A beneficiary under a will, having taken a piano at a valuation agreed upon with the other beneficiary, and having kept it for two years, is properly chargeable in the administrator's accounts with that amount.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1229-1242; Dec. Dig. § 303.\*]

## 2. PARTITION (§ 5\*)—PAROL PARTITION OF PERSONALTY—APPROVAL.

A court of equity may approve a parol partition of personal property followed by possession among minors who have reached years of discretion, if the circumstances were such as would have warranted the court to make such division on application.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 13-17; Dec. Dig. § 5.\*]

## 3. EXECUTORS AND ADMINISTRATORS (§ 495\*)—COMMISSIONS—RIGHT TO.

An administrator was properly allowed commissions on rents collected by him from land belonging to beneficiaries, and not acquired under the will involved, in carrying out testator's desire to provide for the education of the beneficiaries.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2083-2116; Dec. Dig. § 495.\*]

Appeal from Common Pleas Circuit Court of Barnwell County; Robt. Aldrich, Judge.

Action by Essie L. Muldrow against R. M. Mixson, administrator. Decree for defendant, and plaintiff appeals. Affirmed.

Willcox & Willcox, for appellant. Bates & Simms, for respondent.

JONES, C. J. This is an appeal from a decree of the circuit court affirming the judgment of the probate court of Barnwell county, adjusting the accounts of R. M. Mixson, as administrator with the will annexed of the estate of Willa I. Loud. The exceptions present two questions: (1) Whether the administrator was justified in charging appellant with a piano at a valuation of \$400; (2) whether the administrator had a right to take charge of the real estate of plaintiff, not acquired under the will of her mother, and to charge commissions on the rents collected therefrom.

[1] Willa I. Loud died testate in the summer of 1905, and upon the death of the executrix named in the will the defendant, Mixson, at the solicitation of the beneficiaries, was appointed administrator with the will annexed. In the fourth clause of the will the testatrix devised and bequeathed to her children, Cary Smith Loud and Essie Ashton Loud, all of her property of every nature and kind whatsoever, and in the sixth clause she declared it her will and desire that her said daughters shall be educated, and empowered the executor to use the rents and profits of the real estate for the purpose of the education, maintenance and support of the said children until they are 21 years of age or shall marry, and upon said children attaining the age of 21 years or upon their marriage they are to "take the property" freed from all limitations or trusts whatsoever. The property of which Mrs. Loud died seised and possessed consisted of a dwelling house and one or more vacant lots in the town of Williston, S. C., and some personal property, consisting of household furniture, which was sold by the administrator, except a hat rack and a set of furniture, which the children divided among

themselves, and about which there is no dispute, and except the piano in dispute. The beneficiaries agreed that the piano was worth \$400, and objected to a sale of it for less than that sum, and, fearing that it would be sold at a sacrifice if exposed to public sale, they objected to such sale. The piano was then taken to the house of the administrator, and there remained until March, 1907, when the plaintiff, who had married E. A. Muldrow in January, 1907, wanted the piano and decided to take it at the valuation, and requested that it be shipped to her at Florence, S. C., which was done with the consent of other beneficiary, Cary. At that time Essie, Mrs. Muldrow, was about 18 years old, and Cary, who afterwards married Guy Vaughn, was about 20 years old. The plaintiff kept and used the piano for more than two years without objection. According to the testimony \$400 was a reasonable valuation of the piano. The administrator in his accounts has charged plaintiff with \$400, the value of the piano, and credited her with \$200, one-half thereof. Both the probate and circuit courts concur in sustaining this as proper under the circumstances, and we affirm their conclusion.

[2] A court of equity may approve a parol partition of personal property followed by possession among minors who have reached years of discretion, if the circumstances were such as would have warranted the court to make such division on application. There is nothing in the circumstances of this case to show any unfairness. The plaintiff, who had been taking instruction in music, wanted the instrument in her own home, and agreed to take it at the valuation of \$400, which the testimony shows was reasonable, and did take and use the same for more than two years before any attempt was made to turn it back to the administrator. A just consideration of the rights of the other beneficiary, who might sustain loss by a forced sale of the piano after such lapse of time, ought to induce the court to sanction the parol partition, fairly made between the parties. Both the probate court and circuit court construed the will as authorizing the beneficiaries to take their shares of the estate on their marriage, not only as to real estate, but as to personal property, and that this involved authority to exercise some choice and agreement as to division after marriage, although before reaching full age. There is force in this view, and no doubt the administrator felt warranted in delivering the piano to the plaintiff after her marriage, upon the agreement between the parties interested. We, however, do not rest our conclusion upon this construction of the will.

[3] With reference to the second question, we think it was not unjust or improper to allow the administrator to charge commission on rents collected by him from real estate belonging to plaintiff and her sister, and not acquired under the will. It is true it

was not strictly the duty of defendant as administrator to collect these rents, but he was concerned to carry out the wishes of the testatrix to provide for the education of these young ladies. They had no other person to look after their land, secure tenants, and collect the rents, and they wished him to do so. His services appear to have been beneficial, and the circuit court has commended the fidelity of the administrator to his trust. The charge is but a reasonable compensation for the services rendered, and should be sanctioned.

The judgment of the circuit court is affirmed.

(89 S. C. 561)

**ROWE v. MOORE et al.**

(Supreme Court of South Carolina. Nov. 1, 1911.)

**1. WILLS (§ 608\*)—CONSTRUCTION—ESTATES DEVISED—APPLICATION OF RULE IN SHELLEY'S CASE—INTENTION OF TESTATOR—"HEIRS OF HER BODY."**

A testator, in item 10 of his will, devised land unto his daughter during her natural life, and then absolutely to the heirs of her body forever, and in item 3 he devised land to his son for his natural life, and then to the heirs of his body forever; the child or children of one of his children dead to take the share of his or their parent. The other items of the will, wherein an absolute estate was not devised, were similar to item 10, save that some omitted the word "absolutely" before "heirs of her body"; while item 13 stated that it was the testator's will and intention that none of his children taking a life estate under any of the foregoing items should have power of alienation. Held that, in view of the provision last mentioned, the words "heirs of her body," used in item 10, and those same words used in the other items, must be taken as meaning children; and, such being the testator's intent, the rule in Shelley's Case does not apply, and the daughter took a mere life estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3267-3271.]

**2. WILLS (§ 440\*)—CONSTRUCTION—INTENTION OF TESTATOR.**

In construing a will, the intention of the testator is to be gathered from the entire instrument, and must be given effect, if lawful.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.\*]

**3. WILLS (§ 608\*)—CONSTRUCTION—ESTATES DEVISED—APPLICATION OF RULE IN SHELLEY'S CASE.**

Though still in force, the rule in Shelley's Case does not apply to a devise for life, remainder to the devisee's heirs or heirs of body, where those words are so qualified by additional words as to show an intention that they are used to indicate a new stock of inheritance, and are not mere words of limitation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

Appeal from Common Pleas Circuit Court of Marlboro County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by Martha Moore Rowe against Marvin W. Moore and another. From a judgment for defendants, plaintiff appeals. Affirmed.

The following is the opinion of Shipp, J., of the court below:

"This is an action for specific performance heard by me at chambers, while presiding in the Fourth circuit, at Dillon, S. C., at the March term of court, 1911. The hearing at chambers was consented to by all parties interested in the action. The plaintiff was represented by her counsel, Knox Livingston, Esq., and the defendant Marvin W. Moore by his counsel, J. W. Le Grand, Esq., and the infant defendant was represented by his guardian ad litem, Walter S. Rowe.

"Oral arguments on the questions presented by the pleadings, and printed briefs containing points and authorities, were submitted to me by counsel on both sides. On account of the importance of the questions presented, I have reserved my opinion until this Saturday, the 13th day of May, 1911. This is an agreed case, and has resolved itself into a legal question, and involves only the construction of the will of Milton A. J. Moore, who, according to the proceedings, departed this life in the county of Marlboro, state of South Carolina, on the 8th day of February, 1903, leaving of full force and effect his last will and testament, of which his widow, Alice G. Moore, and his brothers, J. D. and J. A. W. Moore, were nominated executors, all of whom thereafter qualified and entered upon the discharge of their duties as such executors.

"The plaintiff and the defendant Marvin W. Moore are children of the testator, and the infant defendant, Walter S. Rowe, Jr., is the only child of the plaintiff. By item 10 of his last will, Milton A. J. Moore devised certain real estate therein described to his daughter, Martha Moore (now Rowe).

"On the 12th day of January, 1911, a written agreement was entered into between Martha Moore Rowe and the defendant Marvin W. Moore, by the terms of which Martha Moore Rowe agreed to convey 'or secure to be conveyed unto the said Marvin W. Moore, his heirs and assigns forever, by a good and indefeasible title in fee simple, free from all incumbrance, all that certain piece, parcel or tract of land, lying and being situate in the county of Marlboro, in the state aforesaid, containing one hundred and twenty-six acres, more or less, bounded by the public highway leading from Bennettsville to Cheraw, and by lands of said Marvin W. Moore; this being the same tract of land devised in and by the last will and testament of her father, the late Milton A. J. Moore, to the said Martha Moore Rowe, and is designated on a general plat of the land of said testator made by J. R. Parker, surveyor, as tract No. 3 of the McCollum lands.'

"The consideration of such purchase was \$15,000, to be paid as set forth in the agreement, but, the details of such agreement being immaterial for the decision of the question to be determined by this court, I will refrain from quoting the same.

"After the agreement was executed by both



parties, and on the day of January, 1911, the plaintiff executed in due form under her hand and seal, a title to the premises agreed to be conveyed, and tendered same to the defendant Marvin W. Moore, who refused to accept the deed, claiming as his reason for such refusal that the plaintiff, Martha Moore Rowe, did not receive any greater than a life estate under item 10 of her father's will, and therefore could not convey to him a good and indefeasible title, in fee simple, free from all incumbrance, to the property agreed to be conveyed.

"It appears that the defendant Marvin W. Moore is willing to carry out his agreement, provided a good and indefeasible fee-simple title to the premises can be made to him by the plaintiff. Upon the refusal of Marvin W. Moore to accept the title offered, this consent action for specific performance was commenced.

"By agreement, 'the question and only question submitted to the determination and judgment of the court is, "Can the plaintiff, Martha Moore Rowe, convey said tract or parcel of land, by good and valid deed in fee simple, she having issue of her body still living?" If yea, then the court will decree the specific performance of said contract on the part of the defendant the said Marvin W. Moore, upon the delivery to him of the warranty deed of said Martha Moore Rowe, for said tract or parcel of land.' \* \* \*

[1] "The property which is the subject of this action was devised to plaintiff by item 10 of Milton A. J. Moore's will, and the plaintiff contends that this item is complete in itself, and does not necessitate the construction of any other part of the will of Milton A. J. Moore, in order to ascertain its meaning, and that by this item she received a fee-conditional estate under the rule in Shelley's Case, and upon the birth of issue, to wit, Walter S. Rowe, Jr., such estate was raised to a fee simple, and that she now has full right and power in herself to convey the premises devised to her in item 10 by an indefeasible fee-simple title.

"Item 10 of the will is as follows: 'I will and devise unto my daughter, Martha Moore, for and during her natural life, and then absolutely to the heirs of her body forever, one hundred and twenty-six acres of the McCollum lands, known on Plat of Parker, as No. 3.' The defendant Marvin W. Moore contends that the words 'heirs of her body' in item 10 mean children, and that this can be easily understood by construing the entire will, and that to hold that item 10 is complete in itself will defeat the manifest intention of the testator, and will thereby place a strict construction on the words 'heirs of her body'; whereas, it will appear from a construction of the entire will and codicils attached thereto that it was clearly the intention of the testator that the words 'heirs of her body' should mean children; that it is manifest that the words 'heirs of her body' were used to represent children in item 3 of the will.

"Such part of item 3 as is material to the construction of item 10 is as follows: 'After the death of my wife, I will and devise the said one hundred and fourteen acres of land unto my son, John Milton Moore. Also on his reaching the age of twenty-one years, I also will and devise to him, fifty acres of the Webster lands, and fifteen acres of the land purchased from A. W. Moore, and the thirty-two acres of land bought from Mrs. E. C. Moore, to have and to hold to my said son, for and during his natural life, and then to the heirs of his body forever, the child or children of one of his children dead, to take the share of his or their parent.'

"It is clear to my mind that the testator used the words 'heirs of the body' in the sense of children in item 3, and it would be against reason to hold that the testator used the words 'heirs of his body' in the sense of children in item 3, and in other items of the same will, in making devises to others of his children, uses the words 'heirs of her body' in any other sense than that of children. Items 4, 5, and 6 gave to each party named therein absolute estates; of this fact there can be no doubt. Items 7, 8, 9, 11, and 12 are identical with item 10, with the exception that in some of said items the word 'absolutely' precedes the words 'heirs of the body,' while in others this word is left out. The word 'absolutely' is used in item 10. While this word taken alone does not aid in evincing the intention of the testator to use the words 'heirs of the body' in the sense of children, still, when construed in connection with all other parts of the will, this word does tend to strengthen the contention that it was the purpose of the testator to create, under item 10, a life estate only, and not a fee conditional.

"In item 13 it will be observed that the testator said: 'It is my will and intention, that none of my children taking only a life estate under any of the foregoing items, shall have any power to incumber or dispose of same, and that any incumbrance or conveyance on their part, shall be absolutely null and void.' The words 'none, under any of the foregoing items,' and 'their,' used in item 13 just quoted, all refer to more than one child, and to more than one life estate.

"It can be easily understood from reading the entire will that the testator used the words 'heirs of her body,' in items 3, 7, 8, 9, 10, 11, and 12, as meaning children; otherwise item 13 is absolutely without force or effect.

[2] "This court said, in the case of *Weathersbee v. Weathersbee*, 82 S. C. 10 [62 S. E. 840]: 'Here, as in every case, the business of the court is to ascertain from the whole instrument the intention of the maker. That ascertained, it must be executed, if lawful.' In *Vaughan v. Bridges*, 61 S. C. 184 [39 S. E. 351]: 'For, after all, the cardinal rule for the construction of a will is to seek for the intention of the testator, as disclosed by the language which he used.' I might quote a number of other authorities for the posi-

tion just taken, but I deem it unnecessary.

[3] "It is true that the rule in Shelley's Case is still binding authority in South Carolina, but when it appears that the words 'heirs,' 'heirs of the body,' or 'issue' are so qualified by additional words in the will as to evince an intention that they are not to be taken as descriptive of an indefinite line of descent, but are used to indicate a new stock of inheritance, the rule in Shelley's Case does not apply.

"Upon consideration of the entire will and codicils of Milton A. J. Moore, and after giving due weight to the contentions of the plaintiff and the defendant, Marvin W. Moore, as set forth in the pleadings in this action, and for the reason herein given, I hold that the testator, Milton A. J. Moore, used the words 'heirs of her body,' in item 10 of his will, in the sense of children, and that Martha Moore Rowe received a life estate, and nothing more, in the property devised to her in said item 10, with the remainder to her children, and that she cannot convey to the defendant, Marvin W. Moore, a good and indefeasible title, in fee simple, to the said property, and that said Martha Moore Rowe cannot comply with her part of the agreement, and I therefore refuse to compel specific performance, on the part of the defendant, Marvin W. Moore."

Knox Livingston, for appellant. J. W. Le Grand, for respondents.

GARY, A. J. For the reasons therein stated, the judgment of the circuit court is affirmed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(69 W. Va. 539)

JOHNSON v. WHEELER LUMBER CO.  
(Supreme Court of Appeals of West Virginia.  
Sept. 9, 1911.)

(Syllabus by the Court.)

1. COURTS (§ 252\*)—JURISDICTION—AMOUNT IN CONTROVERSY.

As to a defendant, the jurisdiction of this court is tested by the amount of the judgment or decree of the court below against him, and not by the amount sued for.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 252.\*]

2. JUDGMENT (§ 323\*)—AMENDMENT.

When notice of a motion to correct the judgment of a prior term given by one party to the other, returnable to a day certain, is not proven or docketed, or otherwise noticed on the record on the return day, such motion should be treated as having been abandoned; and it is error, reversible here, for the court below, at a subsequent day, unless the error or omission be waived by appearance thereto, to take up such motion and pronounce judgment thereon.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 323.\*]

3. APPEAL AND ERROR (§ 238\*)—REVIEW—VOID JUDGMENT.

Such erroneous and void judgment is not a judgment by default, and it may be reviewed here without a motion in the court below to correct the same, pursuant to sections 5 and 6, chapter 134, Code 1906.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1399; Dec. Dig. § 238.\*]

Error to Circuit Court, Randolph County.  
Action by Ed Johnson against the Wheeler Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. B. Maxwell, for plaintiff in error.  
James Coberly, for defendant in error.

MILLER, J. The plaintiff, defendant in error, presents a preliminary question of jurisdiction.

The amount of the judgment against defendants, a co-partnership, on the verdict of the jury on appeal, in the circuit court, is one hundred and eleven dollars and nine cents, with damages at the rate of ten per centum per annum until paid, and costs. It is claimed by plaintiff, however, that as the amount demanded by him in his action, begun before a justice, was but eighty-six dollars and forty-nine cents, exclusive of interest and costs, the amount in controversy is not sufficient to give this court jurisdiction of a writ of error to the judgment below against defendants. This is not the law. As to the defendant the amount of the decree or judgment is the test in all cases, of the amount in controversy. *Marion Machine Works v. Craig*, 18 W. Va. 559; *Faulconer v. Stinson*, 44 W. Va. 546, 29 S. E. 1011; *State v. Boner*, 57 W. Va. 81, 49 S. E. 944. So the point is overruled.

[1] The first point relied on by defendants is that the court below was without jurisdiction to pronounce the judgment complained of. On the trial, at the preceding term, defendants at the close of plaintiff's evidence, demurred thereto, and the jury returned a conditional verdict, that if the law should be for plaintiff on defendants' demurrer to the evidence then they found for plaintiff the sum of one hundred and eleven dollars and nine cents; but if for defendants, then they found for them. At a subsequent day of that term, according to the order then entered, on consideration of said demurrer, the court was of opinion, that the law arising thereon was for the defendant, and its judgment then pronounced was that plaintiff take nothing by his action, and that defendants recover their costs. This judgment was pronounced at the November term, 1909, of said court.

[2] The judgment here complained of was entered on February 19, 1910, on notice by plaintiff to defendants, that on February 18, 1910, he would move the court to change the judgment of the preceding term, "so that it will overrule the said demurrer of the said

defendant to the said evidence, in said action, and give judgment in favor of the said plaintiff against the said defendant for the amount of his claim in said action"; and that the ground of said motion was, "that the said order was entered through a misprision or misapprehension of the clerk, and is contrary to the finding of the court."

The first point made against this judgment is, that the notice, made returnable to February 18, was not docketed, or noticed on the record, until February 19, the day of the judgment thereon, and that consequently plaintiff must be regarded as having abandoned his notice, and that the court without a new notice duly served on defendants was without jurisdiction on this ground to pronounce the judgment complained of, or disturb its judgment for defendant at the preceding term.

We have no statute controlling motions of this character, and we think the general rule is, when a notice like the one we have here is made returnable to a day certain, and is not docketed on the return day, or is not noticed on the record, the person giving such notice should be treated as having abandoned the notice and that it is error for the court at a subsequent day, unless the error or omission be waived by appearance thereto, to take up the motion and pronounce judgment thereon. *Central Land Co. v. Calhoun*, 16 W. Va. 361, 366, 367, involved a notice for award of execution on a forfeited forthcoming bond, not proved or docketed, or noticed on the record on the return day. The court in that case, by Judge Green, says: "This omission of the plaintiff in error to have his notice proved and his motion docketed at the proper time could have been taken advantage of by the defendants in error in the county court; but by entering a general appearance, three days afterwards, and moving to have the proceedings on their merits continued, and failing to ask before such appearance and motion to have them dismissed because of this irregularity, the defendants admitted themselves to be properly before the court and effectually waived all right to object to this irregularity, even in the court below, much less in this court." Citing *Venable v. Coffman*, 2 W. Va. 319, and *Bank of the Valley v. Bank of Berkeley*, 3 W. Va. 391. See, also, 28 Cyc. 7; 15 Amer. & Eng. Ency. Law (1st Ed.) 913. The rule applicable to cases of notice or process, controlled by section 2, chapter 124, Code, not requiring docketing, is inapplicable. *Gas Co. v. Wheeling*, 7 W. Va. 22; *O'Brien v. Camden*, 3 W. Va. 20.

Plaintiff's reply to this point is that defendant appeared, as shown by the record, and not objecting at the hearing of the motion, waived the error, if any, bringing the case within the exception noted in *Land Co. v. Calhoun*, *supra*. In support of this position the judgment entry is relied on. It recites that "this day came the plaintiff

\*, \*, \*, and moved the court to amend and correct the order entered in this cause on the 25th day of Nov., 1909, \*, \*, \*. And it appearing to the court that notice of the intention of said plaintiff to make such motion has been duly served upon the defendants, and after hearing the evidence adduced, and the argument of counsel the court is of opinion, and doth consider, that the said order, entered, \*, \*, \* was so entered through a misprision or misapprehension of the clerk, and that the same is contrary to the finding of the court." The order further shows the motion sustained, and the former order amended and corrected and the order then entered *nunc pro tunc*, should stand instead of and take the place of said former order, as follows: "This day came the parties by their attorneys, and the court having maturely considered of its judgment, upon the defendants' demurrer to the evidence, is of opinion that the law arising upon said demurrer is for plaintiff. It is therefore, &c." There is nothing in this order, thus far, to indicate the presence, or appearance of defendants to said notice. True the order *nunc pro tunc* recites the appearance of "the parties by their attorneys," but this clearly has reference to the time of the original judgment in favor of defendants, on the demurrer to the evidence, not to the notice of the motion to correct and amend that judgment. We do not think the recital that the court heard "the evidence adduced" even implies the presence of the defendant participating in the trial of the motion, or offering evidence thereon. But the last sentence of the judgment appealed from is: "To which action of the court the defendants excepted." It is urgently insisted that this part of the order clearly shows the presence of defendants, not at the date of the original judgment, corrected, but on February 19, 1910, when the judgment appealed from correcting the former judgment was pronounced. If this be the correct interpretation of that order we think the position of plaintiff's counsel well founded; but should the order be so interpreted? Should the language of the last sentence quoted, be construed as applying to the action of the court on the motion of plaintiff to correct the original judgment, or as a part of and relating to the *nunc pro tunc* judgment? We think the latter the proper and reasonable construction. This seems clear from the language of the first part of the order reciting the appearance, the service of the notice on, but not the appearance thereto of defendants, and the plain purpose of the last sentence of the order to save an exception to the judgment, as according to the claims of plaintiff and the finding of the court it was intended the original judgment should be. Our conclusion is, therefore, that the error was not waived by appearance and failure to object.

[3] But it is claimed that the court heard evidence on the motion, and that this evi-

dence not being certified or brought up, the appellate court cannot reverse the judgment on the notice. There might be merit in this proposition if the court had acquired jurisdiction to enter into the merits of the motion, but if the notice was allowed to lapse, as we think it was, the court could not consider the merits of the motion without appearance thereto by defendant, and waiver of the error to docket the motion on the return day of the notice. Such void or erroneous judgment we do not think should be treated as a judgment by default, requiring as a condition precedent to review here, a motion in the court below to correct the same, pursuant to sections 5 and 6, chapter 134, Code 1906. A judgment by default contemplates process of a court, duly served, and default of appearance, not one entered on notice, abandoned as in the case at bar. *Bank v. Manufacturing Co.*, 48 W. Va. 406, 409, 37 S. E. 541.

These views call for a reversal, and preclude any consideration of the merits of the motion, or of the judgment sought to be corrected thereby.

Our opinion is to reverse and set aside the judgment of February 19, 1910, leaving the judgment of the November term, 1909, which it undertook to correct, in full force.

(69 W. Va. 533)

ALLISON et al. v. CITY OF CHESTER et al.  
(Supreme Court of Appeals of West Virginia.  
Sept. 9, 1911.)

*(Syllabus by the Court.)*

**MUNICIPAL CORPORATIONS (§ 865\*)—LIMITATION OF INDEBTEDNESS—CONTRACTS WITH WATER COMPANY.**

A contract of a municipal corporation, with a water works company, for a supply of water for public use, for a stipulated number of years, at a stipulated price per year, payable in quarter annual payments, is not void, by section 8, article 10, of the Constitution (Code 1906, p. lxxix), limiting municipal indebtedness, because the aggregate of such payments, for the full term of the contract, with existing indebtedness, exceeds the amount for which such municipality, is by said section, allowed to become indebted. The validity of such contract is tested by the aggregate of the quarterly payments for the first year.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1836-1838; Dec. Dig. § 865.\*]

Appeal from Circuit Court, Hancock County.

Bill by Charles F. Allison and others against the City of Chester and others. Decree for defendants, and plaintiffs appeal. Affirmed.

J. B. Sommerville, for appellants. Hubbard & Hubbard, Billingsley & Clark, and W. B. Moore, for appellee South Side Water Works Co.

MILLER, J. The decree appealed from, dissolving the preliminary injunction and dismissing plaintiffs' bill, presents for decision a single question, a question of constitutional limitation.

Amendatory of a prior ordinance of November 20, 1903, the Council of the City of Chester, on November 4, 1909, adopted an ordinance reciting the passage of the former ordinance by which it had contracted with the South Side Water Works Company for a supply of water for extinguishing fires, and for other purposes, and since which time the growth of the city had been such as to require the laying of a more extensive system of water mains than originally contemplated and provided for, and that further extensions would be required from time to time, and that the making of such extensions and additions as was and would be required, and was proposed, to meet the new and continually increasing demands, the Water Works Company would be required to expend a large amount of money; and furthermore reciting that in order to justify said company in making such expenditures, and to enable it to secure the funds necessary to extend and enlarge its plant as desired, and proposed, it was then ordained as follows:

"Section 1. That said contract entered into by said ordinance of November 20, 1903, and the acceptance thereof by the South Side Water Works Company, be altered so that said Company shall, for a period of 30 years, supply fire hydrants and water to said city for extinguishing fires and for other purposes, and the said city shall during the said period pay for the same at the rate and upon the conditions following, to-wit:

"(1) Said Water Works Company shall maintain the fire hydrants already in place in said city and connected with said Company's mains, and said Company shall also furnish, install and maintain at such points on said Company's mains as may be designated by Council such additional fire hydrants as Council may from time to time require. Hydrants which may be installed shall be of the same pattern or equal efficiency with those already in use, and no hydrant once installed or maintained under this contract shall be discontinued during the term thereof.

"(2) Said Water Works Company shall at all times during the term of this contract, except in case of accident to machinery or mains, or when making connections, furnish water at all of said fire hydrants at such pressure and in volume as may be reasonably required for fire protection.

"(3) Said Water Works Company shall furnish, erect on its mains and supply with necessary water, free from all charges to the city, such iron drinking troughs for horses as Council may approve, not to exceed four in number, which troughs shall be maintain-

ed and kept in good repair by Council during the term of this contract.

"(4) The city shall have the right to use water from said fire hydrants for extinguishing fires, and to a reasonable extent for sprinkling and cleaning streets or fire department practice.

"(5) The City of Chester, in consideration of the foregoing stipulations on the part of the Water Works Company, agrees to pay said Company at the rate of Forty-Five Dollars (\$45.00) during the term of this contract for each fire hydrant now maintained or hereafter installed under order of the Council up to and including fifty in number. Water for flushing sewers shall be paid for at the rate of ten cents per thousand gallons. Payments hereunder shall be made quarterly by the city in full for all service rendered by the Water Works Company during the preceding quarter."

Section 8, article 10, of the Constitution (Code 1906, p. lxxix) provides: "No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years; Provided, That no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same."

It is conceded that the annual payments provided for in the contract can be paid each year out of the current revenues of the city, but that the aggregate of such payments cannot be so met, and that if such aggregate constitutes an indebtedness within the meaning of the Constitution the contract is void; for it is also conceded that the questions connected with the making of the contract had not prior to entering into the same been first submitted to the vote of the people, as required by the provisions of the organic law.

The sole question, presented for decision then, is, should the aggregate of all the quarter annual payments provided for in the contract be treated as an indebtedness of the City of Chester, within the meaning of the constitutional inhibition, or only that portion thereof which were thereby to become due the first year?

It is well settled in this, and in other states having like or similar constitutional provisions, that municipalities may not be-

come indebted absolutely or contingently beyond the constitutional limitation, for present delivery of property, or for services performed, or to be performed, as in the building of water works, or any other kind of municipal improvements, even though the time of payment be postponed to future dates, no matter what may, be the form of the contract. Our own cases of *List v. Wheeling*, 7 W. Va. 501; *Spilman v. Parkersburg*, 35 W. Va. 605, 14 S. E. 279; *Honaker v. Board of Education*, 42 W. Va. 170, 24 S. E. 544, 32 L. R. A. 413, 57 Am. St. Rep. 847; *Shinn v. Board of Education*, 39 W. Va. 497, 20 S. E. 604; *Dempsey v. Board of Education*, 40 W. Va. 99, 20 S. E. 811; *Camden Clay Co. v. New Martinsville*, 67 W. Va. 525, 68 S. E. 118, and *Davis v. Wayne County Court*, 38 W. Va. 104, 18 S. E. 373, all, with the cases cited, sustain and illustrate the application of this well settled rule.

But it is contended for appellant, with respect to *Davis v. County Court*, not that it was a case on all fours with the case at bar, but that the principles announced therein, and, as it is claimed, substantially approved in *Spilman v. Parkersburg*, *Camden Clay Co. v. New Martinsville*, and other cases, goes farther, and, using the language of the decision, holds that, where such municipal authorities "attempt to or do bind, without a proper vote of the people, the levies of future years in any manner or for any purpose whatsoever, either by contract, express or implied, their action in so doing is a usurpation of power and an infringement of the Constitution, and such contract is null and void." The language of Judge Holt, in *Spilman v. Parkersburg*, much relied on, is: "By the term 'indebtedness' as here used, is meant the state of being by voluntary obligation, express or implied, under legal liability to pay in the present or at some future time for something already received, or for something yet to be furnished or rendered. This includes every kind of indebtedness, no matter in what manner created, or voluntarily brought about; or for what purpose, whether it be for municipal self-preservation or not; whether for pure air, pure water, good light, clean and convenient and safe streets and sidewalks; whether it be payable now or hereafter, payable quarterly or annually, or at any date running on for thirty-four years; whether for current expenses, or fixed and definite debts or charges; whether for personal property or real property, leasehold or freehold; it is none the less indebtedness, created in some manner and for some purpose, and is within the purview and the bar of the Constitution." This very broad and comprehensive definition of the term indebtedness, clearly comprehended the case which the court there had in hand. It is substantially the definition of the term given in 22 Cyc. 75, but this authority says: "It is a word of large meaning, and must be con-

strued in every case in accord with its context." So that when our Constitution makes use of the term "indebted," we must look to the whole context to interpret its meaning. As throwing light on this question the words of the same article of the Constitution: "Nor without, at the same time, providing for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years." Clearly the liability of the contract we have here is not such an indebtedness as is comprehended by this clause, which apparently is applicable to all indebtedness inhibited by the Constitution.

Moreover, the language of a court should always be interpreted with reference to the particular case in hand. In the Davis Case the controversy related to certificates of indebtedness, or so called road orders, issued by the county court, apparently, in payment of a county bridge. In *Spilman v. Parkersburg*, the subject of controversy was a contract in the form of a lease, by the terms of which, the City of Parkersburg, at the termination of the lease, if all annual payments provided for had been paid, was to become the owner of an electric lighting plant, constructed by the lessor, as provided by the contract. Unquestionably the contracts involved in each of those cases constituted debts, from their inception, and although in the latter case the contract for lighting the streets was in form a lease, it was in fact a conditional purchase of the property, binding the levies of the city for future years, an indebtedness of the city, and void as an infraction of the constitutional inhibition against the creation of such indebtedness, without submitting the question pertaining thereto to a vote of the people.

The record before us presents no such case as was presented in *Davis v. County Court* or *Spilman v. Parkersburg*. The contract here involved relates to an annual supply of water; the water may never be furnished, or furnished for only a portion of the term provided for; it amounts in our opinion to a mere provision for the necessary current annual expenses of the city, the aggregate of the payments not comprehending an indebtedness inhibited by the Constitution.

It is conceded, however, that there are decisions in other states, notably in Illinois, holding that contracts, such as is here involved, do constitute indebtedness within the meaning of the Constitution of those states. *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781, and *Chicago v. McDonald*, 176 Ill. 404, 52 N. E. 982, among other cases, are cited and relied on.

We deem it wholly unnecessary to enter into any extended review or analysis of these cases, or those to the contrary on which we base our conclusions, or to discuss the underlying principles involved. That has been

sufficiently accomplished, we think, in prior decisions of this court, and the numerous cases cited and relied on in the text-books and decisions cited.

In disposing of this case it seems only necessary to say that we are disposed to follow the great weight of judicial authority, including the decisions of the Supreme Court of the United States, and many other state and federal cases, and, as we think, the better supported by reason, in holding that where the contract or ordinance, as in the case at bar, is one intended to provide for the furnishing of a municipality with water to be used for public purposes, the payment therefor to be made from year to year, such contract should not be construed or treated as the creation of an indebtedness within the inhibition of our Constitution, except as to the amount actually fallen due, but as a mode or means of providing for the necessary current expenses of the municipal government. True the revenues of succeeding years, to a certain extent, become bound for the future performance of the contract, and beyond the discretion of the municipality to alter or abrogate; but a supply of water is an absolute necessity, indispensable to the very existence of the people, and without such authority to so contract, a municipality would be entirely helpless. Judge Brannon, *arguendo*, citing many cases, expresses approval of this doctrine, in *Welch Water, Light & Power Co. v. Town of Welch*, 64 W. Va. 373, 62 S. E. 497, 498, and we think it sound, and that it is not in conflict with any prior decision of this court. Some of the many cases so holding are *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Beard v. Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 34 L. R. A. 402, 44 Am. St. Rep. 232, and note; *Higgins v. San Diego*, 118 Cal. 524, 45 Pac. 824; *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191; *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 95, 106 Am. St. Rep. 201; *South Bend v. Reynolds*, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795; *Cunningham v. City of Cleveland*, 98 Fed. 657, 39 C. C. A. 211; *Grant v. City of Davenport*, 36 Iowa, 396; *Stedman v. City of Berlin*, 97 Wis. 505, 73 N. W. 57; *Wade v. Burrough of Oakmont*, 165 Pa. 479, 30 Atl. 959; *Gas Light Co. v. New Orleans*, 42 La. Ann. 188, 7 South. 559; *Raton Water Works Co. v. Town of Raton*, 9 N. M. 70, 49 Pac. 898; *Luddington Water Supply Co. v. City of Luddington*, 119 Mich. 580, 78 N. W. 558. In 28 Cyc. 1544, citing in notes the above and many other cases, the law is stated thus: "A contract by a municipality to pay for water, lights, sewage, and the like, at stated times in the future, does not create an indebtedness for the aggregate amount of such payments, within the meaning of a provision limiting the indebtedness of municipalities, and the validity of

such a contract is tested by the amount of the first payment thereunder."

We hold that the decree appealed from is right, and our opinion is to affirm it.

(69 W. Va. 473)

# STATE v. LEWIS.

(Supreme Court of Appeals of West Virginia.  
June 16, 1911. Rehearing Denied  
Oct. 24, 1911.)

(Syllabus by the Court.)

## 1. INDICTMENT AND INFORMATION (§ 121\*)—BILLS OF PARTICULARS.

The law of bills of particulars applies to criminal and civil cases.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.\*]

## 2. INDICTMENT AND INFORMATION (§ 121\*)—BILL OF PARTICULARS—LARCENY.

Under an indictment for simple larceny, a bill of particulars, specifying the character of larceny to be proven, may be demanded by the defendant.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.\*]

## 3. CRIMINAL LAW (§ 858\*)—TRIAL—TAKING OF PAPERS TO JURY ROOM.

A letter given in evidence to a jury may be taken by the jury to its room, on its retirement to consider the case, if the jury so requests.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2056-2059; Dec. Dig. § 858.\*]

## 4. CRIMINAL LAW (§ 784\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

When the inculpatory evidence against an accused is circumstantial, it is error to refuse him an instruction which correctly states the force of such evidence required for conviction, and the principles by which it is to be weighed and considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.\*]

Williams, P. dissenting.

Error to Circuit Court, Harrison County.

Charles A. Lewis was convicted of larceny, and brings error. Reversed and remanded.

H. C. Batten, Thomas Ramage, and Geo. M. Hoffhelmer, for plaintiff in error. Wm. G. Conley, Atty. Gen., and J. O. Henson, Asst. Atty. Gen., for the State.

BRANNON, J. [1] Charles Lewis was sentenced to the penitentiary upon an indictment charging simple larceny of 3,500 pounds of wool. The evidence tended to show, not simple larceny by him, but the taking and carrying away of the wool by another, and receiving and concealing it by Lewis, with knowledge that it had been stolen. At request of Lewis, the court made an order requiring the state to furnish the accused a bill of particulars, more specifically setting forth the real accusation, "in order that the defendant might be apprised of that which he is expected to defend." The state refus-

ed to do this, claiming that such particulars could not be more definite than the indictment, and, as the bill of exceptions states, "the defendant was forced to go into trial without said bill of particulars, after it had ordered the said bill of particulars to be filed with the accused." We hold this to be error of substantial character. In *Clark v. Railroad*, 39 W. Va. 732, 20 S. E. 696, we held that our Code (chapter 130, § 46) required such bill in civil actions for tort or on contract, if the declaration is of so general a nature as not to apprise the party of the cause of action, where justice and fair trial, free of surprise, call for it. We said that refusal of it was not arbitrary discretion, but a basis of error. In the case we said that the principle had often been applied in criminal cases. Not in every case can it be demanded. We said that only in cases where the law allows general statements in a declaration can specification be demanded. The right cannot in every case be used. It can only be exercised where the law allows a general statement in the pleading, but justice demands further information of the demand or accusation. It is a matter of sound, but not arbitrary, discretion. This court applies these principles in the late case of *State v. Railroad*, 68 W. Va. 193, 69 S. E. 703, to criminal cases, upon an indictment against a railroad company for obstructing a road by a train; the court holding it reversible error to refuse such bill of particulars to specify which of many trains caused the obstruction. [2] If told that Code, c. 130, § 46, in words applies only to an "action or motion," I would answer that if that section (a remedial one) does not apply it is a power inherent in a court to regulate trial, and that the Constitution demands that "the accused be fully and plainly informed of the character and cause of the accusation," and thus authorizes such discretion in the court. Anyhow, there is much law applying this procedure to criminal cases. 22 Cyc. 371; *Kirby v. U. S.*, 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 800. Such being the right of an accused, I can at the moment think of no case calling more plainly for its application. Why? Because by our well-settled law, on a trial of an indictment alleging simple larceny, conviction may be had, not only for simple larceny, but for receiving or concealing stolen goods, obtaining under false pretense, or embezzlement. *State v. Halida*, 23 W. Va. 499; *State v. Edwards*, 51 W. Va. 220, 41 S. E. 429, 59 L. R. A. 465; *Pitnogle's Case*, 91 Va. 811, 22 S. E. 351, 50 Am. St. Rep. 867. This is because statute law declares these offenses larceny. I always doubted the soundness of this rule, but it is fixed. The relief against it is the right to a specification. The indictment says that the defendant himself stole the things. On trial comes evidence that another man stole, and

defendant received. Is not this legal surprise? The court made an order for a bill of particulars, thus deciding that one was called for. Why recant or ignore this order? What reason? None, except the mere statement of the bill of exceptions that "the attorneys for the state wholly neglected and refused to make up and give to defendant the said bill of particulars, claiming that they could not be more definite in said bill than in the indictment." Here the court assigns neglect. We do not say that it was practicable to be more definite as to the wool; but do say that the state could have easily specified whether it was intended to prove that the defendant had himself stolen the wool from its place of deposit, or that he had feloniously received and secreted it. We think the bill should have been required, and that it was error to ignore it.

But, though the refusal of the bill of particulars was error at the time of the refusal, yet we must determine whether we will reverse for that cause. Did Lewis suffer from it? Where it appears that a party is not aggrieved, error is harmless. Such a bill of particulars cannot be demanded, where unnecessary, or where the party already knows the facts. 3 Ency. Pl. & Prac. 527, 529. The record of the trial from the evidence from Lewis himself shows that he shipped boxes containing the wool to Baltimore, and then went there and saw the wool, and sold it. He thus had information as to receiving; that being the offense presented by the evidence of the state. We do not say that this would tell him that evidence on the trial would be confined to the act of receiving the wool, and no evidence of its theft by him would be given. But, again, he gave evidence by himself and others to repel the charge of receiving, and it is not made to appear that he would have given more evidence, had he been furnished with a bill of particulars. We think that, in order to effect reversal for this cause, it ought somehow to appear that Lewis could have furnished other additional evidence to repel that charge. He should have asked the court for continuance, or have filed an affidavit that he could have furnished further evidence, had he been warned of the particular charge to be proven against him. Before another trial, such bill of particulars should be furnished Lewis. For future use on the subject of bills of particulars in negligence cases, and generally, I cite 1 Wharton, Cr. Law, § 1048, and full and valuable note in 3 Am. & Eng. Ann. Cas. 161.

[3] A letter was given in evidence. The jury after retirement called for it and it was sent to its room. This is no error. The Code, in chapter 131, § 12, says the court may allow "papers" to be carried from the bar. We discuss this matter in State v. Stover, 64 W. Va. 670, 63 S. E. 315. Why give a paper in evidence at bar, and then with-

hold it from the jury? 10 Ency. Pl. & Prac. 592.

It is suggested, with some hesitation, by counsel that, though a conviction for receiving stolen goods may be under an indictment for larceny, yet the *verdict* must state that the defendant was guilty of receiving. It is admitted by counsel that a search has revealed but one case to sustain this position. We cannot so hold. As our law allows conviction on an indictment for simple larceny, the verdict may be guilty as charged in the indictment, without specifying the particular kind of larceny.

Two railroad shipping orders were given in evidence to show that Lewis had shipped the wool. It is claimed they were not properly proven. This point is not sustained, as Lewis' own evidence proves that he signed them.

[4] The following instruction was refused defendants: "(10) The court instructs the jury that, in order to warrant a conviction for a crime on evidence in whole or in part circumstantial, it is absolutely essential that all the circumstances from which a conclusion is to be drawn, and without which it could not be drawn, shall be established by full proof, and every circumstance essential to the conclusion must be proven in the same manner, and to the same extent, as if the whole issue (that is, the guilt or innocence of the defendant) had rested upon the proof of each individual and essential circumstance, and should to a moral certainty exclude every reasonable hypothesis consistent with the innocence of the accused." We think that this instruction should have been given. It was pertinent to the case as one involving circumstantial evidence of guilt. It states a principle or rule guiding in the consideration of such evidence. It tells how its main facts must be proved, and how they must relate to each other and harmonize to produce conviction. It may be said to be theoretical, or to deal with the abstract philosophy of circumstantial evidence, and not readily understandable to an average jury; still these abstract rules are found in the books on evidence, when they tell us what principles apply to circumstantial evidence. They are of common and general use in courts. They are lights guiding the feet in the use of such evidence, as we stated in State v. Musgrave, 43 W. Va., on pages 693, 694, 695, 696, 28 S. E. 813. We do not see that it is inconsistent with the majority opinion in that case. We think the instruction is sound, under legal principles as to circumstantial evidence. Of what use is the exposition of rules as to treatment of such evidence found in so many books of evidence and court opinions through centuries, if they may not, or must not, be stated to juries? Are they only for judges and lawyers, and to be withheld from juries, the sole triers of the facts under the evidence? State v.



Flanagan, 26 W. Va. 116; 12 Cyc. 487, 488. It has been suggested that, though this instruction is sound, as all members of the court think, yet another instruction cures its refusal—No. 6, given. It says that to convict, the state must prove beyond reasonable doubt that the wool had been stolen by a person other than the defendant; that the defendant received it, knowing it to have been stolen; that he received it, or aided in concealing it, with dishonest intent; that it was the same wool alleged to have been stolen from R. T. Lowndes. On first thought one might think that this instruction covered the ground and answered the purpose of No. 10; but on consideration we can hardly think so. This No. 6 only tells the jury what ultimate facts must be found in order to convict; it deals with quantity, weight, or effect of evidence; whereas No. 10 lays down the principles applying in the use of circumstantial evidence; it tells how it is to be handled or treated in its consideration. We say that No. 10 is sound, and the party has a right to his instruction in his own words, if sound, and that its refusal cannot be excused by another instruction, unless the latter clearly covers the same end. "When the inculpatory evidence is circumstantial, it is error to refuse a requested instruction which correctly expounds the cogency requisite in that character of proof." *Dreyer v. State*, 11 Tex. App. 631.

We reverse the judgment, without expression on the evidence, set aside the verdict, and award a new trial, and remand the case to the criminal court of Harrison county.

WILLIAMS, P. (dissenting). I think our former decision of this case was erroneous, and I am therefore in favor of granting a rehearing. I have at no time been of the opinion that the refusal to give defendant's instruction No. 10 constituted sufficient ground for reversal, and I am now convinced that this is not such a case as entitles defendant to demand a bill of particulars, for two reasons: (1) To say that he has such right is a contradiction of the well-settled rule that, when an indictment contains more than one count, the state cannot be compelled to elect on which count it will proceed to trial. Evidence under any one, or all, the counts may be given. *Dowdy v. Commonwealth*, 9 Grat. (Va.) 727, 60 Am. Dec. 314; *State v. Halida*, 28 W. Va. 499. (2) The indictment informs defendant as fully as he could have been informed by a bill of particulars, and a bill of particulars is therefore useless. At common law there was but one kind of larceny, but our Legislature has created, out of kindred offenses, three additional kinds of larceny, viz.: (a) Receiving stolen goods, knowing them to be stolen; (b) obtaining money or goods by false pretense, with intent to defraud; and (c) em-

bezzlement. Any one of these may be proven under a single count for common-law larceny. *State v. Williams*, 68 W. Va. 86, 69 S. E. 474, 32 L. R. A. (N. S.) 420, and cases cited in the opinion. Defendant knew this, because every one is presumed to know the law. Was he not, therefore, as much advised by the indictment itself, although it contained but a single count for common-law larceny, as he could have been by an indictment drawn with four separate counts, each setting forth distinctly a separate kind of larceny? Of course he was, because the one count, in effect, includes all the crimes above enumerated. It is therefore clear that defendant was as fully advised of the particular offense with which he was charged by the indictment with one count, as he would have been by an indictment with four counts. It was conceded by all the judges during the discussion of this case that, if the indictment had contained a separate count for each kind of larceny, defendant would have had no right to demand a bill of particulars, and I have shown that the legal effect of the indictment is the same as if it had contained separate counts for all the kinds of larceny. Now, if the state should be compelled to furnish a bill of particulars, it would unquestionably have the right to set forth all the matters provable under the indictment, the practical effect of which would be, so far as it relates to informing defendant, an indictment for larceny with four counts. To say that the state could not furnish such a bill of particulars is to say it may be compelled to elect. The question is then resolved to this: That a bill of particulars in a larceny case is equivalent to an indictment for larceny containing all the counts. But an indictment containing one count—the count for common-law larceny—is equivalent to an indictment with all the counts for larceny. Then, pray, is not an indictment with the common-law count for larceny equal to a bill of particulars? Things that are equal to the same thing must be equal to each other. This principle is as applicable here as in mathematics.

Suppose the court had required the state to furnish a bill of particulars, it could have complied by stating that it expected to prove (1) that defendant stole the wool; (2) that he received it from another, knowing it to be stolen, and (3) that he obtained it by false pretenses, with intent to defraud. Such a bill of particulars would give defendant no more specific information of the particular offense of which the state expected to prove him guilty, than he received from the indictment itself. I am therefore unable to see any good reason for the view entertained by the majority of my associates. I think their holding, if adhered to, will place an unnecessary burden upon criminal procedure. The indictment informed defendant of the kind, quantity, and value of the

thing stolen, and who was its owner, and the place where the offense was committed. He had no right to demand of the state any further information in advance of his trial. He had no right to be told *how*, in what manner, the crime would be proven. He must come to trial prepared to meet any, and all, lawful evidence as to the *manner* in which the larceny charged was committed. He cannot demand of the state a revelation of its evidence before going to trial. This case is widely different from any criminal case in which the courts have held that a defendant has a right to a bill of particulars. It is wholly unlike the case of *State v. B. & O. R. R. Co.*, 68 W. Va. 193, 69 S. E. 703.

I would not reverse for the refusal to give defendant's instruction No. 10, because the jury were fully instructed in regard to the matter of circumstantial evidence by defendant's No. 6 and the state's No. 4, which were given, and which are as follows, viz.: State's No. 4: "The jury is instructed that circumstantial evidence is that class of evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency, from the laws of nature, the usual connection of things, and the ordinary transactions of business to lead the mind to a conclusion that the fact exists which is sought to be established." Defendant's No. 6: "The court instructs the jury that before you can find the defendant, Charles A. Lewis, guilty in this case it is incumbent upon the state to prove, beyond all reasonable doubt and to your entire satisfaction: First. That the offense charged in the indictment occurred in Harrison county, W. Va. Second. That the wool mentioned in the evidence in this case had been previously stolen by some person other than the defendant. Third. That the accused, Charles A. Lewis, received the said wool from another person. Fourth. That at the time he received the wool he knew it had been stolen. Fifth. That he so received the said wool, or aided in the concealment thereof, with a dishonest intent. Sixth. That the wool he so received was the *identical* wool or some part thereof, which is alleged in the indictment to have been stolen from R. T. Lowndes, and this being an essential question involved in this case must be proven beyond all reasonable doubt." This instruction calls the jury's attention to the six particular circumstances necessary to be established, and tells them that they must believe all of them to have been proven beyond a reasonable doubt, before they can convict. All necessarily includes every one, and the instruction means nothing less than that the jury must believe beyond reasonable doubt that each one of the six circumstances is established. It is more helpful to defendant's case than his No. 10, and cov-

ers the same ground. In view of the instructions which the court gave, I can clearly see that defendant could not have been prejudiced by the refusal to give his No. 10.

I am opposed to reversing the judgment of trial courts upon purely technical matters, when it plainly appears from the record that the party complaining was not prejudiced. I do not think it is wise to trammel our judicial procedure with technicalities which furnish no aid in arriving at just results. The tendency of modern times, as appears both by legislative enactment and by judicial decision, is to get away from the useless technicalities which so often incumbered the common law. It is our duty to look to the whole case, and, so viewing it, I am clearly of the opinion that defendant has no just cause of complaint on account of any ruling made by the trial court. Respecting the weight to be given to the testimony of the witnesses, the jury are the judges. It is not my province to say whether their verdict was righteous or unrighteous, when there is lawful evidence on which they can found it. I would affirm the judgment.

(9 Ga. App. 890)

ADEPE v. CITY OF THOMASVILLE.  
(No. 3,375.)

(Court of Appeals of Georgia. Oct. 23, 1911.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF (§ 58\*)—WRIT OF ERROR—DISMISSAL—ACKNOWLEDGMENT OF SERVICE.

The motion to dismiss is controlled by *Strickland v. Thornton*, 2 Ga. App. 377, 58 S. E. 540.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 100-105; Dec. Dig. § 58.\*]

2. MUNICIPAL CORPORATIONS (§ 733\*)—OPERATION OF ELECTRIC LIGHT PLANT—NEGLECT OF EMPLOYE—LIABILITY.

In operating an electric light plant, furnishing electric lights for pay, a city is engaged in a private, nongovernmental business, and is liable to one injured through the negligence of its employé engaged in repairing wires.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1547-1549; Dec. Dig. § 733.\*]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by Abraham Adepe against the City of Thomasville. Judgment for defendant, and plaintiff brings error. Reversed.

Theodore Titus, for plaintiff in error. T. N. Hopkins, Anderson, Felder, Rountree & Wilson, Roscoe Luke, and Geo. P. Whitman, for defendant in error.

RUSSELL, J. [1] 1. It appears from the bill of exceptions, and also from the transcript of the record, that a general demurrer was sustained to the petition on March

27, 1911. The certificate of the judge is dated April 3, 1911. The acknowledgment of service by counsel for the defendant in error is dated March 5, 1911. The bill of exceptions was filed in the clerk's office of the court below on April 5, 1911, and in the office of the clerk of this court on April 15, 1911. A motion is made to dismiss the bill of exceptions, because it does not appear that there has been legal service thereof on the defendant in error. It conclusively appears that the word "March," in the acknowledgment of service, was intended for "April." In such a case the bill of exceptions will not be dismissed. *Strickland v. Thornton*, 2 Ga. App. 377, 58 S. E. 540.

[2] The petition alleged substantially the following facts: While standing on the sidewalk in front of his store on the principal street of the city of Thomasville, the plaintiff was hit on the head by a metal instrument weighing four or five pounds, and as a result his skull was fractured, and he sustained other enumerated injuries. It is alleged that the metal instrument was thrown by an employé of the electric light plant operated by the city, which was engaged in the business of furnishing for pay electric lights to the citizens of the city. At the time of the injury the employé was engaged in repairing the electric wires, and had the metal instrument hereinbefore referred to fastened to the end of a rope, and was attempting to throw it across the wires, located about 15 or 20 feet above the sidewalk; but the instrument missed the wires and fell with great violence on plaintiff's head. The plaintiff was standing on the sidewalk in front of his store, where he had a right to be. The street where the accident occurred is the principal business thoroughfare of the city, is occupied on each side by numerous business houses, and the sidewalks are in constant use by the people of the community. The claim had been presented to the city as provided by law. The negligence alleged is the act of the employé of the city in attempting to cast the heavy metal instrument over the wires, at the time and place and in the manner stated. The court sustained a general demurrer to the petition, and this is the error assigned in the bill of exceptions.

We are of the opinion that the petition sets forth a cause of action. In operating an electric light plant, the city is acting in a private corporate capacity, instead of exercising a governmental function. *Dillon, Municipal Corporations* (5th Ed.) §§ 1647, 1670. In furnishing electric lights for pay, the occupation is similar to furnishing water for pay. *Huey v. Atlanta*, 8 Ga. App. 597, 70 S. E. 71. It does not appear from the allegations of the petition that the plaintiff was guilty of contributory negligence. A fuller investigation into all the facts may

authorize such an inference, but as against a general demurrer the petition sets forth a cause of action.

Judgment reversed.

(137 Ga. 65)

LOFTIS v. ALEXANDER et al.

(Supreme Court of Georgia. Oct. 28, 1911.)

(Syllabus by the Court.)

PARTIES (§ 40\*)—INTERVENTION—RIGHT TO INTERVENE.

Suit was filed by the payee of notes secured by a deed from the maker of the notes to certain real estate against the executor of the maker to obtain a general judgment on the notes for the principal, interest, and attorney's fees due thereon, and a special lien on the property to the extent of the amount claimed and costs of suit. It was alleged that notice of an intention to sue was given the defendant 10 days before the last return day of the term of court to which suit was brought. A purchaser from the executor of the equity of the estate of the deceased maker of the notes and deed filed a petition admitting the allegations of the petition, and making, among others, substantially the following averments: The suit was filed without any notice to him. In the contract between him and the executor he agreed to pay off the notes at maturity, and was prevented from paying the notes before suit was brought thereon by reason of the statements and conduct of one representing the payee of the notes. After the suit was filed, Alexander (the payee) on November 5, 1910, "for a valuable consideration agreed to accept from defendant on the following Monday, to wit, November 7, 1910, the sum of \$4,888 in settlement of said indebtedness, and agreed upon the payment of said amount to cancel said note and said loan deed, and authorized the settlement of said suit upon the payment by defendant of the court costs. About 10 o'clock on Monday, November 7, 1910, defendant tendered to said Alexander \$4,888, in lawful currency of the United States, in payment of said debt, and demanded the cancellation of said note and the satisfaction of said loan deed, and authority to have said case entered settled upon the payment by defendant of the court costs that had accrued. Said Alexander refused to accept said tender, to cancel said note, satisfy said loan deed, and authorize settlement of said suit upon the payment by defendant of the court costs." He prayed that he be allowed to intervene and become a party, and that the plaintiff be restricted to a recovery of only the principal and interest due on the notes to a specified date. *Held*, there was no error in dismissing the application of the purchaser from the executor and refusing to allow him to become a party to the suit.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 40.\*]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between W. S. Loftis and John W. Alexander and others. From the judgment, Loftis brings error. Affirmed.

J. B. Stewart, for plaintiff in error. R. B. Blackburn, Lowndes Calhoun, and L. Z. Rosser, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(127 Ga. 68)

**METHODIST EPISCOPAL CHURCH  
SOUTH v. DUDLEY SASH, DOOR  
& LUMBER CO.**

(Supreme Court of Georgia. Oct. 28, 1911.)

(Syllabus by the Court.)

**1. EXCEPTIONS, BILL OF (§ 38\*)—TIME FOR  
PRESENTATION—EVIDENCE.**

The defendant in error (hereinafter called the plaintiff) brought an action to foreclose a materialman's lien on the property of the plaintiff in error (hereinafter called the defendant) to the October term, 1909, of the court. At the April term, 1910, the defendant filed a plea, which the court struck at the October term, 1910, at which term a verdict was directed by the court in favor of the plaintiff. The defendant made a motion for a new trial, which the court overruled on November 18, 1910, on which date defendant tendered and had certified a bill of exceptions, in which complaint was made that the court erred in striking the plea and overruling the motion for a new trial. *Held*, the certificate of the clerk showing that the October term, 1910, of the court adjourned on October 13, 1910, the bill of exceptions presented on November 18, 1910, will be treated as having been presented after the adjournment of the court, though the bill of exceptions recites that it was presented during the October term, 1910, of the court and within the time required by law.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 38.\*]

**2. APPEAL AND ERROR (§ 682\*)—RECORD—  
QUESTIONS PRESENTED FOR REVIEW.**

No exception pendente lite having been filed to the order striking the plea, and the bill of exceptions complaining that the court erred in refusing a new trial and in striking the plea having been presented more than 30 days after the adjournment of the court, the assignment of error that the court erred in striking the plea cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 682.\*]

**3. NEW TRIAL (§ 18\*)—GROUNDS—RULING ON  
PLEA.**

A ruling of the court in striking a plea cannot be made the ground of a motion for a new trial. *Hawkins v. Studdard*, 132 Ga. 265, 63 S. E. 852, 131 Am. St. Rep. 190.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 24-29; Dec. Dig. § 18.\*]

**4. MECHANICS' LIENS (§ 291\*)—DEFAULT  
JUDGMENT—TAKING DEFAULT.**

Where a suit is brought, with allegations regularly stated in paragraphs, as required by Civil Code 1910, §§ 5538, 5539, in an action other than one for unliquidated damages or based on an unconditional contract in writing, and the writ or process has been served as the law directs on the defendant, and there is no defense made by the party sued either in person or by attorney at the time the case is submitted for trial, it will be considered in default, and the plaintiff shall be permitted to take a verdict as if each and every item and paragraph were proved by testimony. Civil Code 1910, § 5662.

(a) The provision of the Code stated in the preceding headnote applies to a suit by a materialman to enforce his claim of lien upon real estate for materials furnished to a contractor for the improvement thereof.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. § 291.\*]

**5. MECHANICS' LIENS (§ 276\*)—ENFORCEMENT  
—PLEA.**

In such a suit, it should have been alleged that the contract price was equal to or greater

than the amount of the lien sought to be foreclosed; but the absence of such an allegation was an amendable defect.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 539-545; Dec. Dig. § 276.\*]

**6. APPEAL AND ERROR (§ 204\*)—PRESENTA-  
TION OF QUESTIONS IN LOWER COURT—AD-  
MISSION OF EVIDENCE.**

Where, in such an action, the plea of the defendant was stricken and the case proceeded to trial without any defense, the admission by the court of evidence to prove that the contract price was greater than the amount of the lien claimed will not require the grant of a new trial, although the petition did not allege such fact; it not appearing that any objection was made to the introduction of such evidence. *Royal v. McPhail*, 97 Ga. 457 (3). 25 S. E. 512; *Cotton States Life Ins. Co. v. Edwards*, 74 Ga. 220.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258-1280; Dec. Dig. § 204.\*]

**7. TRIAL (§ 31\*)—PRESENTATION OF QUESTIONS  
IN LOWER COURT—ADMISSION OF EVIDENCE.**

Where, on motion of counsel for the plaintiff, the answer of the defendant was stricken, and thereafter the counsel for the plaintiff asked the counsel for the defendant if they would admit the extent of the indebtedness of the property owner to the contractor, and counsel for the defendant declined to make any admission, and thereupon the court stated to counsel for the plaintiff that he could not ask defendant for admissions as to any other matter, as such defendant was out of court and had nothing to say as to the further proceedings in the case, this was a ruling against the plaintiff, precluding him from calling on the defendant, or defendant's counsel, for admissions; and although the reason assigned by the court for such ruling may have been broadly stated, it did not constitute a ruling against the defendant as to any particular question. If the defendant desired to invoke a ruling of the court as to any point, it was incumbent upon it, or its counsel, to raise such point and invoke such ruling as a basis for a motion for a new trial or a bill of exceptions. If no point or question was raised in its behalf, and no ruling made against it by the court, the admission of evidence without objection could not, after verdict, be made the basis of a motion for a new trial, because of such general statement by the court in restraining the plaintiff's counsel from seeking to obtain admissions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 55, 84; Dec. Dig. § 31.\*]

**8. PETITION—SUFFICIENCY OF EVIDENCE—DI-  
RECTION OF VERDICT.**

When the case proceeded as in default, the allegations in the petition and the evidence introduced without objection were sufficient to authorize the direction of a verdict in favor of the plaintiff.

Error from Superior Court, Burk County;  
H. C. Hammond, Judge.

Action by the Dudley Sash, Door & Lumber Company against the Methodist Episcopal Church South. Judgment for plaintiff, and defendant brings error. Affirmed.

A. P. Bell, C. B. Garlick, and E. H. Callaway, for plaintiff in error. H. J. Fullbright, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(156 N. C. 641)

## STATE v. ROCHELLE.

(Supreme Court of North Carolina. Nov. 1, 1911.)

## 1. INTOXICATING LIQUORS (§ 233\*)—CRIMINAL PROSECUTIONS—EVIDENCE.

While the possession of a federal liquor license raises under Revisal 1905, § 2060, the presumption that the holder is engaged in that business, the fact that one accused of unlawfully engaging in selling intoxicating liquors has no such license does not raise the presumption that he is not engaged in the business; and hence evidence of that fact is inadmissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 298½; Dec. Dig. § 233.\*]

## 2. CRIMINAL LAW (§ 775\*)—TRIAL—INSTRUCTIONS—ALIBI.

The court charged that if defendant attempts to prove an alibi, and fails, it is a circumstance for the jury to consider, and, as the Supreme Court has said, they should carefully scrutinize the evidence because of its liability to abuse, and that by scrutinizing he meant them to study carefully, examine, and cautiously receive the evidence. *Held*, that this charge was not error, it not indicating that failure to prove an alibi was any evidence of guilt, and, considered as a whole, it could not have been misleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833-1837; Dec. Dig. § 775.\*]

Appeal from Superior Court, Durham County; Allen, Judge.

L. S. Rochelle was convicted of the illegal sale of intoxicating liquor, and appeals. Affirmed.

V. S. Bryant and B. S. Royster, for appellant. T. W. Bickett, Atty. Gen., and Geo. L. Jones, Asst. Atty. Gen., for the State.

CLARK, C. J. [1] The defendant was convicted of the illegal sale of intoxicating liquor. The first exception is because the court declined to allow him to put in evidence a subpoena duces tecum issued by the state for Wheeler Martin, collector of internal revenue, to bring with him a list of all persons in said county who had obtained United States license to sell liquor. It is true, that when a man takes out United States license to sell liquor, under our statute a presumption arises that he is engaged in that business. Rev. § 2060; Vinegar Co. v. Hawn, 149 N. C. 355, 63 S. E. 78. But the fact that he has no such license from the United States government does not raise a presumption that the defendant is not engaged in the illegal sale of liquor. It may well be that the defendant did not consider such license necessary for his purpose, or profitable, or prudent. It costs money and makes evidence against him.

[2] The only other exceptions requiring notice are exceptions 3 and 4 to the charge of the court, as follows:

Exception 3. "If the defendant attempts to prove an alibi, and fail in it, it becomes a circumstance for the jury to consider. They can regard it entirely as unproven, and they

can also consider the failure to establish an alibi, if the jury find he has failed in doing so, and give it such force as the jury may deem proper."

Exception 4. "You should carefully consider the evidence offered to establish an alibi because of its liability to abuse, as our Supreme Court says."

In *State v. Jaynes*, 78 N. C. 504, Bynum, J., said that evidence of an alibi "should be closely scrutinized because of its liability to abuse." His honor therefore was, as he said, simply quoting from a decision of this court. We do not understand him as intimating that failure to prove an alibi was any evidence of guilt. He simply said that evidence of that kind should be closely scrutinized. Indeed, his honor in that connection himself fully explained the meaning of the word "scrutinize" as follows: "It simply means that you should cautiously examine the evidence of the character I have alluded to; the evidence of the detective; the evidence of the defendant; the evidence tending or intending to establish an alibi. By scrutinizing, I have already said you should study it carefully, and examine it, and cautiously receive it. You should carefully examine and scrutinize the evidence of the detective, because of his bias, likely to exist by reason of his employment to find the evidence. You should carefully scrutinize the evidence of the defendant because of his interest. You should carefully scrutinize the evidence offered to establish an alibi because of its liability to abuse, as our Supreme Court says." Thus, read in connection with the context, the expression of the careful and cautious judge who tried this case could not have been misunderstood by the jury, and was but a statement of the law as laid down by this court. His honor further told the jury that if the defendant established an alibi it is a complete defense; and as to the defendant's testimony he told them that, while the jury should scrutinize it and receive it cautiously, yet if, after scrutinizing it, they were satisfied of the truth of it they should give it the same force and effect as that of any other witness.

No error.

(156 N. C. 591)

## WARREN v. ATLANTIC &amp; Y. RY. CO.

(Supreme Court of North Carolina. Nov. 1, 1911.)

## APPEAL AND ERROR (§ 679\*)—REVIEW.

The allowance of an amended complaint superseded the original complaint, requiring defendant to either demur to or answer the amended complaint, so that the Supreme Court cannot pass upon the sufficiency of the original complaint upon appeal taken after the amendment was filed.

[Ed. Note.—For other cases, see Appeal and Error. Dec. Dig. § 679.\*]

Appeal from Superior Court, Guilford County; Daniels, Judge.

Action by J. H. Warren against the Atlantic & Yadkin Railway Company. Order overruling a demurrer to the complaint, and defendant appeals. Appeal dismissed.

Wilson & Ferguson, for appellant. J. I. Scales and Justice & Broadhurst, for appellee.

**PER CURIAM.** This is an action for personal injury heard upon demurrer at April term, 1911. The demurrer was overruled, and defendant excepted and appealed.

It was admitted upon the argument in this court that when the demurrer was overruled the plaintiff asked and obtained permission to file an amended complaint. The demurrer was interposed to the original complaint. We cannot pass upon the demurrer to the original complaint, as it is superseded by the new complaint. When the plaintiff by permission filed an amended complaint at the time when the demurrer was overruled, the defendant should have either demurred, or answered to the new complaint. As this amended complaint is not in the record, we cannot tell whether it states a cause of action or not. It may allege very different facts from the first complaint. The defendant will be allowed to demur or answer the amended complaint.

Appeal dismissed.

(156 N. C. 590)

**RICHARDSON v. EDWARDS et al.**

(Supreme Court of North Carolina. Nov. 1, 1911.)

**APPEAL AND ERROR (§ 1062\*)—FORM OF SPECIAL ISSUE—HARMLESS ERROR.**

After an issue in a personal injury case as to whether the plaintiff was injured by the defendant's negligence, the court submitted the issue, "If so, did the plaintiff contribute to his injury?" *Held*, that the second issue was defective in form, but the error was cured by an instruction to consider the issue as, "Did the plaintiff contribute by his own negligence to his injury?"

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.\*]

Appeal from Superior Court, Union County; O. H. Allen, Judge.

Action by J. E. Richardson against T. M. Edwards and others. Judgment for defendants, and plaintiff appeals. No error.

These issues were submitted:

"(1) Was the plaintiff injured by the negligence of the defendant? Answer: Yes.

"(2) If so, did the plaintiff contribute to his injury? Answer: Yes.

"(3) What damage, if any, did plaintiff sustain?"

From the judgment rendered, the plaintiff appealed.

Stack & Parker, for appellant. Redwine & Sikes and Adams, Armfield & Adams, for appellees.

**PER CURIAM.** The form of the second issue is defective. The record shows that his honor instructed the jury to consider the issue as if it read, "Did the plaintiff contribute by his own negligence to his injury?" which is the usual and approved form. We think the error was fully cured.

We have examined the other assignments of error, all of which relate to the charge of the court, and find them to be without substantial merit. The case was fairly put to the jury in accord with the well-settled decisions of this court.

No error.

(156 N. C. 423)

**WILKES v. MILLER et al.**

(Supreme Court of North Carolina. Nov. 1, 1911.)

**1. JUDGMENT (§ 769\*)—LIEN—CROSS-INDEXING—NECESSITY.**

A judgment which was not cross-indexed when docketed did not become a lien upon the judgment debtor's land.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1827; Dec. Dig. § 769.\*]

**2. MORTGAGES (§ 307\*)—DISCHARGE OF LIEN—SUBSTITUTION—CANCELLATION OF ORIGINAL MORTGAGE.**

The substitution of one note and mortgage for another will not discharge the lien of the original mortgage, unless it be surrendered to the mortgagor or canceled of record, being otherwise only a renewal or acknowledgment of the same debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 804, 897; Dec. Dig. § 307.\*]

Appeal from Superior Court, Union County; W. R. Allen, Judge.

Action by Jane R. Wilkes against R. M. Miller, administrator of J. W. Miller, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This case was with an action instituted prior to the bringing of this action, for the purpose of foreclosing a mortgage made by W. F. Rhea and wife to J. W. Miller; the mortgagor and mortgagee both being dead at the time of the institution of these actions. By consent of the parties, the trial judge found the facts and conclusions of law, and rendered judgment in favor of the defendant R. M. Miller, administrator of J. W. Miller.

The following are the findings:

"(1) That prior to 1886, W. F. Rhea was the owner of the tract of land referred to in the complaint; that he is now dead, and J. C. Sikes is his administrator; that the said Rhea left surviving him a widow, who is still living, and no children.

"(2) That J. W. Miller is dead, and R. M. Miller, Jr., is his administrator.

"(3) That on the 1st day of March, 1886,

the said W. F. Rhea and wife conveyed said tract of land to Joseph McLaughlin by mortgage deed to secure the payment of a balance due on a note for \$550, executed by the said Rhea March 15, 1881, which mortgage deed was registered in Union county, in Book W, page 480, on the 1st day of March, 1886.

"(4) That on the 2d day of February, 1887, the said Rhea and wife conveyed said land to Joseph McLaughlin by mortgage deed to secure a note of even date for \$313.20, which mortgage deed was registered in Union county on the 5th day of February, 1887.

"(5) That on the 1st day of January, 1889, the said Rhea and wife conveyed said land to J. B. Ross by mortgage deed to secure a note of even date for the sum of \$250, which mortgage deed was registered in Union county on the 1st day of February, 1889.

"(6) That the notes and mortgages referred to in findings 3 and 4 were duly assigned to J. W. Miller on the 11th day of January, 1893, and the note and mortgage referred to in finding 5 were duly assigned to said Miller on the 27th day of February, 1889.

"(7) That on the 11th day of January, 1893, there was due on the notes referred to in findings 3, 4 and 5 the sum of \$830, and on said day the said Rhea and wife executed to the said Miller a note for said sum, and conveyed said land to said Miller to secure the payment of the same by mortgage deed, which was registered in Union county on the 4th day of May, 1896.

"(8) That at the time of the execution of the note and mortgage referred to in the preceding paragraph the said Miller retained the notes and mortgages referred to in the third, fourth, and fifth findings, and the same have never been surrendered nor canceled of record.

"(9) That thereafter an action was instituted in the superior court of Union county against the administrator and heirs at law and widow of W. F. Rhea to foreclose the mortgage referred to in the seventh finding, and at February term, 1905, a judgment was rendered therein in favor of the plaintiff, administrator of Miller, for the sum of \$1,230.48, with interest on \$830, and condemning said land to be sold to pay the same; that said land was sold thereunder for the sum of \$350, and said sale was duly confirmed. There was no reference in the complaint in said action to the notes and mortgages referred to in findings 3, 4, and 5.

"(10) That on December 2, 1884, said Liddell & Co. obtained two judgments in Mecklenburg county against the said W. F. Rhea; one for \$201.33, with 8 per cent. interest from date of judgment, and the other for \$217.33, with 8 per cent. interest from date of judgment, and \$3.20 costs. Transcripts of said judgment were sent to Union county, and the same appear on the judgment docket of said county as of December 4, 1884, but said judgments were never cross-indexed.

"(11) That on November 5, 1895, Jane R. Wilkes, trading as the Mecklenburg Iron Works, obtained a judgment against the said W. F. Rhea before a justice of the peace of Mecklenburg county for the sum of \$239.60, with interest on \$181.50 from November 5, 1895, at 8 per cent., and \$3.80 costs, which judgment was duly docketed in Union county November 15, 1895.

"(12) That the findings and conclusions of the referee as to the attempted allotment of a homestead to the said W. F. Rhea are adopted.

"(13) That this present action was instituted on the 20th day of December, 1905, for the purpose of subjecting the proceeds of the sale of land referred to in the ninth finding to the payment of the judgment referred to in the eleventh finding.

"(14) That Liddell & Co. has been made a party to this action, and claims proceeds.

"And it is thereupon considered and adjudged that neither Jane R. Wilkes, trading as the Mecklenburg Iron Works, nor the Liddell Company, is entitled to any part of the proceeds of sale.

"It is further considered and adjudged that the said Jane R. Wilkes pay the costs accrued since this action was commenced, except so much as is incident to the determination of the claim of Liddell & Co., which said company shall pay."

R. B. Redwine, for appellant. Adams. Armfield & Adams, for appellees.

BROWN, J. [1] 1. The judgments of Liddell & Co. referred to in finding 10 were docketed prior to the registration of the mortgages referred to in the findings, but the judgments were never cross-indexed. Therefore they never constituted a lien upon the land. *Dewey v. Sugg*, 109 N. C. 329, 13 S. E. 923, 14 L. R. A. 393.

2. The Wilkes judgment was docketed November 5, 1895, after the registration of the original mortgages referred to in findings 3, 4, and 5. On January 11, 1893, there was due on the mortgages (all on same land) \$830. On that date Miller, the owner of the debt, took from the debtor another note and mortgage, securing the same debt. The original notes and mortgages were never canceled or surrendered, but were retained by Miller. Upon these facts, the original notes and mortgages were not discharged, and their lien continued.

[2] The substitution of one note and mortgage for another will not discharge the lien of the original note and mortgage unless the latter is surrendered to the mortgagor or canceled of record. It is only a renewal or acknowledgment of the same debt. *Collins v. Davis*, 132 N. C. 106, 43 S. E. 579; *Hyman v. Devereux*, 63 N. C. 626.

The conclusion of his honor that the Wilkes and Liddell judgments are not entitled to any portion of the proceeds of the

sale of the land, and that the same should be applied to the judgment in favor of Miller in the foreclosure suit, is correct.

Affirmed.

ALLEN and WALKER, JJ., not sitting.

(156 N. C. 435)

**STARR v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.**

(Supreme Court of North Carolina. Nov. 1, 1911.)

**1. ELECTRICITY (§ 19\*)—ACTIONS—EVIDENCE—JURY QUESTION.**

In an action against a telephone company for an injury by lightning which resulted from its negligence in leaving unconnected wires in premises from which it had removed a telephone, the question of whether lightning was transmitted by these wires held for the jury.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 19.\*]

**2. ELECTRICITY (§ 16\*)—OPERATION—REMOVAL OF WIRES FROM BUILDING—NEGLIGENCE.**

Where a telephone company after removing an instrument from a house took off the lightning arrester, and severed the ground connections, but left the unattached wires in the building, it is guilty of negligence, and is liable for any injury caused by the transmission of lightning over such wires.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 16.\*]

**3. EVIDENCE (§ 9\*)—TRIAL (§ 192\*)—JUDICIAL NOTICE—LIGHTNING.**

That lightning is frequently discharged and passes to the earth, and that lightning is likely to pass along metal wires, and that a human body is also a good conductor, and, if in contact with a wire charged with electricity, the circuit may ground through the body, are matters of common knowledge, and a proper matter of judicial notice, and in an action against a telephone company for injuries by lightning, conducted by its wires into a building from which the telephone had been removed, the court properly charged the jury as to those facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 8; Dec. Dig. § 9.\* Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.\*]

Appeal from Superior Court, Guilford County; Allen, Judge.

Action by Henry F. Starr against the Southern Bell Telephone & Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. E. W. Palmer, Brutus J. Clay, and Wilson & Ferguson, for appellant. R. C. Strudwick and W. P. Bynum, for appellee.

CLARK, C. J. [1] The defendant removed a telephone from the plaintiff's house, but for its own convenience left the wires leading into plaintiff's porch still connected with its general system of wires, and with the loose ends twisted together and hanging down six or eight inches from the plate of the porch. At the same time the defendant removed the lightning arrester, and severed the ground

connection of the said wires. There was evidence that the wires left in this condition were dangerous on account of the means thus afforded of their conducting lightning which might strike any part of the defendant's general system of wires into the house, and that the plaintiff was unaware of this danger, but relied upon the defendant to leave the wires in a safe condition. One afternoon in June, 1909, the plaintiff was sitting on his porch under said wires, when a storm accompanied by thunder and lightning came up. The plaintiff arose to go into his house, and, as he stood up, the ends of said wires being about 18 inches from and to the left of his head, there came a violent clap of thunder, and a ball or bolt of lightning struck him on the left and back of his head, which the plaintiff claims came from the ends of said wires, rendering him unconscious and seriously injuring him. The jury found that said injuries were caused in this mode and by the negligence of the defendant.

The defendant's chief contention is that the court erred in not granting its motion to nonsuit the plaintiff; but we think not. The matter was one peculiarly one of fact, and was for the jury to determine. It is true no one saw the discharge of the lightning leap from the wires and strike the plaintiff on the left and back of his head. But the evidence justified the jury in finding such to be the fact. When one fires a pistol at another, no one sees the ball strike the body, but the pointing the pistol within proper distance, its discharge, and the wound are evidence from which the jury can infer the cause of the wound.

[2] In dealing with this dangerous agency of electricity, if the defendant left its wires for its own convenience hanging in the plaintiff's porch, it was negligence for which it was liable if the injury of the plaintiff was caused as the jury finds by lightning striking on its wires and being discharged against the plaintiff thereby. Especially is this so when the defendant was guilty of the further negligence of taking off the lightning arrester and severing the ground connections.

In a case almost identical in the facts with the present—Telephone Co. v. McTyer, 137 Ala. 601, 34 South. 1020, 97 Am. St. Rep. 62—the court said: The only justification for the wires being carried into a building and maintained there is the telephone service thus supplied by means of them. If they are put there not for that purpose, but for the mere convenience of the telephone company, and allowed to be in such condition as that persons and property in the building are liable to be injured by lightning gathered and brought into the building by them and there discharged, their mere presence is a wrong. So, when they were originally carried into



the building, and equipped and maintained to supply the service to the owner, but at his instance the service has been discontinued and the instruments removed, and the company, instead of then removing the wires, merely cuts them loose from the instrument, twists their ends together, and leaves them thus dangling in the building, so that atmospheric electricity striking them anywhere along their course on the outside will be inducted into the building, and there discharged to the peril of persons and property, this is an unpalliated wrong on the part of the company. It is the creation and maintenance of a dangerous situation without that warranting occasion for it which may exist when the wires are in use, without any occasion whatever, in fact; and the company is liable in damages for whatever injuries may result to persons and property on the premises." And, further, the court said: "In view of the known capacity of these wires to collect and carry dangerous currents of atmospheric electricity into the store and there discharge them, to the deadly peril of persons in there at the time, and in view of the total absence of any occasion for the wires to be left there at all, there can in our opinion be no doubt that the company owed a plain duty, not only to Thomas, but also to his customers, to remove the wires, and thereby to obviate this peril to him and to them. Nor was there any excuse for its failure to perform this duty. Its remission of it was a positive wrong, committed by defendant's servant who removed the telephone and twisted up and left the wires. No man of ordinary care and prudence would have so acted. There is not room for two reasonable conclusions as to the character of the act in respect of negligence *vel non*. It was negligence *per se*, and to be so declared as matter of law."

[3] The defendant also excepts because the judge charged the jury: "Then, as I said, there are some well-known facts that may be considered in the same way as if they had been testified to. It is a well-known fact, for instance, that lightning in times of storms is frequently discharged from the clouds and passes to the earth, and that metal wires in the air are good conductors of electricity, much better than the air, and that electricity discharging from the clouds near such wires is liable and apt to pass on them and along them to the earth, and that if a human body, which is also a good conductor, is in contact with a wire charged with electricity, it will pass through it to the ground; or if near it, if the charge is strong enough, it is likely to seek it and pass to the ground, the human body being a better conductor than air. Therefore it is the duty of one engaged in a business which requires the dealing with metal wires to use every reasonable precaution to protect any one likely to come in con-

tact with or near to the same; and so when the defendant was ordered to remove this telephone, and when it did remove it from the house of the plaintiff, it was its duty to remove the same and leave it in a reasonably safe condition, if it left any part of the wire attached to the house. So an important inquiry is whether the wire was left in a reasonably safe condition, or did the defendant leave it in a dangerous condition."

This was not an expression of opinion, but the statement of facts generally known. What is a matter of common knowledge to every one else should certainly be matter within the knowledge of a court, and of which it can take judicial notice.

No error.

(156 N. C. 451)

### KIME v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 1, 1911.)

#### 1. CARRIERS (§ 218\*)—CARRIAGE OF LIVE STOCK—INJURIES—NOTICE OF CLAIM.

A provision in a bill of lading covering a shipment of live stock, making notice of injury within five days from the time of the removal of the live stock a condition precedent to recovery, is valid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 938; Dec. Dig. § 218.\*]

#### 2. CARRIERS (§ 218\*)—LIVE STOCK—NOTICE OF INJURY—FAILURE TO GIVE—EFFECT.

Where the agent of a carrier of live stock had, at the time they were unloaded, notice of injuries received by them in transit, the shipper's failure to give the notice required by the bill of lading will not prevent recovery.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 218.\*]

#### 3. CARRIERS (§ 230\*)—CARRIAGE OF LIVE STOCK—INSTRUCTIONS—EVIDENCE IN SUPPORT.

In an action against a carrier for injury to live stock, the shipper testified that when the stock was unloaded the agent of the company was near the gangway, and that the stock, which consisted of horses and mules, had to be supported and steadied, so as to keep them from falling down the gangway. Held, that an instruction that if the evidence of plaintiff was believed, the jury should find that no notice was given to the carrier of the injuries was erroneous, being contrary to the testimony in question.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.\*]

Appeal from Superior Court, Alamance County; Daniels, Judge.

Action by H. G. Kime against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

This is an action to recover damages for injury to stock transported by the defendant railroad.

The plaintiff offered evidence tending to prove that 21 horses and 3 mules were received by the defendant from a connecting common carrier, and that they were carried in an old

stock car, which had been worked over; that the ventilating windows and doors were closed up tightly with slats, and the car rendered almost air tight, being without ventilation, and unsuitable and unfit for the transportation of live stock; and that they were injured thereby while in possession of the defendant.

The bill of lading covering the shipment was introduced in evidence, and, among other things, it contained the following stipulations:

"(1) No claim for damages, which may accrue to the said shipper under this contract, shall be allowed or paid by the said carrier or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to an authorized officer or agent of the said carrier within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim is made in like manner and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

"(2) The said shipper or the consignee is to pay the freight charges thereon to the said carrier at the rate of \$45.00 per C—L, which the lower published tariff rate, based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier, nor any connecting carrier, shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers, or their employes or otherwise: If horses or mules—not exceeding \$100.00 each."

It was admitted that the plaintiff did not give to the defendant written notice of his claim for damages, but he contended that this was unnecessary, as the agent of the defendant was present when the horses and mules were unloaded, and saw them, and knew of the injury to them.

The following verdict was returned by the jury:

"(1) Was plaintiff's stock injured by the negligence of the defendant company, as alleged in the complaint? Answer: Yes.

"(2) If so, what amount of damage has the plaintiff sustained on account of said negligence and injury? Answer: Yes; \$475.

"(3) Did the plaintiff comply with the contract of shipment as to the giving of notice to defendant as to his claim for damages? Answer: No."

Judgment was entered upon the verdict in favor of the defendant, and the plaintiff accepted and appealed.

W. H. Carroll, for appellant. Parker & Parker, for appellee.

ALLEN, J. The ruling of the learned judge before whom this case was tried, granting the motion of the defendant for judgment upon the verdict, is based upon the answer to the third issue; he being of opinion that the failure of the plaintiff to give notice to defendant of the injury to the stock is fatal to his right of action.

[1, 2] He correctly held, in accordance with our authorities, that the provision in the bill of lading, requiring notice, was valid, and that the failure to give written notice would not prevent a recovery by the plaintiff, if the agent of the defendant knew of the injury to the horses and mules at the time they were being unloaded. *Selby v. Railroad*, 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635; *Jones v. Railroad*, 148 N. C. 586, 62 S. E. 701; *Austin v. Railroad*, 151 N. C. 137, 65 S. E. 757; *Kime v. Railroad*, 153 N. C. 400, 69 S. E. 264.

[3] He was, however, further of opinion, and so charged the jury, that there was no evidence "that the agent of the defendant saw or knew that it [the stock] was injured," and directed the jury to answer the third issue, "No," if the evidence of the witness for the plaintiff was believed, and in this we think there was error. The plaintiff was a witness in his own behalf, and testified that he was present when the stock was unloaded at Burlington, and that Mr. Ray, the depot agent, was also present; that the horses and mules were in a suffocated condition, and that the perspiration was on them, like they had come out of a river; that they were out of breath and very weak, and that the boys, who were helping to unload, had to take them by the tails and hips and steady them; that they did not lead them as was usually done, but had to steady them and lead them down the gangway to keep them from falling; that Mr. Ray, the agent, was standing on the platform when they were moved away. He was then asked the following questions: "Q. Was he in a condition to see the horses? A. Yes, sir; good as I could. Q. How close were the horses to Mr. Ray? A. They had to come right by the side of him. Q. How many feet? A. Something like six or eight feet. Q. That was when they came out? A. Yes, sir." If this evidence is believed, the condition of the stock was such that it would necessarily attract attention, and the agent was so situated that he could scarcely fail to observe them. In our opinion, this is some evidence that he saw the horses and mules, and knew they were injured.

The question is also raised on the record as to the effect of the valuation clause in the bill of lading, but as this is considered in another case at this term, and the facts bearing on this controversy may be more fully developed on another trial, we refrain from discussing it.

For the error pointed out, a new trial is ordered.

New trial.

(156 N. C. 458)

**SINCLAIR v. TEAL et al.**

(Supreme Court of North Carolina. Nov. 1, 1911.)

**ADVERSE POSSESSION (§ 65\*)—BOUNDARIES—DIVISION LINE—ACQUIESCENCE.**

Decedent by will probated July 2, 1889, devised 100 acres of land to J., to be laid off, commencing at a specified corner. Plaintiff, who was executor and to whom the adjoining land was devised, was not present, and did not participate in a survey of J.'s land, which was made by the county surveyor. J. took possession of the land laid off to her, which, in fact, by mistake in the survey contained 108 acres, and she and those under whom she claimed and plaintiff thereafter continued in possession, occupying and cultivating the land up to the division line as then ascertained until another survey was made in 1907, when the mistake was discovered. *Held*, that it was plaintiff's duty to ascertain whether the original survey was correct within a reasonable time after it was made, and, having failed to do so, J.'s successors in title were entitled to the excess under the 7, 10, and 20 year statutes of limitations, though plaintiff sued to cut off the excess within three years after actually discovering the mistake.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 365-370; Dec. Dig. § 65.\*]

Appeal from Superior Court, Anson County; Justice, Judge.

Action by A. D. Sinclair against E. P. Teal and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Fred J. Coxe, for appellant. Robinson & Caudle, for appellees.

CLARK, C. J. Llewellyn Sinclair by his will probated July 2, 1889, devised to his daughter, Mary Jarman, 100 acres of land, "commencing in the old line at a corner of a 25 acres, my corner and Lewis Rickett's land, where it joins my old land and runs near North, so as to make 100 acres West of said line." The 100 acres were surveyed off for her soon after the probate of the will, said survey being made by the county surveyor at the instance of Mary Jarman, without the plaintiff, the executor of the will, A. D. Sinclair, being present. The said executor, who was devisee of the land adjoining, found out soon thereafter that said survey had been made, and he and the said Mary Jarman each treated said survey as containing only 100 acres as devised in the will, and from said date said Mary Jarman and those claiming under her and the said A. D. Sinclair were each in possession of their respective land on each side of said line under said survey, under known and visible lines and boundaries, each cultivating up to said line. On March 2, 1893, Mary Jarman and husband mortgaged the land to one Covington, describing the same by metes and bounds as had been fully set out in the survey made by the county surveyor. The land was sold

under the mortgage, and the purchaser received the deed containing said description bearing date October 11, 1894. The purchaser went into possession under said deed under known and visible lines and boundaries, and remained in possession of the same till November 18, 1905, when he for value conveyed the same to the defendant E. P. Teal, describing the said metes and bounds, who has remained in possession under known and visible lines and boundaries up to this date. Another survey was made in the latter part of the year 1907, when it was discovered that the tract contained 108 acres, and this action was commenced October 27, 1909, being less than three years prior to the beginning of this action, to cut off and recover eight acres.

The defendant pleads the 20-year statute, the 10-year statute, the 7-year statute, and the 3-year statute. It would seem that he was protected by each one of them, but the plaintiff claims that under Rev. 1905, § 395 (6), he could maintain his action on the ground of mistake, it having been brought within three years after the actual discovery of the mistake in the acreage. If this had been true as between the plaintiff and Mary Jarman, it would not have deprived the defendant of the protection of the other statutes of limitations that are pleaded. But even between the original parties the three-year statute runs from the time the fraud or mistake was discovered, "or should have been discovered in the exercise of ordinary care." *Peacock v. Barnes*, 142 N. C. 219, 55 S. E. 99, and cases there cited. It was the duty of the plaintiff as executor to lay off said land to Mary Jarman, the devisee. He did not do so, but permitted her to have it surveyed and enter into possession. It was therefore his duty to ascertain if the quantity was correct. Indeed, he could have ascertained that fact by the simple process of taking the metes and bounds as reported by the county surveyor, and making a calculation therefrom. He says those metes and bounds were repeated in the description of the property, in the mortgage, and in the successive conveyances down to the defendant. He recognized the line between himself and his sister and her successors in title and in possession by cultivating up to that line, and permitting them to do so for more than 20 years. In *Peacock v. Barnes*, supra, the court quotes with approval *Pomeroy*, Eq. Jur. (3d Ed.) § 917, note 2: "This can only mean that the plaintiff's ignorance is not negligent; that he remains ignorant without any fault of his own; that he had not discovered the fraud or mistake, and could not by any reasonable diligence have discovered it."

Upon the agreed statement of facts as above, the court properly held that the plaintiff was not entitled to recover.

Affirmed.

(156 N. C. 419)

**CURRIE & McQUEEN v. SEABOARD AIR LINE RY.**

(Supreme Court of North Carolina. Nov. 1, 1911.)

**1. RAILROADS (§ 480\*)—FIRES—PRESUMPTIONS AND BURDEN OF PROOF.**

Where property is destroyed by fire started by a railroad engine, after plaintiff has introduced evidence from which presumption of negligence arises, the burden of satisfying the jury that the engine was properly equipped, that competent men were in charge of it, and that it was prudently operated, is upon the defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1709-1716; Dec. Dig. § 480.\*]

**2. RAILROADS (§ 484\*)—FIRES—QUESTION FOR JURY—PRESUMPTION OF NEGLIGENCE—REBUTTAL.**

Where the presumption of negligence arising from the fact that a fire was started by a railroad is one of fact, and defendant gives evidence in rebuttal which if believed would establish the fact that the engine was properly equipped, and was in charge of competent employees, and was prudently operated, this evidence is not uncontradicted, and it is for the jury to pass upon its weight.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.\*]

**3. RAILROADS (§ 484\*)—FIRES—ACTIONS—SUFFICIENCY OF EVIDENCE—DEFECTS IN AND MANAGEMENT OF ENGINES.**

In an action for damages for property destroyed by fire, where there is evidence to support a finding for plaintiff as to the origin of the fire, a nonsuit is properly refused.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.\*]

**4. RAILROADS (§ 482\*)—FIRES—ACTION—SUFFICIENCY OF EVIDENCE.**

Evidence, in an action against a railroad for damages to property from a fire alleged to have been caused by defendant's engines, held sufficient to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730-1736; Dec. Dig. § 482.\*]

Appeal from Superior Court, Moore County; O. H. Allen, Judge.

Action by Currie & McQueen against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover damages for the destruction by fire of the lumber plant of the plaintiff, on Sunday, the 29th day of May, 1910. At the conclusion of the evidence, the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted.

The defendant requested the court to give the following instructions, which were refused, and the defendant excepted:

"That, although from the evidence introduced by the plaintiff, which raises the presumption of negligence, that the defendant did set fire to the property of the plaintiffs, yet the court charges you that, upon all the evidence introduced, you would not be warranted in charging the defendant with actionable negligence; and this is so, because the plaintiffs have done nothing more than to introduce evidence tending to show pre-

sumptive negligence, which is rebuttable, and, the defendant having introduced uncontradicted evidence to rebut that presumption, the plaintiffs cannot recover, because they have failed to go further and show, by additional evidence, that there was actual negligence, as alleged in the complaint.

"If the jury believed the uncontradicted evidence of the defendant's witnesses, the engine from which the damage is alleged to have come was in good condition and had a proper spark arrester and other appliances to prevent the escape of fire, and was skillfully operated and managed by a competent engineer, and the jury should answer the second issue, 'Yes.'"

The defendant also excepted for that his honor charged the jury on the second issue as follows: "Upon this issue, the burden of proof is upon defendant to show by the greater weight of the evidence that, at the time of the escape of sparks, it had a proper spark arrester and other appliances to prevent the escape of sparks, such as are approved and in general use at the time, and that the engine and appliances were in good condition and operated in a careful way by a skillful and competent engineer."

The following verdict was returned by the jury:

(1) Was the property of the plaintiffs, referred to in the complaint, set on fire and burned by sparks from the defendant's engine at the time alleged in the complaint? Answer: Yes.

(2) If so, did said engines of the defendant, at the time of the escape of said sparks, have a proper spark arrester and other appliances to prevent the escape of sparks, approved and in general use at said time, and were said engines and appliances in good condition and operated in a careful way by skillful and competent engineers? Answer: No.

(3) Were the plaintiffs guilty of contributory negligence, as alleged in the answer? Answer: No.

(4) What damage, if any, are the plaintiffs entitled to recover of the defendant? Answer: \$10,000.

There was judgment in favor of the plaintiff, and the defendant excepted and appealed.

W. H. Neal, for appellant. D. E. McIver and G. W. McNell, for appellee.

ALLEN, J. Three questions are presented by this appeal:

(1) That there was error in imposing the burden of proof on the defendant on the second issue.

(2) That, if the burden of proof was on the defendant, it was by reason of the presumption, arising from proof that the defendant destroyed the property of the plain-

tiffs by fire, and that this was a presumption of law and not of fact, and, when evidence was offered rebutting the presumption, it was error to leave the question to the jury, in the absence of other evidence of negligence, and it ought to have been decided as matter of law by the court.

(3) That it was error to refuse to nonsuit the plaintiff on all the evidence.

1. The learned counsel for the defendant urges with much force on the consideration of the court several cases in our own reports, holding that the burden of proof is on the plaintiff as to negligence, and that, while the duty of proceeding with the evidence may shift from one party to the other, the burden of the issue does not shift, and he insists, on the authority of these cases, that there was error in holding that the burden on the second issue was on the defendant.

An examination of these decisions will show that in all of them one issue was submitted to the jury to determine the liability of the defendant, and that this issue embraced two facts: The origin of the fire, and the negligence of the defendant.

In the case before us these facts were to be settled by separate issues, and in this is to be found the distinction between the cases relied on and the one under consideration.

[1] The first issue establishes the fact that the defendant destroyed the property of the plaintiff by fire, and from this fact alone the presumption arises that the defendant was negligent. *Ellis v. R. R.*, 24 N. C. 138; *Lawton v. Giles*, 90 N. C. 380; *Manf. Co. v. R. R.*, 122 N. C. 881, 29 S. E. 575; *Hosiery Mills v. R. R.*, 131 N. C. 238, 42 S. E. 602; *Lumber Co. v. R. R.*, 143 N. C. 324, 55 S. E. 781; *Deppe v. R. R.*, 152 N. C. 82, 67 S. E. 262; *Kornegay v. Atlantic Coast Line R. Co.*, 154 N. C. 392, 70 S. E. 731. These authorities place the burden on the defendant to rebut the presumption of negligence, arising from proof connecting the defendant with the origin of the fire, by evidence which will satisfy the jury that the engine was properly equipped, that competent men were in charge of it, and that it was prudently operated; and necessarily the burden of the issue embracing these facts alone is on the defendant.

2. The prayers for instruction tendered by the defendant require a consideration of the nature of the presumption in cases like this, because, if this presumption is evidence in behalf of the plaintiff, the evidence of the defendant is not uncontradicted, as the instruction required the judge to charge.

It may be well to analyze the instructions before discussing them. They require the judge to decide that the evidence of the defendant is uncontradicted, and that, if believed by the jury, it is sufficient to establish the fact that the engine was properly equipped and was prudently operated by competent employees.

In many jurisdictions it is held that the presumption of negligence arising from proof that the defendant set out the fire is one of law, and generally, where this conclusion is reached, the courts approve the view contended for by the defendant that it is the duty of the court to pass on the sufficiency of the rebutting evidence, as matter of law.

This position is also supported by the case of *Williams v. R. R.*, 130 N. C. 116, 40 S. E. 979, in which it was held to be error to refuse to give an instruction substantially like those requested by the defendant.

[2] On the other hand, when the presumption is treated as one of fact, the rule usually obtains that the evidence must be submitted to the jury, who must pass on its sufficiency, and with the exception of *Williams v. R. R.*, supra, our court has held the presumption to be one of fact.

In *Cox v. R. R.*, 149 N. C. 118, 62 S. E. 885, Justice Walker, speaking for the court, says: "The presumption is one of fact and not law. Evidence that the sparks were emitted from the engine and that they set fire to the timber made a prima facie case for the plaintiff, but only to the extent of being evidence sufficient to carry the case to the jury and to warrant a verdict in favor of the plaintiff, if the jury should find the ultimate or crucial fact that the fire was caused by the defendant's negligence."

In *Deppe v. R. R.*, 152 N. C. 82, 67 S. E. 264, Justice Manning, after stating the duty imposed on the defendant, says: "If the defendant can show at the trial that it 'had used all those precautions for confining sparks or cinders,' which are approved and in general use, and the jury shall so find the fact, the trial judge will instruct them to answer the issue of negligence, 'No,' provided the precautions were used by a competent and skilled engineer, in a careful way. Rule 1 in *Williams v. R. R.*, 140 N. C. 623 [53 S. E. 448]; *Knott v. R. R.*, 142 N. C. 238 [55 S. E. 150]."

Note that, after the rebutting evidence is introduced by the defendant, it is for the jury to find the fact.

These cases and others to the same effect are cited with approval in *Kornegay v. R. R.*, 154 N. C. 392, 70 S. E. 732, where the principle is stated as follows: "When it is shown that the fire originated from sparks which came from the defendant's engine, the plaintiff made out a prima facie case, entitling him to have the issue as to negligence submitted to the jury, and they were justified in finding negligence unless they were satisfied, upon all the evidence in the case, that, in fact, there was no negligence, but that the defendant's engine was equipped with a proper spark arrester and had been operated in a careful or prudent manner. *Williams v. R. R.*, 140 N. C. 623 [53 S. E. 448]; *Cox v. R. R.*, 149 N. C. 117 [62 S. E. 884]."

The reasons for the rule, and its justice, are nowhere better stated than by Chief Jus-

tice Smith, in *Aycock v. R. R.*, 89 N. C. 329: "A numerous array of cases are cited in the note in support of each side of the question as to the party upon whom rests the burden of proof of the presence or absence of negligence, where only the injury is shown, in case of fire from emitted sparks. While the author favors the class of cases which impose the burden upon the plaintiff, we prefer to abide by the rule so long understood and acted on in this state, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpating circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the complaining party may not; and it is but just that he should be allowed to say to the company, 'You have burned my property, and, if you are not in default, show it and escape responsibility.'" The note referred to is one to *R. R. v. Schultz*, 2 Am. & Eng. R. R. Cases, 271.

The presumption is one of fact and is itself evidence of negligence, and the evidence of the defendant in rebuttal of the presumption is as to facts upon which the decision of the issue depends, and there would seem to be no reason for excepting evidence of this character from the statute which forbids the judge from expressing an opinion on the facts, or as to the weight of the evidence. If it should be held that the defendant was entitled to the instructions prayed for, the duty would be imposed on the judge to decide that there were no contradictions in the evidence of the defendant, that the witnesses were worthy of belief, and that the evidence was sufficient and satisfactory, which are matters committed by the law to the jury and not to the judge.

We conclude, therefore, that, assuming there were no contradictions in the evidence of the defendant, and that, *if believed*, it established the facts that the engine was properly equipped and was in charge of competent employes, and was prudently operated, this evidence cannot be said to be uncontradicted, and it was for the jury to pass on its weight. The evidence was contradicted by the presumption, which was some evidence of negligence.

We do not think *Williams v. R. R.*, *supra*, is in line with the other decisions of this court, and we must decline to follow it.

[3] There are, however, other valid reasons for sustaining the ruling of his honor. There was some evidence of defects in the spark arrester, coming from the witnesses for the defendant. J. R. Bissett, master mechanic of the defendant, testified that there were patches on the wire netting, and that the covering of the manhole had long openings in it instead of square ones. He also said: "The covering of the manhole was in general use before they had adopted this wire netting, and we discarded that—the master mechan-

ics' convention did—because the sparks would get hung in there and make a solid mass of it, and the engine would get choked and the flame would come out the furnace door when it was opened, and they would have to go in there and knock it, so they stopped this same netting to cover the manhole with. The reason those manholes with the long openings, instead of the square, were used, was that the S. A. L. had in stock a quantity of them, and we used them on the manholes to fill the bill, because there is enough opening, with what is in there, to give the engine draught enough to steam with." It was permissible to argue from this evidence that the spark arrester in use was old and dilapidated, and that it had been condemned by the convention of the master mechanics. It is also doubtful if any evidence was introduced that the engine was properly operated. Two engines of the defendant passed the place of the fire within a short time of each other; one being No. 746, and the other 752.

J. M. Stoker, engineer, was the only witness examined as to the operation of No. 746, and he says nothing as to how the engine was being managed, except that he was running about 30 miles an hour when he passed the place of the fire, and the only evidence on this point as to engine No. 752 was that of N. R. Vaughan, engineer, who said he was sitting on the right-hand side of the engine, and was running at from 30 to 35 miles an hour. No inquiry was made of either as to what he or his fireman was doing, or whether or no sparks escaped from the engine he was in charge of, as it passed the property of the plaintiff. In the absence of such evidence from witnesses who knew the facts, the jury might well infer that they were silent because a disclosure would be hurtful.

3. If we are correct in our conclusion that the burden was on the defendant on the second issue, it follows that there was no error in denying the motion to nonsuit, if there was evidence to support a finding, in favor of the plaintiff, on the first issue as to the origin of the fire.

[4] In our opinion, there was sufficient evidence to support the verdict. The lumber plant, which was burned, was situated near the right of way of the defendant. Engine No. 746 passed the lumber plant about 3:10 p. m., and engine No. 752 about 3:30 p. m. The fire occurred on Sunday, and several witnesses, who had the opportunity to see, testified that they saw no smoke or other evidence of fire before the engines passed, and that the plant was burning within 15 or 20 minutes after the passing of the last engine. The engineer on engine No. 752 testified that he did not notice any smoke as he passed the plant, and one of the plaintiffs testified that he was at the plant about 1 o'clock p. m. on Sunday, and saw no evidence of fire, and that he was in the boiler room the night before at 11 o'clock, and there were then only a few sparks in the back end of the boiler well.

Another witness for the plaintiffs, Mrs. Vick, testified that she noticed sparks, cinders, and heavy smoke coming from the train. If this evidence is true, there was no fire about the premises before the engines passed; sparks escaped from the engine, and within 15 minutes thereafter the property of the plaintiffs was on fire, and it was not unreasonable to conclude from these facts that the property of the plaintiffs was set on fire and burned by sparks from the defendant's engine.

We have examined all of the exceptions appearing in the record, and find no error.

No error.

(156 N. C. 439)

**DORSETT v. ATLANTIC COAST LINE R. CO.**

(Supreme Court of North Carolina. Nov. 1, 1911.)

**1. CARRIERS (§ 381\*)—PASSENGERS—EJECTION—EVIDENCE.**

Where plaintiff was ejected because he had failed to exchange his mileage coupons for a ticket and refused to pay his fare except with the mileage coupons on the train, he was entitled to testify whether he consented to the agent's giving him a ticket to a junction point instead of his destination, in order to show that plaintiff had not voluntarily withdrawn his application for a ticket to destination.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 381.\*]

**2. APPEAL AND ERROR (§ 1047\*)—DISCRETION OF TRIAL COURT ON RECEPTION OF EVIDENCE.**

Allowing plaintiff to be examined in rebuttal on evidence already gone over in his original examination, while irregular, is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4132; Dec. Dig. § 1047.\*]

**3. CARRIERS (§ 356\*)—PASSENGERS—TICKETS—MILEAGE COUPONS.**

Where a mileage book contract required the holder to exchange mileage coupons for a ticket before boarding the train, and plaintiff so presented his book and demanded a ticket within a reasonable time, but the carrier's agent refused to issue a ticket to destination, alleging lack of time, and gave him a ticket to a junction point only, plaintiff on arriving at the junction point and being unable, for want of time, there to exchange his mileage coupons for a ticket to continue his journey, was entitled to ride on the mileage book, so that the conductor's refusal to accept the mileage coupons for transportation, and ejection of plaintiff for his refusal to pay fare except with such coupons, was actionable injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1409-1432; Dec. Dig. § 356.\*]

**4. CARRIERS (§ 382\*)—EJECTION OF PASSENGER—PUNITIVE DAMAGES.**

Where defendant erroneously ejected plaintiff from its train because he refused to pay fare except by a tender of mileage coupons, and such ejection was accompanied by mistreatment on the part of defendant's employees, plaintiff was entitled to recover punitive damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1489; Dec. Dig. § 382.\*]

Appeal from Superior Court, Lee County;

O. H. Allen, Judge.

Action by V. M. Dorsett against the At-

lantic Coast Line Railroad Company. Verdict for plaintiff for \$1,250, reduced by the court to \$1,000, and defendant appeals. Affirmed.

Rose & Rose, for appellant. A. A. F. Seawell and D. E. McIver, for appellee.

**BROWN, J.** The evidence of the plaintiff tends to prove that on October 30, 1909, he presented his mileage book issued by defendant to its agent at Red Springs in due time before arrival of its train for Fayetteville and demanded a ticket for Siler City, N. C. This being refused, he demanded ticket to Sanford, N. C., which was likewise refused. The agent stated he had no time and gave plaintiff a ticket to Fayetteville. It is necessary to change cars at Fayetteville for Sanford and Siler City.

While plaintiff was alighting from the train at Fayetteville, he saw Conductor McCulloch, of the train from Fayetteville to Sanford, and asked him if he (plaintiff) had time to get a ticket. He was told by the conductor that he did not have time, and the train left immediately. Train was in motion by the time plaintiff could get to his seat. Conductor McCulloch demanded a ticket of plaintiff. Plaintiff tendered his mileage coupons, explaining the circumstances stated above, which conductor refused. The conductor, aided by his porter and baggagemaster, by force, in a very rough manner, and with anger and violence, ejected plaintiff from defendant's train.

There was evidence offered by defendant contradicting, qualifying, and explaining the plaintiff's evidence which it is unnecessary to set out.

[1] The three assignments of error relating to the evidence cannot be sustained. It was permissible to ask plaintiff whether he consented to the agent giving him a ticket to Fayetteville in order to show that plaintiff had not voluntarily withdrawn his application for a ticket to Sanford.

[2] Allowing the plaintiff to be examined in rebuttal upon evidence already gone over in his original examination, while irregular, does not constitute reversible error.

The remaining assignments of error relate to the charge and to refusal to give certain instructions, which it is unnecessary to set out here.

The propositions of law chiefly urged by the learned counsel for defendant are settled in *Harvey v. A. C. L. R. R.*, 153 N. C. 568, 69 S. E. 627. It is decided in that case that a mileage book is a contract for carriage, subject to certain restrictive regulations, that the owner is compelled under the terms of the contract to present it at the ticket office in reasonable time, and, when he does so, that he is entitled to receive a ticket in exchange for his mileage strip.

[3] If the traveler fails to do this, he has no right to have the book accepted for transportation on the train. When he complies with the contract on his part, and the carrier fails to give him the requisite ticket in exchange, the carrier is at fault and may not lawfully refuse to honor the mileage contract on the train and cannot rightfully eject him. The plaintiff, according to all the evidence, complied with the contract on his part. He waived his right to a ticket to Siler City, but not to Sanford. It was defendant's duty to furnish plaintiff a ticket to Sanford in exchange for his mileage which he had bought and paid for. The plaintiff, according to the evidence, had no time to present his book at Fayetteville even if that was necessary, which we do not admit, as plaintiff had already presented it at Red Springs.

If the railway companies insist upon the traveler presenting his book at the ticket window, they must be prepared to honor it there. If they fail to do so, they should instruct their conductors to honor it on the train. This will prevent much friction and will doubtless save the railway companies from much litigation and expense.

In the Harvey Case it was admitted that there was no foundation for punitive damages, and two members of this court thought the verdict rendered grossly excessive and that it should have been set aside for that reason.

[4] But in this case the plaintiff offers evidence which fully justified the court in instructing the jury that in their discretion they might, if they saw fit, award punitive as well as compensatory damages.

We think the charge of the court is a full presentation of the contentions of both parties and is free from error.

No error.

CLARK, C. J. (concurring). In *Harvey v. R. R.*, 153 N. C. 567, 577, 69 S. E. 627, the court did not find it necessary to pass upon the validity of the requirement that the holder of a mileage book shall present it and obtain a ticket thereon, but, passing by that question, as in this case, held that the plaintiff was entitled to recover.

I am of opinion that in any aspect the plaintiff is entitled to recover for that such requirement is an unreasonable regulation and therefore void, for at least four reasons:

1. Down to the enactment of the statute by which the General Assembly of 1908 (Laws Ex. Sess. 1908, c. 144) prescribed  $2\frac{1}{2}$  cents per mile as a maximum legal rate for transportation over the railroads of this state, such requirement had never been heard of in North Carolina. It is therefore not necessary, and hence unreasonable.

2. Throughout the Union, except practically in this and two or three other adjoining states, such requirement is still unheard of, and mileage is still pulled on the trains, as was the case here prior to 1908. See table, 153 N. C. at page 580, 69 S. E. 633. Therefore it cannot be necessary in this state, where the volume of travel is much smaller than in many others, and hence it is unreasonable to vex the public by an unnecessary requirement.

3. By chapter 216, Laws 1907, the General Assembly prescribed  $2\frac{1}{4}$  cents per mile as a maximum legal rate for transportation over the railroads in this state. The railroad companies proposed to the executive of this state that, "if the rate was changed to  $2\frac{1}{2}$  cents per mile, they would issue mileage books good on their lines within and without the state and good on all railroads within the state at the rate of 2 cents per mile." Thereupon the Special Session of 1908 was called which enacted the  $2\frac{1}{2}$  cent per mile rate. This session was held at considerable expense to the taxpayers of the state. No one in this state had ever heard of a requirement that mileage books be exchanged for a ticket. Every one understood, of course, that the mileage books issued would be such as the public had always been accustomed to. That mileage had saved the public the annoyance which it now daily suffers of being compelled to purchase tickets. The requirement to buy tickets with mileage was adopted after the General Assembly had adjourned. It was a breach of faith, and hence unnecessary and void. It is vexatious and annoying to the traveling public.

4. This hitherto unheard of requirement that mileage should be used, not as mileage, but to buy tickets with, was doubtless adopted to deter the public from the purchase of mileage books by making their use less of a convenience. For that reason, also, it should be held void, for travel should be made as convenient as possible for the traveling public. The great "Pennsylvania System," as well as some other roads, find it an economy and a convenience to themselves as well as to the public to allow mileage books to be used on the train, not only by the holder, but for any one else who may be with him. It is certainly less expensive to the railroad company to have an agent, other than the conductor, to take up mileage on the train, than to have extra agents at the stations to exchange tickets for mileage. In this state the Raleigh and Southport, and possibly some other roads, still accept mileage on their trains. This is another evidence that the innovation of requiring the public to buy tickets with mileage is unnecessary and a vexatious imposition upon the public.



(156 N. C. 461)

AUSTIN v. LEWIS et al.

(Supreme Court of North Carolina. Nov. 1, 1911.)

**JUSTICES OF THE PEACE (§ 40\*)—JURISDICTION—RESIDENCE OF DEFENDANT.**

Revisal 1905, § 1447, authorizes a justice of the peace to issue process beyond his own county, where one of the defendants is a bona fide resident thereof. *Held* that, where plaintiff's complaint stated no cause of action against the resident defendant, the justice had no jurisdiction over the defendant residing in another county.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 143-145; Dec. Dig. § 40.\*]

Allen, J., dissenting.

Appeal from Superior Court, Union County; Ferguson, Judge.

Action by W. D. Austin against J. W. Lewis and others. Judgment for plaintiff, and defendant Lewis appeals. Dismissed.

Stack & Parker, for appellant. Williams, Lemmond & Love, for appellee.

CLARK, C. J. This action was begun before a justice of the peace in Union county to recover \$80. The defendants as recited in the warrant are J. W. Thomas and J. W. Hasty, both of Union county, and J. W. Lewis, of Mecklenburg county. The plaintiff filed a complaint before the justice, reciting that he had sold to the defendant Lewis two car loads of lumber at the sum of \$12.50 per M, and delivered the same to said Hasty and Thomas for the said Lewis, to whom it was duly shipped; that the said Lewis had received the same, and had paid the plaintiff, through said Hasty and Thomas, \$224.01, leaving a balance due of \$82.39. The defendant Lewis entered a special appearance and filed a motion to dismiss, because it appeared upon the summons that he was a resident of Mecklenburg, that the sum demanded under alleged contract was under \$200, and that it appeared upon the face of the complaint that no cause of action was stated against Hasty or Thomas, nor any allegation connecting them with Lewis, or alleging any liability on their part, and that joining them in the action was a fraud upon the jurisdiction of the court. The motion to dismiss the action was overruled, and was renewed upon appeal in the superior court, and was again denied.

The motion to dismiss should have been granted. Lewis, being a nonresident of Union, could not be sued in that county, unless there were other bona fide defendants residing in said county. Revisal 1905, § 1447. The complaint states no cause of action against either Hasty or Thomas. Originally a justice of the peace had no authority to issue any process to any other county but his own. He was authorized to do so in certain instances by chapter 60, Acts 1871-72, now

Revisal, §§ 1449, 1450. *Fertilizer Co. v. Marshburn*, 122 N. C. 414, 29 S. E. 411. This authority became much abused. Claims and notes were assigned to a resident of a distant county, and thereupon action would be brought before a justice of the peace against nonresident defendants, who would submit to judgment by default rather than attend. Indeed, it was not necessary that the plaintiff should reside in such county. *Sossamer v. Hinson*, 72 N. C. 578. Thereupon Acts 1876-77, c. 287, now Revisal, § 1447, was passed, which requires that one or more bona fide defendants shall reside in the county. *Lilly v. Purcell*, 78 N. C. 83. Neither Hasty nor Thomas are bona fide defendants, and the justice did not have jurisdiction. Action dismissed.

ALLEN, J., dissents.

(156 N. C. 432)

CURRIE v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Nov. 1, 1911.)

**1. CARRIERS (§ 20\*)—CARRIAGE OF GOODS—FAILURE TO DELIVER—ADJUSTMENT OF CLAIM—FILING CLAIM.**

Under Revisal 1905, § 2634, which provides a penalty for the failure to adjust claims for loss or damage to property while in possession of a carrier within a specified time after presentation of a demand in writing, a written statement setting forth the purchase of the article claimed to have been lost, with the price, quantity, name of vendor and shipping point, is, when handed to the company's agent within the time specified by the statute, with a statement that it was for the goods lost, sufficiently definite to enable the company to investigate the claim, and will satisfy the requirements of the statute.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 20.\*]

**2. CARRIERS (§§ 120, 121, 136\*)—CARRIAGE OF GOODS—LOSS OF OR INJURY TO GOODS—INHERENT DEFECTS.**

While carriers, in the absence of stipulations to the contrary, are insurers of goods intrusted to them for shipment, they will not be so held where loss or damage results from the negligence of the shipper, or from vices or defects inherent in the goods, so that where, in an action for the value of a puncheon of molasses which burst while in the custody of the carrier, there is evidence that the cause was the fermentation of the molasses, defendant is entitled to have it considered by the jury under a proper charge.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 486, 531-536, 596-608; Dec. Dig. §§ 120, 121, 136.\*]

Appeal from Superior Court, Bladen County; O. H. Allen, Judge.

Action by N. A. Currie against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

The jury rendered the following verdict:

"(1) In what sum, if any, is defendant indebted to the plaintiff by reason of the loss of a puncheon of molasses? A. \$47.20.

"(2) In what sum, if any, is defendant indebted to plaintiff by way of penalty? A. \$50."

W. H. Neal, for appellant.

HOKE, J. [1] The court has held that section 2634, Revisal 1905, imposing a penalty on common carriers for failure to settle claims for loss or damage to property while in their possession as such within 60 days after filing same, in case of shipments wholly within the state and 90 days when the shipments were without the state by correct interpretation, requires that, in order to a recovery of the penalty, the claim should be filed with the company within the time specified. *Thompson v. Express Company*, 147 N. C. 343, 61 S. E. 182. The testimony tended to show that the molasses was lost by reason of the bursting of the puncheon, and defendant objected to the recovery, first, that there had been no proper filing of the claim. The written statement of plaintiff's demand within the time was left with the proper officials of defendant company, in terms as follows: "Clarkton, N. C. Sept. 3, 1909. Sea Board Air Line. Bought of N. A. Currie, Merchant and Cotton buyer, 1 Puncheon of molasses 118 Gals. at 40 cents a Gal. \$47.20. Shipped from Wilmington." And plaintiff was allowed to testify, over defendant's objection, that he told the agent on presenting the claim that it was for the puncheon of molasses that burst. While the form of the demand is not one to be approved or generally followed, we think it sufficiently definite to notify defendant of the amount and nature of the claim, affording, as it did, sufficient information to enable the company to make investigation and secure the evidence relevant to the inquiry, and we concur with his honor in holding the notice to be a sufficient filing within the meaning of the statute. *Stonestreet v. Frost*, 123 N. C. 640, 31 S. E. 836. Defendant further objected that the court declined to submit or entertain the view arising on the testimony that the puncheon burst by reason of fermentation of the molasses, and for which defendant was in no way responsible.

[2] While common carriers in the absence of valid stipulation to the contrary are held in this state to be insurers of goods intrusted to them for shipment, it is generally understood that the principle does not extend or apply to loss or damage arising from the negligence of the shipper or from vices or defects inherent in the nature of the goods. This limitation on the liability of common carriers of goods was referred to as accepted law by Allen, judge, in his concurring opinion in *Peanut Co. v. Railroad*, 155 N. C. 148, 71 S. E. 71, and the statement is in full accord with the authorities. *Moore on Carriers*, §§ 4, 5; *Hutchinson on Carriers* (3d Ed.) §§ 333, 334. In this

last citation the author says: "So obviously the carrier, not himself at fault, cannot be held liable for losses which have been caused by the inherent nature, vice, defect, or infirmity of the goods themselves, as in the case of decay, waste, or deterioration of perishable fruits, the evaporation of liquids, the bursting of vessels, owing to the fermentation of their contents," etc. There was evidence on the part of the defendant tending to establish the conditions referred to, and we are of opinion that defendant was entitled to have the same considered by the jury under a proper charge. For the error indicated, defendant is entitled to a new trial, and it is so ordered.

New trial.

(39 S. C. 555)

### NORTHWESTERN R. CO. OF SOUTH CAROLINA v. COLCLOUGH.

(Supreme Court of South Carolina. Nov. 1, 1911.)

#### 1. APPEAL AND ERROR (§ 1010\*)—REVIEW—FINDINGS.

The Supreme Court cannot reverse findings by a trial court, unless they are not sustained by legal evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

#### 2. EMINENT DOMAIN (§ 152\*)—GRANTS BY LIFE TENANT—RAILWAY RIGHTS OF WAY.

A life tenant having granted a railway right of way, the only right left in the remaindermen or their grantees as to any part of the land subject to condemnation is the right to compensation for so much of their interest as is taken on death of the life tenant.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 406; Dec. Dig. § 152.\*]

#### 3. LIFE ESTATES (§ 23\*)—GRANTS BY LIFE TENANT—RAILWAY RIGHTS OF WAY.

Grant by life tenant of a railway right of way wider than the company is empowered to condemn under its charter does not give any easement as against remaindermen or their grantee beyond the authorized width.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 21, 42; Dec. Dig. § 23.\*]

#### 4. EMINENT DOMAIN (§ 152\*)—RIGHTS OF PURCHASER—COMPENSATION FOR EASEMENT PREVIOUSLY GRANTED.

Unless right of remaindermen to compensation for land granted by a life tenant as a railway right of way is assigned to their grantee, he cannot recover compensation from the company for use of the land before he acquired title.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 403-406; Dec. Dig. § 152.\*]

#### 5. LIFE ESTATES (§ 23\*)—INTERFERENCE WITH RAILWAY RIGHT OF WAY.

That a purchaser of land from remaindermen may have a right to condemnation of his interest in a strip deeded to the company by a life tenant does not affect the company's right to enjoin interference with the company's use until his right to compensation is established.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. § 23.\*]

Appeal from Common Pleas Circuit Court of Clarendon County; George E. Prince, Judge.

"To be officially reported."

Action by the Northwestern Railroad Company of South Carolina against Samuel M. Colclough. Judgment for plaintiff, and defendant appeals. Modified and remanded.

J. J. Cantey and Charlton Du Rant, for appellant. Purdy & O'Bryan, for respondent.

JONES, C. J. This is an appeal from a judgment upon the merits in the same action in which preliminary injunctions were granted as reported in 84 S. C. 37, 65 S. E. 950. A trial by jury of the legal issues being waived and the cause having been heard upon the merits, a decree was rendered adjudging that the strip of land in controversy had been appropriated to railroad uses for a right of way for the plaintiff's railroad under a grant of the said land from the owner of the life estate therein, and perpetually enjoining and restraining the defendant from further interference with the use by the plaintiff of the said right of way, 100 feet wide on each side from the center of plaintiff's track, over and upon the land described in the complaint. By this decree, however, the defendant was granted leave to move his fences and buildings from the said strip of land within 20 days after notice of the filing thereof. The defendant has appealed upon numerous exceptions, involving questions both of law and fact.

[1] In so far, however, as the appeal seeks a review of the findings of fact by the trial judge upon the legal issues in the case, it must be held that this court has no power to reverse such findings, unless there be no legal evidence to sustain the same. *Wallace v. Orangeburg*, 87 S. C. 359, 69 S. E. 664. As such evidence appears in support of all of the said findings, it follows that the only questions raised by the appeal now for determination are the questions of law made by the exceptions.

Briefly, it may be stated that the evidence established a grant, about the year 1888, made upon valuable consideration by the life tenant of the strip of land here in question to the grantor of the plaintiff for railroad purposes, and an occupation thereof by the plaintiff railroad company for its use as a right of way for some period of time, the length of which is not clearly stated, prior to the taking possession of a part thereof by the defendant in the year 1904. Notwithstanding the grant by the life tenant was duly recorded in the year 1889, the life tenant and her husband, the latter being then trustee for the remaindermen and being invested with a power of sale under the trust deed, undertook to convey to the defendant in the year 1904 certain lands adjoining the track and right of way of the plaintiff, the description thereof calling for a measurement

in feet which would include the right of way in part, although the deed calls for the right of way as a boundary. At some date subsequent to the deed of 1904, the life tenant being dead, the defendant erected certain buildings and fences, either wholly or partly within the limits of the grant to the plaintiff of the right of way aforesaid.

[2] The finding of the circuit court as matter of fact is that a right of way was laid out and appropriated to railroad uses, 100 feet in width on each side of the track of the plaintiff railroad company, in pursuance of the grant of the life tenant, and subsequently it is further found that the plaintiff was in the possession and use of such right of way, actually as to part and constructively as to the remainder, at the time of the entry and possession taken by the defendant. The land in question having thus been granted by the life tenant and appropriated and used by the railroad company for a right of way, during the lifetime of the life tenant, the only right which was left in the remaindermen or in their trustee, in so far as concerns any part of said lands which could legally be condemned for a right of way, was a right to compensation, upon the death of the life tenant, for any land belonging to them which had been so appropriated to railroad uses in accordance with the rights conferred by the charter under which the same was taken. The defendant, as grantee of the remaindermen or of their trustee, could not recover any part of the land so dedicated to railroad uses, so far as the same was authorized by the charter to be taken for a right of way, and the defendant had no right to take possession of any part thereof so dedicated in accordance with such charter, so as to interfere with the right of easement held by the plaintiff therein, even if the same could be shown to be embraced within the limits of the defendant's deed. *Bridges v. Railroad*, 86 S. C. 267, 68 S. E. 551; *Tompkins v. Railroad*, 21 S. C. 421; *Railway v. Reynolds*, 69 S. C. 481, 48 S. E. 476; *Cureton v. Railroad*, 59 S. C. 371, 37 S. E. 914.

[3] It appears, however, that by the terms of its charter the railroad company was only authorized to condemn for the purpose of its right of way a strip of land extending on each side of the center of its roadbed a distance of 75 feet. While, therefore, it had the right, no doubt, to accept a grant for a greater width, its power of condemnation under its charter only extended to a distance of 75 feet from its roadbed. Hence it follows that after the death of the life tenant as against the defendant who is the grantee of the remaindermen it could only claim an appropriation of the strip of land here in question to the extent of 75 feet in width thereof on each side of the center of such roadbed, since that is the limit of its right to condemnation; and it has no easement, therefore, as against the defendant in any

part of the said strip of land beyond the limits just mentioned. It must be concluded, therefore, that any estate acquired by the defendant in the premises by the deed of 1904 was subject to the easement previously granted to and then being used by the plaintiff company, so far as concerns that portion of the land in question which is embraced within the strip extending 75 feet on each side of the center of the roadbed of the plaintiff, and which it had the right to hold as a right of way, notwithstanding the death of the life tenant, subject to the right of the remaindermen to demand compensation for their interest in the same.

[4] As, however, it was not shown that there had been any assignment or transfer to the defendant of any right to compensation to which the remaindermen or their trustee may have been entitled, it follows that the defendant would not have the right to recover any such compensation from the plaintiff for any appropriation of the land in question to railroad uses prior to the acquisition of title by the defendant. See *Bridges v. Railroad*, 86 S. C. 267, 68 S. E. 551.

For the reason stated, there was no error in enjoining and restraining the defendant, his agents and servants, from in any manner interfering with the plaintiff, its agents or servants, in exercising its right to the use of said strip of land for railroad purposes, in so far as concerns that portion of the land which is embraced within the limits of 75 feet on each side of the center of the roadbed of the plaintiff's railroad. But there was error in granting such injunction in so far as regards that part of the lands beyond the limits just mentioned, for the reason that the plaintiff has a grant only of the life estate therein which has terminated by the death of the life tenant, and has no power of condemnation under its charter beyond the limits of the 75 feet on each side from the center of the roadbed.

There are no considerations presented by any of the exceptions or urged in argument which would warrant a different conclusion from that just announced.

[5] The fact, if it be a fact, that the defendant may have a right to compensation for the use of such right of way by the plaintiff, upon a proper showing to that end, does not in any degree deprive the plaintiff of the right to such injunction, at least until the defendant's right to compensation, if it exists, shall have been made to appear. It may be added, with reference to the third exception, that there was no adjudication by this court at the former hearing upon any question as to the merits at issue in this case, but there was merely a determination as to the right to a temporary injunction to preserve the status and as to the right of possession pendente lite. Without further reference to the points made by the several

grounds of appeal, all of which have been duly considered and must be overruled, either for the reasons already stated or because they do not affect the result, the conclusion has been reached that the judgment of the circuit court should be modified in the particular above mentioned, and in all other respects that the same must be affirmed.

It is therefore ordered that the circuit judgment be modified in accordance with the terms of this opinion, and that the cause be remanded to the circuit court for such action as may be necessary to conform the circuit judgment to the conclusions herein announced.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 5)

RUSSELL et al. v. LYON et al.

(Supreme Court of South Carolina. Nov. 3, 1911.)

1. OFFICERS (§ 15\*)—APPOINTMENT—STATUTORY PROVISIONS.

Under Act Feb. 18, 1911 (27 St. at Large, p. 194), providing for the appointment of rural policemen by the Governor on the recommendation of the legislative delegation from each county, persons who have received the legislative recommendation, but who have not been appointed by the Governor, are not qualified to act as policemen, nor to receive a salary as such.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 15.\*]

2. OFFICERS (§ 95\*)—APPOINTMENT—DE FACTO OFFICERS.

Persons who have been recommended by a legislative delegation to act as rural policemen under Act Feb. 18, 1911 (27 St. at Large, p. 194) providing for the appointment of such policemen by the Governor upon such recommendation, but whom the Governor has refused to appoint, have no color of title to the office which will entitle them to recover salaries as de facto officers for time served.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 134, 139; Dec. Dig. § 95.\*]

"To be officially reported."

Original petition by L. H. Russell and others for injunction against R. L. Lyon and others. Injunction granted.

D. H. Magill, for petitioners. H. S. F. Giles, for respondents.

JONES, C. J. This is a petition in the original jurisdiction of the court under which certain citizens and taxpayers of Greenwood county seek to enjoin the respondents Lyon and Hughes from holding and exercising the office of rural policemen of said county, and receiving the salary thereof, and to enjoin respondent Payne as treasurer of said county from paying Lyon and Hughes the said salary. Upon return to the rule to show cause the respondents demurred to the jurisdiction of the court, but subsequently the demurrer was withdrawn, and the cause was submitted

to the court on its merits upon the following facts: "Under the act of the Legislature of 1911 (page 194), the Governor commissioned J. B. Riley, L. C. Elledge, and R. L. Golden, immediately upon the approval of the said act, rural policemen for Greenwood county upon the recommendation of D. H. Magill, Esq., one of the four members of the legislative delegation for Greenwood county, the other three members of the delegation not being notified, nor given an opportunity to make recommendations. J. B. Riley resigned 30 days after his appointment. The other two, L. C. Elledge and R. L. Golden, demanded the salary of the office, and, after refusal of payment, brought mandamus against the county officials to compel payment. See *Elledge v. Wharton*, 89 S. C. 113, 71 S. E. 657. Immediately after the decision of the Supreme Court in this case, the legislative delegation of Greenwood county was called together for the purpose of recommending to the Governor for appointment three suitable men for the position of rural policemen for Greenwood county under the terms of the said act. At said meeting the full delegation was present, and they selected by ballot of three votes each the following men as rural policemen: L. C. Elledge, R. T. Hughes, and R. L. Lyon, all electors and citizens of Greenwood county. Mr. D. H. Magill, one of the Greenwood county delegation, being present, but refused to vote. The names of the three men were submitted to the Governor for appointment, and he was requested to appoint them, but he refused to make any other appointments other than he had already made, and stated that he would not commission R. T. Hughes and R. L. Lyon, without giving any reason for such refusal. L. C. Elledge holds his office under his first commission. The three men, L. C. Elledge, R. T. Hughes, and R. L. Lyon, thus elected and recommended by three of the four members of the legislative delegation duly qualified as such rural policemen for Greenwood county, having done everything required by law to perfect their title to the said office except to receive their appointment and commission, and have discharged the duties of the said office for one month. The Governor has continued to neglect and refuse to commission them."

The act to provide for the establishment and maintenance of a rural police system in Greenwood county approved February 18, 1911, enacts in section 1 as follows: "That upon the approval of this act it shall be the duty of the Governor, upon the recommendation of the legislative delegation of Greenwood county, to appoint three able-bodied men of the county of Greenwood, who are of good habits and of courage, coolness and dis-

cretion, known as men who are not addicted to the use of alcoholic liquors, or of drugs, and shall commission them as county policemen for a term of four years, subject to removal by the Governor for cause, provided however, that no person shall be eligible to appointment as such policemen who make application for such appointment."

In the case of *Elledge v. Wharton*, 89 S. C. 113, 71 S. E. 657, it was held that an appointment by the Governor to the office of rural policeman under this statute, without the recommendation of the legislative delegation, was invalid because the statute expressly provides that the appointment should be made upon such recommendation.

[1] By the same rule of construction, we must now hold that the mere recommendation of the legislative delegation without an appointment by the Governor can confer no right to the office. It was entirely within the power of the Legislature to prescribe how these appointments must be made, and the statute plainly requires the concurrence of the legislative delegation and the Governor in ascertaining and determining the existence of the prescribed qualifications for the office and the selection of the person to be commissioned. It appears from the facts stated that the Governor has not assented to the appointment of respondents Lyon and Hughes, and it must follow that they have no authority to act as rural policemen of Greenwood county, and are not entitled to the salary claimed by them as such officers.

[2] Nor are they entitled to the salary as de facto officers. Unlike the petitioners in *Elledge v. Wharton*, supra, they do not show even color of title to the office, for the mere recommendation of the legislative delegation not concurred in by the Governor, and not followed by commission or some prima facie evidence of appointment, does not constitute such color of title to office as might under certain circumstances justify a court in awarding them the salary attached to the office.

We will not in this proceeding undertake to oust respondents from an office they are alleged to have usurped, but have considered the matter of their right to the office only with the view to determine the duty of the respondent treasurer with reference to the payment of the salary claimed.

The judgment of the court is that the respondent Payne, treasurer of Greenwood county, be, and he is hereby, enjoined from paying salaries claimed by respondents Lyon and Hughes as rural policemen of Greenwood county.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 1)

**TERRY v. STATE MUT. LIFE INS. CO. OF ROME, GA.**

(Supreme Court of South Carolina. Nov. 7, 1911.)

**INSURANCE (§ 360\*)—PREMIUMS—PAYMENT—DIVIDENDS.**

A life policy issued to insured and payable to plaintiff provided for annual premiums of \$16.32, the first of which carried the contract to November 28, 1906. Insured was notified that the second annual payment would be due on that date, and that he had a credit dividend of \$2.45 applicable either to the payment of the premium for the succeeding year or convertible into paid-up insurance. The policy provided for 30 days' grace in the payment of premiums, and also that every policy holder at the time any premium fell due might pay a semiannual or quarterly premium according to the association's schedule, which would continue the policy for the time paid for. Insured paid no further premium, and died on January 10, 1907. The quarterly premium, if paid on November 28, 1906, would have amounted to \$4.33, and the dividend, if applicable to the payment of the premium for a less period than three months, would have been sufficient to carry the policy beyond the date of insured's death. Held that three months was the shortest period for which a premium was payable under the contract, and, the dividend being insufficient to pay the premium for that period, the policy lapsed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 913-924; Dec. Dig. § 360.\*]

Appeal from Common Pleas Circuit Court of Hampton County; Geo. E. Prince, Judge.

"To be officially reported."

Action by Mrs. C. S. Terry against the State Mutual Life Insurance Company of Rome, Ga. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

James W. Moore, for appellant. W. S. Smith, W. D. Connor, and J. W. Vincent, for respondent.

**JONES, C. J.** On November 28, 1905, the defendant company issued to Wm. Bartlett Terry a policy of insurance for \$1,000 payable on his death to his mother, the plaintiff, if then living. The first annual premium of \$16.32 was paid, which carried the contract up to November 28, 1906. The insured was notified that the second annual premium would be due on November 28, 1906, and that he had to his credit in the hands of the defendant a dividend amounting to \$2.45, which was applicable to the payment of the premium for the succeeding year, or convertible into participating paid up insurance, if he should so wish. The insured made no further payment on account of premium, and died on the night of January 10, 1907. The policy allowed 30 days' grace in payment of premiums after the first, during which the policy would remain in full force.

It was further provided that the policy should share annually in the distribution of surplus, and that "dividends will be applied to the payment of the succeeding year's

premium, or may be drawn in cash if all premiums under this policy have been paid." The policy further provided that "every policy holder has the right at the time any premium falls due to pay a semiannually or quarterly premium according to the association schedule for the kind of policy held by him, and the same will continue the policy in force the time paid for." A quarterly premium would have been \$4.33 if election had been made to pay premium quarterly. If the dividend of \$2.45 to the credit of the insured on November 28, 1906, was applicable to payment of premium for a less period than three months, it would have been sufficient to continue the policy in force beyond the date of the death of the insured. Upon the death of the insured his mother, the plaintiff beneficiary, demanded payment of the policy, which was refused, and thereafter she brought this action.

The special referee, W. H. Townsend, to whom the issues had been referred, found the facts as above stated, which are undisputed, and concluded as matter of law that the defendant was not bound under the terms of the contract to apply the \$2.45 dividend in its hands for the credit of the insured to the payment of premium for any period, in the absence of a tender of additional funds sufficient to pay \$4.33, the premium for three months from November 28, 1906, the lowest renewal premium provided for in the contract, and that by reason of the default the policy was not in force at the death of the insured. On exception to the report of the referee, Judge Prince overruled the referee in his conclusion of law, and gave judgment for the plaintiff for \$1,266.38, including interest from May 10, 1907, the date on which defendant denied liability.

The main contest now before this court on exceptions is whether the circuit court was in error in not sustaining the report of the special referee, and in holding that the dividend of \$2.45, belonging to the insured in the hands of the defendant, should have been applied by defendant to continue the policy in force for a period less than three months. We are clearly of the opinion that the circuit court was in error, and that upon the facts stated the policy was not in force at the death of the insured. There is nothing in the contract of insurance to authorize payment of premium for a less period than three months; on the contrary, the express stipulation extends only to a payment of premiums annually, semiannually, or quarterly, and for a continuance of the policy for the time paid for; the dividend being insufficient to pay premium for the shortest period provided for, and there being no tender of additional money sufficient to make up payment for even the shortest period allowed, and nothing to show consent of the defendant to apply the dividend to pro rata payment of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

quarterly premium, or waiver of its right to stand upon the terms of the contract. There is nothing the court can do but declare the policy lapsed for noncompliance with the condition of its continuance according to the contract.

The case of *Ætna Life Ins. Co. v. Hartley* (Ky.) 67 S. W. 21, cited for appellant, is not to the contrary, as in that case the insurance company elected to apply the dividend to the payment of the premium, and therefore could not declare a forfeiture for nonpayment of premium during the time pro rata the dividend was sufficient to cover; the court conceding that the company could not have been compelled to accept less than the full premium in order to continue the policy in force, and could not have been compelled to apply to the premium a dividend less than the premium.

This conclusion renders it unnecessary to consider the question as to interest on the policy which becomes immaterial in the view we take as to the main question.

The judgment of the circuit court is reversed, and the complaint is dismissed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

C. C. 567)

**BUSBEE et al. v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of South Carolina. Nov. 7, 1911.)

**1. TELEGRAPHS AND TELEPHONES (§ 31\*)—TRANSMISSION OF MESSAGES—OFFICE HOURS.**

Where the office hours of defendant telegraph company at the destination of a message on Sunday were from 8 to 10 a. m., and from 4 to 6 p. m., and the message was not filed for transmission until after 10 o'clock a. m., the telegraph company was not negligent in failing to have agents at the destination office to receive the message before 4 o'clock p. m.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 20; Dec. Dig. § 31.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 73\*)—DEATH MESSAGE—NEGLIGENT TRANSMISSION—WILLFUL AND RECKLESS DISREGARD OF DUTY.**

In action against a telegraph company for delay in transmission of telegram on Sunday, *held*, that defendant owed plaintiff the duty to have the agent at hand to receive the message during office hours between 4 and 6 p. m. on Sunday, and that such failure, together with the relay agent's failure to attempt to send the message another way as requested, sufficiently raised the question of willful or reckless disregard of duty.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 73.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 73\*)—DEATH MESSAGE—DAMAGES—EVIDENCE.**

Where plaintiff would not have been able to have reached the bedside of her aunt before her death, had defendant telegraph company promptly delivered a message notifying plaintiff of the aunt's illness, but she could have attended the funeral, and plaintiff testified that

she was attached to her aunt by strong ties of affection, whether plaintiff suffered mental anguish from her inability to attend the funeral for which she was entitled to recover was for the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 73.\*]

**4. NEW TRIAL (§ 89\*)—GROUNDS—IRRELEVANT INSTRUCTIONS.**

A new trial should not be granted for the giving of an irrelevant instruction, unless the record showed good reason to suppose the verdict was affected by it.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 57-61; Dec. Dig. § 39.\*]

**5. APPEAL AND ERROR (§ 216\*)—INSTRUCTIONS—WAIVER OF ERROR.**

In an action for delay in delivering a death message, defendant requested the court to charge that where a party is deprived of being with her aunt at her death by delay in the delivery of a telegram, in order to enable such party to recover damages for mental anguish, it must affirmatively appear that special relations of tenderness existed between plaintiff and deceased, and that when the message was accepted for delivery notice was given to the company of such relations. In response to the request, the judge said: "I charge you that if a niece or nephew should go and send a telegram, and the fact of that relationship was not known to the operator, then you see the law that I have given you would not apply, but that relationship must be known in order to bind the company, in order to be able to recover exemplary or punitive damages." *Held*, that the judge's interpretation of the request was so obviously erroneous that it must have been manifest to defendant's counsel at the time that it was due to an inadvertence, so that defendant waived the error by failing to call attention thereto.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 629; Dec. Dig. § 216.\*]

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Abbeville County; John S. Wilson, Judge.

Action by Georgia H. Busbee and another against the Western Union Telegraph Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Gary & Hill, for appellant. Moore & Mars, for respondents.

WOODS, J. This appeal is from a judgment of \$400 recovered by the plaintiff as damages for mental anguish caused by the failure of the defendant company to transmit and deliver promptly a telegram announcing the illness of plaintiff's aunt. In passing on defendant's first position that the circuit judge should have held that there was an entire failure of evidence of willfulness or wantonness, and also an entire failure of evidence of any actual damages suffered by the plaintiff, it becomes necessary to state the evidence with some detail.

Elbert F. White presented for transmission to the defendant's agent at Abbeville, about 10 o'clock a. m. on Sunday, February 28, 1909, this message: "Time filed 10:20 a. m. Check 10 Paid 25. Mrs. W. H. Busbee, Clearwater, S. C. Aunt Aggie and

Aunt Sallie are in dying condition. Come. Elbert." The agent examined the list of the company's offices, but not with sufficient care to discover that Clearwater was on the list, and informed White that there was no such office. Thereupon White directed that the message should be sent "via Bath," and paid 50 cents for the extra charge of sending a message from Bath to Clearwater. When the message reached Augusta, Ga., the relay office, the agent there asked the Abbeville agent why the message was not to be sent direct to the Clearwater office. The Abbeville agent, having thus discovered his error in telling White that there was no office at Clearwater, authorized the Augusta agent to send the message direct to Clearwater. The Abbeville agent testified that he made some effort to find White and return the extra charge of 50 cents, but was not successful, and the money was never returned.

[1, 2] The message was received by the Augusta office a few minutes after 10 o'clock. The Sunday office hours at Abbeville, Bath, and Clearwater were from 8 to 10 a. m. and from 4 to 6 p. m. As the telegram was not received by the defendant's Augusta agent until after the Sunday morning hours at Bath and Clearwater, no negligence can be imputed to it for not having agents in those offices to receive the message before 4 o'clock in the afternoon. *Bonner v. Telegraph Co.*, 71 S. C. 303, 51 S. E. 117; *Harrison v. Telegraph Co.*, 71 S. C. 386, 51 S. E. 119; *Bowen v. Telegraph Co.*, 77 S. C. 127, 57 S. E. 674. All day Sunday, both before and after 4 o'clock in the afternoon, frequent calls were made by the Augusta office on the Clearwater office, but the agent was either absent or neglected to answer. The Augusta agent made no effort to deliver the message through the Bath office. The message was taken by the Clearwater agent at 8:47 on Monday morning, and delivered to Mrs. Busbee about 9:40. The defendant owed to the plaintiff the duty to have an agent at the Clearwater office to receive the message for her during its office hours from 4 to 6 p. m. Evidence of the entire and unexplained failure of the Clearwater agent to perform this obvious duty was evidence from which an inference of a conscious failure to perform a known duty could be reasonably inferred. In addition to this, we think the inference of total disregard of an obvious duty might well be drawn from the failure of the Augusta agents of defendant to make any effort to send the message through the Bath office when no response came from the Clearwater office. The message showed on its face great urgency; the mark on it for special delivery through the Bath office indicated that the special charge had been paid; and it might with reason be inferred that any regard for the obligation assumed would have resulted in an effort to deliver the message through the Bath office. No doubt

the defendant's Augusta agent was right in trying to save for the sender the extra charge and expedite the delivery of the message by sending it direct to Clearwater, as the sender intended it should be sent until misled by the Abbeville agent; but it was none the less his duty to try the Bath office, when the Clearwater office failed to respond. The circuit judge was, for these reasons, right in submitting to the jury the question of willful or reckless disregard of duty on the part of the defendant.

[3] It is equally clear that there was evidence to go to the jury on the question of damages. The evidence does show, as defendant's counsel contends, that even if the telegram had been promptly delivered to the plaintiff at 4 o'clock Sunday afternoon she could not have reached the bedside of her aunt before her death; but it also tends strongly to show that the plaintiff could have reached Abbeville in time to attend the funeral. She alleged and testified that she was attached to her aunt by strong ties of affection from very intimate association, and it was for the jury to decide whether, in view of such association and affection, mental anguish would result from being unable to attend the funeral.

[4] Defendant's counsel submitted the following request to charge: "Telegraph messages are accepted for transmission, subject to the reasonable rules and regulations of the telegraph company, and if the evidence shows that the defendant company had reasonable office hours during which to deliver telegraph messages in the towns of Clearwater and Bath, it was not by law compelled to deliver messages outside of said hours." After reading the request to the jury, the circuit judge said: "I charge you that so far, and I add this to it: Unless through its authorized agent, acting within the scope of his authority, he assumes for valuable consideration to do otherwise." The addition to the request, it is true, was irrelevant, for there was no evidence, whatever that the defendant had undertaken to deliver the message out of office hours. But a new trial should not be granted merely because of an irrelevant instruction, unless the record furnishes good reason to suppose that the verdict was affected by it. We find no such reason in the record in this instance, and the exception must be overruled.

[5] The comment of the circuit judge in charging the fourth request of defendant's counsel gives rise to a point of some difficulty. The request was as follows: "That, where a party is deprived of being with a relation during that relation's dying moments by reason of delay in the delivery of a telegram, and the relationship between the party and said relation is that of niece, proof of such relationship is not of itself sufficient to raise a presumption of mental anguish, and, in order to enable such party to recover damages for mental anguish on



account of such deprivation, it must affirmatively appear from the evidence that special relations of tenderness and affection existed between the plaintiff and the deceased, and that at the time the message was accepted by the telegraph company for transmission and delivery adequate notice was given the company of such special relations." The presiding judge, after reading the request, said: "I charge you that. In other words, Mr. Foreman and gentlemen of the jury, if a niece or a nephew should go and send a telegram, and the fact of that relationship was not known to the operator, then you see the law that I have given you would not apply, but that relationship must be known in order to bind the company; in order to be able to recover exemplary or punitive damages that relationship must be known to the company." The error of the circuit judge in his interpretation of the request is so obvious that it must have been manifest to the counsel for defendant at the time it was due to inadvertence. We think it must be imputed to the counsel as a waiver of the obvious mistake of the presiding judge that he failed to call attention to it. This conclusion is strengthened by the fact that at the close of the charge the presiding judge asked the question, "Is there anything else, gentlemen?" and counsel for defendant submitted an additional request to charge, without referring to this inadvertence. *Worthy v. Jonesville Oil Mill*, 77 S. C. 69, 57 S. E. 634, 11 L. R. A. (N. S.) 690; *Anderson v. S. C. & G. R. R. Co.*, 81 S. C. 1, 61 S. E. 1096.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, C. J., and HYDRICK, J., concur.

GARY, A. J. (dissenting). There are two reasons why I cannot concur in the opinion of Mr. Justice WOODS: First. Conceding that there was testimony, in the first instance, tending to show a reckless disregard of the plaintiffs' rights by the defendant; there was also testimony satisfactorily explaining the circumstances from which such fact might have been inferred by the jury. The question of punitive damages was therefore erroneously submitted to the jury. Second. The eighth exception should be sustained. I concur in the opinion of Mr. Justice WOODS that the language used by his honor, the presiding judge, was erroneous.

It is only necessary to cite the cases of *Butler v. Telegraph Co.*, 77 S. C. 148, 57 S. E. 757, and *Johnson v. Telegraph Co.*, 81 S. C. 235, 62 S. E. 244, 17 L. R. A. (N. S.) 1002, 128 Am. St. Rep. 905, to show that there was prejudicial error. But I cannot accept the view expressed by him that the presiding judge intended to charge the proposition embodied in the request. The language used by him clearly shows he intended to charge that

the plaintiff could recover, if the defendant knew that she was the niece of her deceased relative, "Aunt Aggie" (Mrs. J. S. Fisher)—a very different principle from that contained in the request. The appellant's attorneys had the right to presume that the presiding judge was familiar with the doctrine announced in the cases hereinbefore mentioned; and, unless they had actual notice of a mistake on the part of the presiding judge, or it was so glaring that it could not reasonably be supposed that the jury was misled, their client should not be deprived of the right to review the erroneous charge. No such facts, however, exist in this case.

It seems to me that the doctrine announced in the leading opinion will lead to much confusion, and bring about great injustice, and is at variance with the principle announced in the case of *Herskovitz v. Baird*, 59 S. C. 307, 37 S. E. 922, in which it was held that the failure on the part of counsel to call the presiding judge's attention to the fact that he had omitted to charge certain requests would not estop him from moving for a new trial for such omission, unless he knew the judge's reason for such failure to charge.

I therefore dissent.

(90 S. C. 8)

DIXON et al. v. PENDLETON.

(Supreme Court of South Carolina. Nov. 9, 1911.)

WILLS (§ 498\*)—CONSTRUCTION—"ISSUE."

Devise of a remainder to a daughter and the "issue" of her body living at her death extends to the daughter of such devisee and the children of a deceased daughter of such devisee, the grandchildren of testator.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1087-1089; Dec. Dig. § 498.\*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3782-3792; vol. 8, p. 7693.]

Appeal from Common Pleas Circuit Court of Fairfield County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by Minnie M. Dixon and others against Mannie M. Pendleton. From the judgment, plaintiffs appeal. Modified.

W. D. Douglas, for appellants. McDonald & McDonald, for respondent.

WOODS, J. The appeal in this action for partition involves the construction of the following clause of the will of Osmund Woodward, who died some time in the year 1862: "I will and direct that all the rest, residue and remainder of my estate, both real and personal, of every kind and description, including all the lands and all the negro slaves and their increase, which may be in possession of my children at the time of my decease, as a loan from me, be divided by my executors into five equal parts or portions, one of which I give, devise, and bequeath to each of my daughters, namely: Jemima Har-

rison, Sarah Owens, Amanda Heath, Rebekah Buchanan, and Regina Woodward for and during the term of her natural life, to and for her sole and separate use, benefit and behoof, and in no wise to be subject or liable to the debts, contracts, or incumbrances of any husband, and at her death to the issue of her body who may then be living. In case either of my said daughters shall die without leaving issue of her body then living, all the property above given and devised or bequeathed to her (except as hereinafter particularly specified) shall be equally divided among her surviving sisters, to and for their sole and separate use, benefit and behoof respectively, for and during the term of their natural lives, respectively, precisely in all respects as the original share or portion above devised and bequeathed to them respectively, and at their several and respective deaths, to the issue of their bodies who may be then living. In all contingencies which may arise under this will, the issue of a deceased daughter, if any such, shall represent the parent, and take the share which the parent would have been entitled to if living. In case either of my daughters shall die in my lifetime, without leaving issue living at the time of my decease, the share or portion above devised and bequeathed to her, shall fall into the general residue of my estate, and augment ratably the shares or portions of my surviving children, the number of shares or portions in that case being less."

Amanda Heath, one of the daughters mentioned in the devise, had been married to one Mobley before the execution of the will. After the death of Heath, her second husband, she married one Keller, and in the record is called Lucy A. Keller. She died in 1909, leaving surviving as claimants in remainder under the devise "to the issue of her body who may then be living" the following persons: Mannie M. Pendleton, a child of her marriage with Mobley; the plaintiff Minnie M. Dixon, a grandchild; the daughter of Minnie Heath, a child of the marriage with Heath, who died before her mother; and the other plaintiffs, the children of Minnie M. Dixon and the great-grandchildren of the life tenant, Lucy A. Keller.

The circuit court held that, having regard to the entire context of the will, the word "issue" was intended to mean children, and that, as Mannie M. Pendleton was the only person answering the description of children surviving Lucy A. Keller, she took the entire property. On the part of the appellants, it is contended that the children, grandchildren, and great-grandchildren of Lucy A. Keller were all issue of the body of Lucy A. Keller, and that the property should be divided equally among Mannie M. Pendleton, the daughter, Minnie M. Dixon, the granddaughter, and her children, the great-grandchildren of Lucy A. Keller, per capita. Failing in this, the appellant contends that the word "issue" should be held to be at least

as comprehensive a term as heirs of the body, and that Mannie M. Pendleton, the daughter, and Minnie M. Dixon, the granddaughter, should each take one-half.

Logically and on authority there is strong reason for saying that the words "issue of the body," when not limited by the context, are more comprehensive than "heirs of the body." It has been often held in accordance with the commonly understood meaning of the words that heirs of the body embraces all lineal descendants who would take as heirs, while issue of the body embraces all lineal descendants, including those who would not take as heirs. Under this view, for example, if one dies leaving a son who himself has children, the son and all his children would be issue of the body, but the son only would be an heir of the body; for under the statute of distributions, the son's children would not inherit. This view was strongly presented and the authorities sustaining it cited in the circuit decree in *Rembert v. Catoe*, 89 S. C. 198, 71 S. E. 959, but it was rejected by this court in an opinion in which all the justices but one concurred; and we think that case is decisive of this. There the devise was: "All the rest and residue of my estate, of every kind and description, real and personal, not hereinbefore disposed of, I devise and bequeath to my beloved wife, Sarah H. Jones, for and during the term of her natural life, with the power to dispose of one-third thereof, while living, in any way she may choose to do; the remaining two-thirds thereof, after the decease of my said wife, I devise and bequeath to my daughter Martha Amanda, to her sole and separate use, during her life, and at her death to such of her issue as she may leave living at the time of her death, to be equally divided among such issue, but if my said daughter should die leaving no issue alive at the time of her death, it is my will that said two-thirds be equally divided among my next of kin at that time living, according to the statute of distributions of intestates' estates." The majority of the court held that only those took as issue who would have been entitled to take as heirs of the body under the statute of distributions.

The other question is: Did the testator in this case, when he devised to the issue of his daughter living at the time of her death, mean to limit the devise to her child or children then living, to the exclusion of other issue or heirs of her body? The word "issue" is often limited by the context to signify children to the exclusion of grandchildren and remoter issue; and in his forceful opinion the circuit judge has laid stress on the greater natural affection for children than for grandchildren, and on the use of the word "parent" in connection with the word "issue," as strong reasons for imputing to the testator an intention to so limit it in this instance. But the reasons for thinking that the testator did not mean children only when he said issue seem still stronger. The words

"child," "son," "daughter," are the common words in which men think and speak of their immediate offspring, and, when the word "issue" is used either in thought or expression, it almost invariably denotes an intention to include not only children, but other lineal descendants. Hence issue should not be held to mean children unless the context clearly indicates that restricted meaning. In this long will the testator seems to carefully avoid using the common words "child" or "children," and repeats the word "issue" many times in referring to the descendants of his children. It is important to observe, too, that the will was drawn by a capable lawyer who knew the generally recognized distinction so often made between children and issue. On a doubtful construction between children and other descendants, it is true that the presumption of greater affection for children should have weight; but still greater weight should be given to the almost universal inclination and custom of parents to give the children of a deceased child an equal share with a living child. For these reasons we are unable to agree with the circuit court that the testator intended that any child of his daughter who might survive her should take as her issue, to the exclusion of the children of a deceased child.

Comparison of this will with that construed by the court in *Rembert v. Catoe*, supra, decided since the circuit decree was rendered in this case, will show that the word "issue" can be construed to have been used in the two wills in a different sense only on extreme verbal refinement. Such refinement in the construction of wills has been productive of uncertainty in the administration of law, and delay and expensive litigation in the settlement of estates, and should not be indulged. Applying the rule laid down in *Rembert v. Catoe*, it results that issue of the body of Lucy A. Keller, living at the time of her death, means heirs of her body, living at the time of her death. The heirs of her body as determined by the statute of distributions were her daughter, Maudie M. Pendleton, and her granddaughter, Minnie M. Dixon, and each of these takes one-half of the property devised, to the exclusion of the children of Minnie M. Dixon.

The judgment of this court is that the judgment of the circuit court be modified accordingly.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(137 Ga. 60)

# SOUTHERN RY. CO. v. JAY.

(Supreme Court of Georgia. Oct. 28, 1911.)

(Syllabus by the Court.)

## 1. NEW TRIAL (§ 132\*)—PROCEEDINGS TO PROCURE—BRIEF OF EVIDENCE—DISMISSAL.

A motion for a new trial was made during the August term, 1910, of Monroe superior

court, and an order passed providing that it be heard on the 17th day of October, 1910, and "that the movant have until said time in which to prepare and present for approval a brief of the evidence in said case, and to perfect, by amendment or otherwise, his motion for a new trial, the said brief and amended motion to be filed as ordered by the court." On October 17, 1910, the court passed the following order: "The hearing of the motion for a new trial in the above case having been set for to-day, and it appearing to the court that the court reporter has been unable to write out the evidence taken on the trial, the hearing is continued to the 29th of October, 1910." On October 29, 1910, the following order was passed by the court: "This motion came up for hearing on the 17th day of October, 1910, and an order was passed continuing the motion until this the 29th day of October, 1910, for the reason that the stenographer had been unable to translate the notes of the evidence. On call of the case to-day, counsel for defendant moved to dismiss the motion because there was no authority in the order of the 17th giving the movant until the hearing in which to present a brief of the evidence, whereupon counsel for movant moved to amend the order nunc pro tunc by inserting therein the following: 'And it is further ordered that the movant have until said 29th of October, 1910, in which to present for approval a brief of evidence in the case.' The court being satisfied that said words were intended to be inserted in said order and that said right was intended to be given the movant, it is ordered that said order be amended as prayed for." On October 29, 1910, the court approved the brief of evidence presented by the movant, and ordered it filed as a part of the record, and on the same day passed an order granting a new trial. In the bill of exceptions, after reciting that the court passed the order of October 29, 1910, amending the order of October 17, 1910, providing "that movant have until said 29th of October, 1910, in which to present for approval a brief of evidence in the case," and the fact that the plaintiff objected to such order, it is recited: "The court did this because, as he stated at the time, that he intended to put in the order when he signed it the right to movant to have until October 29, 1910, to present the brief for approval." *Held*, the court did not err in overruling the objection of the plaintiff in error hereinbefore referred to, nor in passing the order of October 29, 1910, nor in refusing to dismiss the motion for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 273-275; Dec. Dig. § 132.\*]

## 2. RAILROADS (§§ 813, 325\*)—OPERATION—INJURIES AT CROSSINGS.

Jay sued the Southern Railway Company for damages because of injuries sustained by being struck by one of its trains while backing over an alleged public crossing in an unincorporated town or village. A verdict was rendered in favor of the defendant, and to the order of the court granting the plaintiff a new trial the defendant excepted. *Held*:

(a) If the crossing at which the plaintiff was injured was one to which the sections of the Code requiring the blowing of the whistle and the checking of speed are applicable, under the ruling of the case of *Morgan v. Central Railroad*, 77 Ga. 788, such sections did not require the engineer in charge of the train which injured the plaintiff to observe their requirements; it appearing that the train was being backed on a side track to leave cars thereon and began such backing between the blow post and the crossing.

(b) The plaintiff testified that he was struck by a local freight train backing into a side track while he was attempting to cross a public road over the track, with his "eyes sorter down to

wards the mill when I was hit. I did not hear it. My hearing was and is defective, and I have to use an ear trumpet. I did not hear any one call to me to get out of the way until just as I was hit. I heard some one halloo, and tried to get off the track, and just then the car hit me. \* \* \* The train was running seven or eight miles an hour. \* \* \* I did not look or listen for the train when I went on the track. I thought it was gone. I could have seen the train by just turning my eyes. If I had, I could have got off, and wouldn't have got on. I wasn't thinking. I was in a brown study. I didn't look for the train, because I just forgot." The evidence of other witnesses was that the train was running from three to five miles an hour. The undisputed evidence showed that the brakeman on the back end of the rear car saw the plaintiff approaching the crossing, and motioned and called to him to stop, and, as soon as he discovered that the plaintiff did not see or hear him, gave both the "emergency" and "washout" signals to the engineer to stop the train. The conductor, who was standing on the ground near the crossing, when he discovered that the plaintiff "was going to go upon the track" immediately gave signals to stop the train. The engineer promptly obeyed the signals, and stopped the train as quickly as possible. The bell on the engine was being rung at the time of the accident. *Held*, the evidence demanded a verdict in favor of the defendant, and the court erred in granting a new trial.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1002-1005, 1029-1036; Dec. Dig. §§ 313, 325.\*]

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Action by J. W. Jay, Sr., against the Southern Railway Company. Verdict for defendant, and to an order granting a new trial, defendant brings error. Reversed.

Harris & Harris, for plaintiff in error. Robt. L. Berner and Fletcher & Zellner, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur, except BECK, J., absent.

(137 Ga. 64)

CHATTAHOOCHEE LUMBER CO. et al. v. YEATES et al.

(Supreme Court of Georgia. Oct. 28, 1911.)

(Syllabus by the Court.)

1. JUDGMENT (§ 747\*) — CONCLUSIVENESS — JUDGMENT IN PARTITION.

A judgment rendered in partition proceedings, had under Civil Code 1910, § 5358 et seq., until reversed or set aside, is binding upon all who were parties to the proceedings with due notice thereof, whatever may be its effect as to another co-owner, to whom no such notice was given. Civil Code 1910, § 5364.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 747.\*]

2. JUDGMENT (§ 747\*) — CONCLUSIVENESS — JUDGMENT IN PARTITION.

Where proceedings under Civil Code 1910, § 5358 et seq., to partition real estate owned by four tenants in common, are had at the instance of two of the co-owners, and the latter afterwards bring a suit against the other two for injunction and damages on account of alleged trespasses committed upon that portion of the property set apart to the plaintiffs, the judgment and the partition proceedings on which it was

based are admissible in evidence to establish the plaintiffs' title to such portion as against the defendant who was a party to such proceedings and had due notice thereof, even if there was no legal notice of such proceedings to the other defendant, upon whom no service was had in the suit for injunction and damages.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 747.\*]

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by the Chattahoochee Lumber Company and others against J. E. Yeates and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Donalson & Donalson and J. R. Pottle, for plaintiffs in error. Saml. S. Bennet and A. E. Thornton, for defendants in error.

HOLDEN, J. Judgment reversed. All the Justices concur, except BECK, J., absent.

(137 Ga. 66)

FULLER v. WOOD et al.

(Supreme Court of Georgia. Oct. 28, 1911.)

(Syllabus by the Court.)

1. PARTIES (§ 80\*) — OBJECTIONS — MODE OF MAKING OBJECTIONS.

Suit was brought by the only child of her deceased father, who died intestate, and the temporary administrator of his estate, against the grantee in a certain deed made by the intestate, for the purpose, among others, of recovering specified personality and of canceling the deed on the grounds that the maker at the time of its execution was mentally incapacitated to make the same, that it was obtained from him by duress and fraud, that the only consideration to support it was one that was immoral and illegal, and that the description of the property which it purported to convey was so indefinite and uncertain as to render the deed void, and for the purpose of having a receiver appointed by the court to take charge of all of the assets of the estate of the deceased and of enjoining the defendant from "changing" such assets. The court appointed a receiver to take charge of such assets. Upon the trial of the case it was agreed that "the whole issue in the case is and shall be only as to whether the deed above set out shall be canceled." *Held*, that in view of the defendant's failure to plead or demur on the ground of a nonjoinder of the widow of the decedent, and in view of the above-quoted stipulation, even though the testimony be insufficient to show that there was such a settlement between the husband and the wife as barred the latter's right to any claim in his estate after his death, a verdict in favor of the plaintiff will not be set aside on the ground that the widow was not a party to the suit.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123-131; Dec. Dig. § 80.\*]

2. PARTIES (§ 88\*) — OBJECTIONS — MODE OF MAKING OBJECTIONS.

If it be conceded that a temporary administrator cannot maintain a suit to cancel a deed of his intestate and recover the rents, issues, and profits of the property attempted to be conveyed thereby (see *Ward v. McDonald*, 135 Ga. 515, 69 S. E. 817), in view of the stipulation above referred to, and in view of the fact that there was no demurrer or plea raising such question, or the question of misjoinder of parties, the defendant, who was the grantee in the deed, cannot have set aside a verdict in favor of the

plaintiffs on the ground that the temporary administrator had no right to maintain the suit, nor on the ground of misjoinder of parties, nor because of the admission in evidence of the temporary letters of administration over objection of defendant because of such want of authority in the temporary administrator to maintain the action nor because the court failed to charge in accordance with such contention.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 150-152; Dec. Dig. § 88.\*]

### 3. DEEDS (§ 38\*)—DESCRIPTION OF PROPERTY.

The description of the property in the deed was as follows: "All right, title, and interest that he now possesses in lots #181-179 Fraser street in the city of Atlanta, county of Fulton, state of Georgia, the same land and houses are located at the northwest corner of Fraser and Fulton Sts., the same being the property deeded or conveyed jointly to Nelson Wood and Lizzie Fuller, and more fully described on the deed books of Fulton county records." *Held*, that the deed could not be declared to be void on its face on the ground that the property was insufficiently described, and, in view of the evidence which applied, the description to the subject-matter, the court erred in submitting to the jury the question as to whether the deed was void for want of sufficient description of the property attempted to be conveyed, and in authorizing the jury to cancel the deed if they found it to be void for that reason. Under the evidence, the deed was not void for want of sufficient description of the property.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65-79; Dec. Dig. § 38.\*]

### 4. WITNESSES (§ 201\*)—COMPETENCY—CONFIDENTIAL RELATIONS—ATTORNEY AND CLIENT.

Where a person who desired to make a deed gave instructions to an attorney to prepare it, in the presence of a third party who bore no confidential relation to the grantor or the attorney, and stated that he owed the person to whom he wished to make the deed "money, and that he wanted to make this deed to pay it back," and upon the deed being prepared such attorney and such third person became the witnesses thereto, the attorney was not incompetent to testify to the statement above recited, on the ground that it was a confidential or privileged communication between attorney and client. *O'Brien v. Spalding*, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 754, 755; Dec. Dig. § 201.\*]

### 5. APPEAL AND ERROR (§ 1056\*)—REVIEW—HARMLESS ERROR.

It is unnecessary to consider the assignment of error complaining that the attorney was not permitted to testify as to what property the grantor told him to draw the deed to cover, as it appears from this assignment that this testimony was offered for the purpose of showing that the deed should be reformed, and the record shows that this issue was by agreement eliminated from the trial of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.\*]

### 6. WITNESSES (§ 139\*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH DECEASED PERSONS—PARTIES—ADMINISTRATOR.

Where suit was originally brought by the temporary administrator and an heir of the decedent against the grantee in a deed made by the defendant to cancel the deed and to recover personal property, upon an issue which could be made by the temporary administrator the defendant would be an incompetent witness; but a temporary administrator is not authorized to sue for the recovery of land, or to cancel a deed,

and where in the progress of such a composite action counsel enter into a stipulation eliminating any question which the temporary administrator could make, and leaving the case for determination substantially between the heir, as plaintiff, and the defendant, upon the question of cancellation, the defendant would not be an incompetent witness to testify to transactions and communications had with the deceased maker of the deed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.\*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by Hattie Wood and another against Lizzie Fuller. Judgment for plaintiffs, and defendant brings error. Reversed.

J. F. Golightly and J. B. Suttles, for plaintiff in error. McDaniel & Black and Robt. C. & Philip H. Alston, for defendants in error.

HOLDEN, J. Judgment reversed. All the Justices concur, except BECK, J., absent.

(137 Ga. 70)

HUBERT v. MERCHANTS' BANK et al.

(Supreme Court of Georgia. Oct. 28, 1911.)

(Syllabus by the Court.)

VENDOR AND PURCHASER (§ 237\*)—BONA FIDE PURCHASERS—CONSIDERATION—PRE-EXISTING INDEBTEDNESS.

Olive, owning a piece of realty, made a deed to secure a debt to Mrs. Costa, under the provisions of Civil Code 1910, § 3306 et seq., and received back a bond for titles as provided for therein. This deed was duly recorded, and recited that the grantee had given the grantor a bond for title. Thereafter Olive, who was indebted to the Merchants' Bank and had pledged to it certain stock in two corporations to secure the indebtedness, transferred to the bank the bond for title to secure such indebtedness, in consideration of which transfer the bank surrendered to him the stock. The bond for title and the transfer thereof were never recorded. Subsequently, under the provisions of the Code above referred to, Olive executed a deed to the property to Mrs. Hubert, subject to the deed from Olive to Mrs. Costa, and without actual notice on the part of Mrs. Hubert of the transfer of the bond for title, which deed was duly recorded. This deed was to secure a pre-existing debt due to Mrs. Hubert by Olive, and "there was no additional consideration therefor." The property sold, and from the proceeds thereof a certain sum (insufficient to pay the debt due either the bank or Mrs. Hubert) was placed in the hands of a receiver to await the determination of the court as to whether the bank or Mrs. Hubert was entitled thereto. From a judgment of the court awarding the fund to the bank, Mrs. Hubert sued out a writ of error to this court. *Held*, Mrs. Hubert having taken from Olive a security deed to the latter's equity in the land for the purpose of securing a pre-existing indebtedness, and on no other consideration, she does not rank as a purchaser within the meaning of the rule of law which protects a bona fide purchaser without notice from the rights of the assignee of a bond for title covering the same property, who had previously acquired a transfer of the bond for titles from Olive upon a present consideration to secure a pre-existing debt. *Harris v. Evans*, 134 Ga. 161, 67 S. E. 880;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Dinkler v. Potts, 90 Ga. 103, 15 S. E. 690; Matthews v. Kennedy, 113 Ga. 378, 38 S. E. 854.

(a) The rights of the bank in the fund arising from the sale of the property are superior to those of Mrs. Hubert, though the assignment of the bond for titles to the bank was not recorded, and the deed to Mrs. Hubert was recorded. This is true, conceding that the law authorizes the record of an assignment of a bond for titles, and that the law with reference to the record of deeds and liens and the effect of a failure to make such record applies to such assignments. See Deen v. Williams, 128 Ga. 265, 57 S. E. 427.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 577-579; Dec. Dig. § 237.\*]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action between E. S. Hubert and the Merchants' Bank and others. From the judgment, Hubert brings error. Affirmed.

E. H. Callaway, for plaintiff in error. Wm. H. Barrett, G. R. Coffin, P. C. O'Gorman, and W. K. Miller, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 63)

**McMILLAN v. QUINCEY et al.**

(Supreme Court of Georgia. Oct. 28, 1911.)

*(Syllabus by the Court.)*

**1. BROKERS (§ 11\*)—EMPLOYMENT—REVOCA-TION OF CONTRACT.**

Where an owner of a large tract of land employed two agents to sell it, and it was agreed that the agents should pay all expenses of every kind of putting the property in shape for selling and incident to the sale thereof, that they should have the land surveyed and divided into town lots, and have the streets well graded and the property well advertised, and that they should use their best efforts to sell it, and should receive no pay or compensation for expenses so incurred, or for advertising and putting the property upon the market, or for their services in connection therewith, except a specified share of the proceeds arising from the sale of the lands, and where, in the performance of such agreement, the agents proceeded to comply with the contract on their part, and expended time and money in laying out the property and preparing it for sale, and did sell some of the lots, the owner did not have the right, without lawful cause, to revoke the contract at his mere option. Under such facts, if no time limit was fixed in the contract for its performance, the agents were entitled to a reasonable time therefor; and if, before the expiration of such reasonable time, the owner of the land, without lawful cause, revoked the contract and declined to allow the agents to proceed further with its performance, he was liable to them in damages for so doing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 58; Dec. Dig. § 11.\*]

**2. BROKERS (§ 11\*)—EMPLOYMENT—LIABILITY OF PRINCIPAL FOR BREACH OF CONTRACT—MEASURE OF DAMAGES.**

In such a case the measure of damages would be fixed in accordance with the terms of the contract. Where certain lots had been sold, and the owner refused to carry out the sales,

the agents were entitled to recover the portion of the purchase price which was to be paid them under the contract. As to unsold lots, they were entitled to recover what they lost under the contract by reason of its breach on the part of the landowner; and, for the purpose of determining the amount of such damage, it could be shown what would have been the share of the agents, after deducting expenses incident to their further performance of the contract, had the lands been sold by them. Strong v. West, 110 Ga. 382, 35 S. E. 693; Durkee v. Gunn (1889) 41 Kan. 496, 21 Pac. 637, 13 Am. St. Rep. 300; Blumenthal & Co. v. Bridges, 91 Ark. 212, 120 S. W. 974, 24 L. R. A. (N. S.) 279.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 58; Dec. Dig. § 11.\*]

**3. SUFFICIENCY OF EVIDENCE—MOTION FOR NEW TRIAL—OVERRULING DEMURREES—NO ERROR.**

The evidence authorized the verdict, and there was no such error in any of the rulings complained of in the motion for a new trial, or in the exception to the overruling of the demurrer, as to require a reversal.

Error from Superior Court, Irwin County; U. V. Whipple, Judge.

Action by H. J. Quincey and another against Jacob McMillan. Judgment for plaintiffs, and defendant brings error. Affirmed.

L. Kennedy and Graham & Graham, for plaintiff in error. Roscoe Luke, for defendants in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 56)

**RUFF v. COPELAND et al.**

(Supreme Court of Georgia. Oct. 12, 1911.)

*(Syllabus by the Court.)*

**CANCELLATION OF INSTRUMENTS (§ 37\*)—SUBJECTS OF RELIEF—SALE OF PURCHASE-MONEY NOTES.**

There was no error in the ruling of the judge refusing to grant an injunction.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-81; Dec. Dig. § 37.\*]

Error from Superior Court, Haralson County; Price Edwards, Judge.

Action by M. U. Ruff against J. T. Copeland and others. From a judgment for defendants, plaintiff brings error. Affirmed.

At an interlocutory hearing of a petition for injunction and other relief, general and special demurrers had been filed. The plaintiff offered to submit evidence, which his attorney stated to the court would sustain the allegations of the petition. The judge refused to allow the evidence introduced, and ordered that a former restraining order be dissolved and that the prayer for injunction be denied. The object of the suit was to set aside the sale of a certain corn mill and real estate appurtenant thereto, which defendants had made to plaintiff, and cancel purchase-money notes, which the plaintiff

had executed, and in aid of the other relief to enjoin defendants from negotiating the sale of certain of the purchase-money notes which had not matured. It was alleged, among other things, in effect, that by way of inducement to plaintiff defendants, by letter, represented to plaintiff, on November 25, 1910, that "our territory extends from Cedartown to Griffin, Ga., on Central of Georgia, and from Austell to Anniston, Ala., on Southern Railway. And our local custom territory extends 8 miles east and 8 miles north, 10 miles west and 12 miles south, our exclusive territory. We have milling and [in?] transit rates over both railroads, and a reputation established that takes care of itself; in fact, if you will come and see for yourself, you will find an opportunity seldom ever offered for sale." Relying on such representations, the purchase was made December 10, 1910; plaintiff giving promissory notes, maturing at intervals, to cover the purchase price, and the defendant executing a bond for title and delivering the property to the purchaser. Plaintiff undertook to operate the mill, but soon found that all of the representations made by the defendants "were false and fraudulent and were made for the purpose of swindling him." The capacity of the mill was not as represented. The defendants did not have the exclusive territory they claimed, there being at least eight mills that ground corn in the territory which defendants made plaintiff believe was their exclusive territory. Defendants had no milling in transit rates on either of the railroads. Soon after plaintiff took charge of the mill property he was ousted from a large part of it by the Central of Georgia Railroad Company, and defendants cannot convey such part. On April 29, 1911, plaintiff wrote defendants a letter, which in effect complained that they had misrepresented, as hereinabove set out, and proposed to "return to you the property, with improvements, in consideration of the return to me of all the papers now held by you against me, with all money to you by me on said property, you to have a reasonable amount for the use of the property, less a reasonable amount as damage which I have incurred in loss of money and time and the expense of moving my family from Smyrna, Ga., to Bremen, Ga. To determine the amount for the use of your mill and my loss and expense, I am willing to submit to and abide the decision of three disinterested men of the town of Bremen, Ga. I am willing at any time to carry out this proposition and give you possession." To this letter defendants "declined" and "refused to reply," but instead have endeavored and are still endeavoring to sell and transfer the notes executed by plaintiff, in order to avoid any defense or claim of fraud which plaintiff has against them. All the representations and promises, so made by the defendants as aforesaid, were false and fraudulent, and were

only made with a view to "dupe, deceive, and defraud" plaintiff and "rob him of his money, home and property."

Frank L. Neufville, Geo. F. Gober, I. N. Cheney, and J. S. Edwards, for plaintiff in error. C. E. Roop and Griffith & Matthews, for defendants in error.

ATKINSON, J. The object of the suit was to compel the defendant to rescind a contract of sale of real estate, to recover back so much of the purchase price as had been paid, and to recover as damages the expense he incurred in moving his family. The case must be decided as if all the allegations of the petition were admitted to be true, because the judge refused to permit the plaintiff to introduce evidence in support of his allegations, and upon the mere reading of the record entered a judgment against him. Where land is sold and delivered, but title is not to pass until payment in full of the purchase money, if the purchaser loses part of the land from defective title, he may claim either a rescission of the entire contract, or a reduction of the price according to the relative value of the land so lost. Code 1910, § 4124. According to the allegations of the petition, this was an entire contract, and the plaintiff was ousted from a part of the property, title to which was not vested in defendants and could not be conveyed by them. Under such circumstances the plaintiff had the right to rescind the entire contract, which would carry with it the right to recover so much of the purchase money as had been paid, and to have surrendered the unpaid notes and securities given for the balance of the purchase price if they were in the hands of the defendants. It would also carry with it the right to plead an abatement of the purchase price if the defendants were suing the notes. One feature of the plaintiff's petition presented the theory that he was entitled to rescind the contract, and recover so much of the purchase price as had been paid, and also have the unpaid notes and securities restored to him, and that based on these rights he was also entitled to an injunction to prevent an assignment of the notes and securities, so that they would not thereby be placed in the hands of third persons beyond the reach of plaintiff's equity. It was not alleged that the defendants were insolvent or nonresidents, but it was not absolutely essential that such grounds for equitable interference should exist. If the plaintiff were entitled to rescind and have his notes and securities surrendered, it ought to be done at once, without making him await the maturity of the notes and payment thereof to third persons, and then taking the risk of collecting back the amount from the defendants. Such relief would be open to him, but it would not be that adequate and complete relief which equity would afford him by staying the transfer of the notes and securities

and allowing the plaintiff to set up his defense while in the hands of the original payee. But, to whatever relief the plaintiff might be entitled, the election which he has made by basing his right to recover on rescission has made it essential that he show a right to rescind. Where a contract is timely repudiated on sufficient grounds, and restoration properly offered, a suit will lie to recover back what was paid in pursuance of the contract; but such is not the case if the contract is not repudiated, or, being repudiated, there are not sufficient grounds to justify it.

Fraud is another ground for the rescission of a contract in equity. Considering the allegations of the petition, as admitted, to be true, it appears that for the purpose of defrauding the plaintiff the defendants made misrepresentations as to the exclusive territory of the mill and as to the milling in transit rates over the railroads. These were matters peculiarly within the knowledge of the defendants, and for them to willfully misrepresent the facts in regard thereto in such manner as to deceive the plaintiff and induce him to buy, when he would not have done so had the truth been revealed, it would amount to such a fraud upon the plaintiff, after he had acted thereon to his injury, as would authorize him to cancel the contract. But in order for the party defrauded to cancel the contract on account of fraud upon the part of the opposite party, inducing him to act to his injury, he should repudiate the contract promptly upon discovery of the fraud. *Strodger v. Southern Granite Co.*, 94 Ga. 626, 19 S. E. 1022; *Pearce & Williams Co. v. Borg Chewing Gum Co.*, 111 Ga. 847, 36 S. E. 457; *Tuttle v. Stovall*, 134 Ga. 325, 67 S. E. 806. He should also offer to restore the opposite party to his original status. Civil Code 1910, § 4305. Relatively to the respective grounds urged for rescission, it does not clearly appear what part of the property plaintiff was ousted from, or when the ouster occurred, or when plaintiff claims to have discovered the facts constituting the alleged fraud, so that it might be said with any degree of certainty that he acted with due diligence in repudiating the contract. Being the plaintiff, the burden rested upon him to make it so appear. Nor did the plaintiff, in his letter of repudiation and offer to rescind, propose unqualifiedly to restore the status. His offer was coupled with the condition, among others, that the defendants should submit to the arbitration of three men in a particular place, and should bear the expense of moving plaintiff's family from Smyrna, Ga., to Bremen, Ga. There is nothing to indicate the amount of this expense, or to show that it was reasonably within the contemplation of the parties at the time the contract was made, so as to render it a proper element of damages for

the plaintiff to recover against the defendants.

Assuming that, in order to rescind, the plaintiff might not be required to forego his claim for damages, yet if in his offer he restricts the manner of ascertaining his damages, and his demand includes the payment of damages for which the defendants are not liable, and it is not shown that the property is not in the same condition as when received, or, if it has been damaged, there is no offer to pay damages for its deterioration, such offer would not amount to an offer to restore the status. While, as against general objections, the admitted allegations were sufficient to show grounds for cancellation on each of the two theories that were relied upon for rescission, they were not sufficient to show affirmatively that the plaintiff had timely and in an appropriate manner offered to make such restoration as would put the defendants in the position which they occupied originally, and accordingly they were not sufficient to show that the plaintiff was in a position to ask rescission in a court of equity. Having founded his application for injunction upon the right of rescission, there was no error in refusing the injunction.

Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 62)

CITY OF DAWSON v. DAWSON TELEPHONE CO.

(Supreme Court of Georgia. Oct. 28, 1911.)

(Syllabus by the Court.)

1. TELEGRAPHS AND TELEPHONES (§ 33\*)—REGULATION—AUTHORITY OF RAILROAD COMMISSION.

The Dawson Telephone Company made application to the mayor and council of the city of Dawson to grant it "a franchise in and over the streets and alleys, sidewalks and property of the city of Dawson, on such terms as you may think wise, for the purpose of erecting, operating, owning and controlling a telephone system in the city of Dawson." Upon such application the mayor and council passed an ordinance on October 6, 1903, granting such franchise, section 3 of which ordinance is as follows: "Said company shall at all times be subject to the city ordinances now in existence, such as may be hereafter passed, and to such rules and regulations touching telephone company, their rates, and affairs as may be hereafter ordained, which are just and reasonable. The said company further agrees and binds itself by this ordinance that the rates charged shall be \$1.50 per month for resident phones and \$2.50 per month for business phones. The said company further agrees that in consideration of the privileges herein granted that it will furnish free phone service to the city of Dawson for its several departments." And section 5 is as follows: "This ordinance shall become operative from the date of its acceptance, in writing, by the company aforesaid." The company signed a writing, directed to the city council, wherein it was recited that the company accepted the franchise granted to it by the council "under date of October 6, 1908." The



company began business under such franchise and charged the rates named in the ordinance. Upon application of the company to the Railroad Commission to allow it to increase its charges for telephone service, the Commission on January 5, 1911, after hearing had upon the application, passed an order permitting the company to charge for residence telephones \$2 per month and for business telephones \$3.50 per month, and the company thereafter increased its rates accordingly. The city filed an application to enjoin the company from charging the rates permitted by the order of the Commission, and to the order of the court refusing the injunction the city excepted. *Held*, the Railroad Commission of this state has the right to fix the rates to be charged by telephone companies for the use of their telephones in sending and receiving messages within the state. Civil Code 1910, §§ 2862, 2863.

(a) The granting of a franchise to a telephone company by an ordinance passed by the municipal authorities of a city, wherein it is provided that the company "agrees and binds itself by this ordinance that the rates charged shall be \$1.50 per month for residence phones and \$2.50 per month for business phones," and an acceptance of such franchise by the company, does not prevent the telephone company from increasing such charges, if permission to do so is subsequently granted it by the Railroad Commission, especially as it appears that the city was not specifically authorized by its charter, or other legislative enactment, to fix the charges to be made by telephone companies. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176.

[Ed. Note.—For other cases, see Telephones and Telegraphs, Cent. Dig. § 21; Dec. Dig. § 33.\*]

## 2. CONSTITUTIONAL LAW (§ 154\*)—IMPAIRING OBLIGATION OF CONTRACT—REGULATION OF RATES.

The order of the Railroad Commission does not violate the provisions of the state and federal Constitutions prohibiting the impairment of the obligations of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 154.\*]

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Action by the City of Dawson against the Dawson Telephone Company. Judgment for defendant, and plaintiff brings error. Affirmed.

T. T. Miller and L. C. Hoyle, for plaintiff in error. H. A. Wilkinson and M. C. Edwards, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 65)

## J. S. SCHOFIELD'S SONS CO. v. WOODWARD.

(Supreme Court of Georgia. Oct. 28, 1911.)

(Syllabus by the Court.)

### 1. SALES (§ 472\*)—CONDITIONAL SALE.

Where one sells and delivers personalty to a contractor, and retains title thereto, but before the writing evidencing the contract retaining title in the seller is recorded or executed the contractor uses the personalty in the permanent improvement of the real estate of another, the seller cannot recover such per-

sonalty from the latter. This is true, though the contract between the owner of the real estate and the contractor for the improvement of the former's property had not been completed, and though the real estate owner had not paid the contractor the full contract price for the improvement of the property at the time the contract retaining title to the property in the seller was recorded.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 472.\*]

### 2. DIRECTING VERDICT.

The court committed no error in directing a verdict in favor of the defendant.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by J. S. Schofield's Sons Company against J. C. Woodward. Judgment for defendant, and plaintiff brings error. Affirmed.

Alex. W. Smith, Jr., and Frank L. Neufville, for plaintiff in error. J. D. Bradwell and Leonard Haas, for defendant in error.

HOLDEN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent.

(10 Ga. App. 22)

## TYUS v. STATE. (No. 3,364.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

### CIRCUMSTANTIAL EVIDENCE.

The decision in this case is controlled by the ruling of this court in *Twilley v. State*, 9 Ga. App. 435, 71 S. E. 587.

Error from City Court of Sparta; R. W. Moore, Judge.

Earnest Tyus was convicted of gambling, and brings error. Reversed.

T. M. Hunt and R. H. Lewis, for plaintiff in error. R. L. Merritt, Sol., for the State.

RUSSELL, J. Judgment reversed.

(10 Ga. App. 26)

## COWART v. WAYCROSS ELECTRIC LIGHT & POWER CO. (No. 3,373.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

### NONSUIT.

The court erred in granting a nonsuit.

Error from City Court of Waycross; Jno. C. McDonald, Judge.

Action by Otis Cowart, by next friend, against the Waycross Electric Light & Power Company. Judgment for defendant, and plaintiff brings error. Reversed.

Jas. R. Thomas, Jas. W. Poppell, and A. B. Spence, for plaintiff in error. J. L. Sweat, for defendant in error.

POWELL, J. Judgment reversed.

(10 Ga. App. 36)

**CHASTAIN v. STATE.** (No. 3,454.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**REVIEW ON APPEAL.**

The evidence amply authorized the verdict, the charge was free from prejudicial error, and no sufficient ground for reversal appears.

Error from Superior Court, Grady County; Frank Park, Judge.

A. Y. Chastain was convicted of crime, and brings error. Affirmed.

Theodore Titus and M. L. Ledford, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

**RUSSELL, J.** Judgment affirmed.

(10 Ga. App. 60)

**BUSH v. TOWN OF MINTER.** (No. 3,633.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**CRIMINAL LAW (§ 1071\*)—CERTIORARI—PETITION.**

Where a petition for certiorari raised only the questions that the finding of the police court was without any evidence to support it and that the venue of the offense was not proved, and the evidence as set out in the petition clearly shows a violation of the municipal ordinance for which the accused was convicted and that the offense was committed "within the city limits" of the municipality, there was no error in refusing to sanction the application for the writ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2702; Dec. Dig. § 1071.\*]

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Jack Bush was convicted of violating an ordinance of the Town of Minter, and from an order refusing a writ of certiorari, he brings error. Affirmed.

Hal B. Wimberly, for plaintiff in error. W. C. Davis, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(10 Ga. App. 82)

**BRUNER v. STATE.** (No. 3,721.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**SALE OF INTOXICATING LIQUORS.**

This case is controlled by the principle stated in *Cheatwood v. City of Buchanan*, 72 S. E. 284, and in a number of similar cases.

Error from City Court of Sylvester; J. B. Williamson, Judge.

Will Bruner was convicted of violating the prohibitory law, and brings error. Affirmed.

J. J. Forehand & Son and Bell & Causey, for plaintiff in error. J. H. Tipton, Sol., for the State.

**POWELL, J.** Judgment affirmed.

(10 Ga. App. 12)

**ARNOLD et al. v. VIRGINIA-CAROLINA CHEMICAL CO.** (No. 3,258.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**SUFFICIENCY OF EVIDENCE.**

The positive evidence proved that all the sacks of guano sold to the defendants were branded and tagged and came fully up to the requirements of the statute. The evidence to the contrary was negative in character and without probative value. No error of law appears, and the verdict as directed was demanded by the evidence. The case is controlled by the decision of the Supreme Court in *Holt v. Navassa Guano Co.*, 114 Ga. 666, 40 S. E. 735.

Error from City Court of Waycross; Jno. C. McDonald, Judge.

Action by the Virginia-Carolina Chemical Company against Joe Arnold and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Allen B. Spence and Jas. R. Thomas, for plaintiffs in error. Patterson & Copeland and Wilson, Bennett & Lambdin, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(10 Ga. App. 23)

**NERO v. STATE.** (No. 3,361.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**CARRYING WEAPONS—CONSTITUTIONALITY OF LAW.**

The only assignment of error in this case is based on the claim that the act of 1910 (Laws Ga. 1910, p. 134), regulating the carrying of arms, is unconstitutional. This question has been decided adversely to the plaintiff in error in the case of *Strickland v. State*, 137 Ga. 1, 72 S. E. 260.

Error from City Court of Macon; Robt. Hodges, Judge.

Albert Nero was convicted of carrying weapons, and brings error. Affirmed.

Napier & Maynard, for plaintiff in error. W. J. Grace, Sol. Gen., for the State.

**RUSSELL, J.** Judgment affirmed.

(10 Ga. App. 26)

**BLOCKER v. IRVINE.** (No. 3,376.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**ASSIGNMENT OF ERROR—SUFFICIENCY.**

The only assignment of error is that the court erred in overruling a general demurrer to the petition. As originally drawn the petition was subject to demurrer. Before the demurrer was passed on, the court allowed an amendment fully curing the deficiency. The only question argued in this court is whether the court erred in allowing the amendment. The assignment of error is inadequate to raise this question.

Error from City Court of Macon; Robt. Hodges, Judge.

Action by W. S. Irvine against Leola Blocker. Judgment for plaintiff, and defendant brings error. Affirmed.

B. J. Fowler, for plaintiff in error. R. S. Wimberly, for defendant in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 26)

MACON, D. & S. R. CO. v. WARNOCK.  
(No. 3,408.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence, though strongly preponderating against the verdict, is not in such condition as to authorize this court to reverse the judgment; no error of law being shown.

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action between J. T. Warnock and the Macon, Dublin & Savannah Railroad Company. From the judgment, the Railroad Company brings error. Affirmed.

Minter Wimberly, W. L. Wilson, and Akerman & Akerman, for plaintiff in error. Wm. B. Kent, for defendant in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 38)

GEORGIA, F. & A. RY. CO. v. FLORIDA & GEORGIA TOBACCO CO. (No. 3,473.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1051\*)—ADMISSION OF EVIDENCE—HARMLESS ERROR.

In a suit against a carrier for failure to deliver a portion of a shipment of goods alleged to have been intrusted to it for transportation, error, if any, in admitting in evidence a bill of lading covering the shipment, over objection for lack of proof of execution, becomes immaterial, where the carrier admits that it received the goods sued for, and sets up delivery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

2. APPEAL AND ERROR (§ 719\*)—ASSIGNMENTS OF ERROR—OBJECTIONS WAIVED.

There is no general assignment of error that the verdict is contrary to the evidence or without evidence to support it, nor any special assignment of error that the value of the goods was not proved. It follows that, though the verdict is without evidence to support it, because of lack of proof as to this element of the case, no new trial can be granted on that account.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982; Dec. Dig. § 719.\*]

3. ASSIGNMENTS OF ERROR.

None of the assignments of error are well taken, so far as they are supported by the record.

4. JURISDICTION.

The trial court was not without jurisdiction of the case.

Error from Superior Court, Decatur County; Frank Park, Judge.

Action by the Florida & Georgia Tobacco Company against the Georgia, Florida & Alabama Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hawes & Pottle and Rich & Nelson, for plaintiff in error. John R. Wilson, for defendant in error.

POWELL, J. Judgment affirmed.

(10 Ga. App. 27)

ODUM v. STATE. (No. 3,412.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

FALSE PRETENSES (§ 9\*)—SUFFICIENCY OF EVIDENCE.

The evidence showing that the defects in the horse traded were patent, and failing to show that the prosecutor was deceived by any false representation knowingly made by the defendant, the conviction of cheating and swindling is contrary to law. *Rainey v. State*, 94 Ga. 599, 19 S. E. 892.

[Ed. Note.—For other cases, see False Pretense, Cent. Dig. § 14; Dec. Dig. § 9.\*]

Error from City Court of Lumpkin; E. T. Hickey, Judge.

G. W. Odum was convicted of cheating, and brings error. Reversed.

G. Y. Harrell, for plaintiff in error. T. T. James, Sol., for the State.

RUSSELL, J. Judgment reversed.

(10 Ga. App. 28)

WALKER v. CITY OF ATLANTA.  
(No. 3,433.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.

The evidence is extremely weak and unsatisfactory, but this court cannot say, as a matter of law, that the witness against the defendant committed perjury.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Will Walker was convicted of an unlawful sale of intoxicating liquors, and brings error. Affirmed.

John A. Boykin, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., for defendant in error.

RUSSELL, J. Tom Adams, a negro, who had been to the stockade three times, was employed by the city detective department to turn up "blind tigers." He was paid \$2 a day, and spent the money faster than he made it. He went to a meat market where

Briscoe Gaines was working, and offered to buy some liquor. Briscoe took the 50 cents offered, and went off and returned in about 15 minutes with a half pint of corn whisky, which he gave to Tom Adams. Adams, Briscoe, and several other negroes took a drink out of the bottle, and then Tom turned the bottle over to the detective, with the statement that he had bought the liquor from Briscoe Gaines. The detective then arrested Briscoe, and, after his arrest, he stated that he had purchased the whisky from the defendant, Will Walker, paying him 40 cents therefor. Thereupon he was released. Will Walker was arrested, and charged with keeping intoxicating liquor on hand for the purpose of illegal sale. On the trial, in addition to the above facts, it appeared that Briscoe Gaines had been sent to the stockade seven times, and that, immediately after he reported to the detectives that he had purchased the whisky from the defendant at his home, a search was made of the home, but no liquor found there. The defendant denied selling the liquor, and claimed that he knew nothing about the transaction. The recorder imposed on him a fine of \$100, or 30 days in the stockade.

It thus appears that the only evidence against the defendant is the testimony of a negro confessedly guilty himself (inasmuch as he admits he made a profit of 10 cents in the transaction), who, after he implicated the defendant, was sent to the stockade, and who had previously been sent to the stockade seven times. If we were jurors, charged with the sworn duty of acquitting unless satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the accused, we would unhesitatingly return a Scotch verdict of not so proven. But we cannot say the defendant has been illegally convicted. The recorder had the better opportunity of testing the credibility of the witness and of judging as to the truth of the transaction.

Judgment affirmed.

(10 Ga. App. 49)

**HOLLOWAY v. STATE.** (No. 3,537.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**WITNESSES (§ 362\*)—IMPEACHMENT—CORROBORATION—EFFECT.**

Even though a witness be successfully impeached by proof of general bad character, yet where his testimony as to the transaction in dispute is corroborated in material particulars, the jury have a right to believe that as to that particular transaction he is telling the truth.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1176; Dec. Dig. § 362.\*]

Error from Superior Court, Pike County; Robt. T. Daniel, Judge.

Sarah Holloway was convicted of unlawfully selling intoxicating liquors, and brings error. Affirmed.

The entire brief of evidence in this case is as follows:

"Ben Meadows, sworn for the state, testified as follows: I know the defendant. In Pike county, on and during the Christmas holidays, about the 25th December 1910, I bought 10 cents worth of whisky from Sarah Hollow. It was at her house in Barnesville, Ga. Mr. Stocks, the chief of police, went with me. He gave me an empty bottle and 25 cents in money. I paid her 10 cents, and carried the whisky back to Mr. Stocks, and gave it to him and 15 cents in change. He stood out in front of the house when I went in. I did not have any whisky nor any money when I went in the house, except the money that Mr. Stocks gave me. That is the whisky I bought (exhibiting bottle). She delivered the whisky to me, and I gave her the money. There was no one in the house except myself and the defendant.

"Cross-examination: I am employed by the county commissioners. Mr. Howard employed me. I am to get nothing for swearing in this court; it was for making the cases in Barnesville. I am under subpoena for this court, and that is why I am here. I know my character. It is bad. Sometime I would, and sometime I would not, believe myself under oath. I believe myself in this case. She did not plead guilty before the mayor in Barnesville. There was no trial.

"J. O. Stocks, sworn for the state, testified as follows: I know the defendant, and I know Ben Meadows. In Barnesville, in Pike county, about the 25th December, 1910, about seven o'clock p. m., I gave Ben Meadows an empty bottle and 25 cents in money. I went with him up to the defendant's house. I stood on the outside near the fence. He went in, stayed a few minutes, and came back with this whisky (identifying). This is the bottle I gave him. He had nothing in it when he went in the house. He brought me back this whisky and 15 cents in change. I searched him in front of the police station, and he did not have any whisky or money on his person. We went from there directly to the defendant's house. He went in and brought this whisky out. Defendant plead guilty before the mayor and was fined \$50. I know the defendant, and I know Ben Meadows. I know the character of Ben Meadows. It is bad. From my knowledge of his character, I would not believe him on oath. I believe him in this case, because I went with him to the place, and know he had no whisky when he went in, and no money except what I gave him, and brought it back in the bottle I gave him, and he brought me back the change.

"State closed.

"Statement of defendant: Ben Meadows came to my house a few days before this time, and had a basket and some whisky in it. He came in, got something out of the

basket, and went out. I never sold him any whisky in my life. I was ironing when he come in, and he asked me for some whisky, and I told him I did not have any, and he went out."

The defendant was convicted and sentenced to 12 months' imprisonment without the alternative of paying a fine.

Henry O. Farr, for plaintiff in error. J. W. Wise, Sol. Gen., for the State.

RUSSELL, J. (after stating the facts as above). The motion for a new trial raises only the question as to whether under this evidence the conviction of the defendant was legal. We are inclined to agree with the witness himself, and also with the policeman, that the former's character is bad, and that, as a general proposition, his testimony would be unworthy of credit; but the circumstances of corroboration are such as might authorize the inference that the witness was telling the truth as to the transaction testified to in the instant case. *Strozier v. Carroll*, 31 Ga. 557; *Powell v. State*, 101 Ga. 20 (5) 29 S. E. 309, 65 Am. St. Rep. 277; *Haynes v. State*, 17 Ga. 465. The only question involved was one to be determined by the jury, and by the jury alone. There is no limitation on the power of a jury to credit a witness, unless the facts testified to by him be, according to the common knowledge of mankind, inherently impossible. *Pyles v. State*, 3 Ga. App. 29, 59 S. E. 193; *Jolly v. State*, 5 Ga. App. 454, 63 S. E. 520.

Judgment affirmed.

(10 Ga. App. 47)

HARDU v. STATE. (No. 3,522.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 236\*)—SALES TO MINOR.

The defendant's own statement amounted, in effect, to an admission that he had caused to be furnished to a minor malt beer, in violation of section 444 of the Penal Code of 1910.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 236.\*]

2. INTOXICATING LIQUORS (§ 169\*)—SALES TO MINOR—GUILT OF AGENT.

An agent who negotiates for his principal a sale of beer to a minor is equally guilty with the principal.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 187-188; Dec. Dig. § 169.\*]

Error from City Court of Swainsboro; H. K. Daniel, Judge.

"Mr." Hardu was convicted of selling liquor to a minor, and brings error. Affirmed.

Saffold & Larsen & C. E. Dunbar, for plaintiff in error. A. S. Bradley, Sol., for the State.

RUSSELL, J. The defendant was convicted of furnishing malt liquors to a minor. According to the testimony and the statement of the defendant himself, the defendant, as agent for a brewery, sold to Roy Rountree, a young man about 17 years of age, five dozen bottles of beer, or "near beer." There was some conflict in the evidence as to the intoxicating quality of the fluid, though the preponderance of the testimony was to the effect that it was a nonintoxicating fluid. The minor was engaged in business as a partner in a mercantile firm, under the name and style of Medlock & Rountree. He purchased goods for the firm, and he solicited the shipment of the malt liquor in question in the course of similar business negotiations as to other articles. However, there was no dispute that Rountree was a minor, and no contention that the defendant had any reason to believe that Rountree had attained his majority.

[1] 1. Section 444 of the Penal Code of 1910 makes the furnishing to a minor of malt liquors of any kind (whether intoxicating or not) a criminal offense. *Stoner v. State*, 5 Ga. App. 720, 63 S. E. 602; *Campbell v. Thomasville*, 6 Ga. App. 212-236, 64 S. E. 815. The infraction of the law is apparently more technical than real. The case is one which in our judgment does not call for the imposition of a heavy penalty; but under the ruling in the *Stoner Case*, supra, it cannot be said that the defendant was not legally convicted of furnishing a minor with a malt liquor.

[2] 2. The issue as to the defendant's guilt is not affected by the fact that he was merely an agent in the sale negotiated. By reason of his agency he sustained an accessorial relation; and, there being no accessories (but all participants in the criminal act being principals) in misdemeanors, the defendant became a principal.

Judgment affirmed.

(10 Ga. App. 40)

CHATFIELD v. STATE. (No. 3,490.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 595\*)—CONTINUANCE.

In overruling the motion for a continuance, the court did not commit such an abuse of discretion as, in the light of all the facts of the case, requires a reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1326; Dec. Dig. § 595.\*]

Error from Superior Court, Crawford County; W. H. Felton, Judge.

Henry Chatfield was convicted of crime; and brings error. Affirmed.

Robt. W. Barnes, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

**POWELL, J.** The accused was convicted of selling liquor. The first indictment against him was quashed for a defect, and a new one immediately returned. As to each of these indictments he asked for a continuance, that he might obtain the testimony of certain witnesses as to his good character. It is inferable from the record that both indictments were returned at the same term of the court at which the accused was tried, and that subpoenas were not requested for the witnesses until after the court had convened. It does not appear when the accused was first arrested for the offense. It does not appear that he had not been previously committed by a magistrate. As to witnesses residing in the county, the accused must, in order to make his showing complete, either show that he has had them subpoenaed under the provisions of sections 943, 944, of the Penal Code of 1910, or else that there has been no commitment trial. As to the witnesses Cray and Morton, it does not appear that they resided out of the county; hence as to them the showing was incomplete. As to the other absent witnesses, there was no showing that they had ever been served with subpoenas. It does appear that subpoenas were issued for them and left with the clerk. As it is not the duty of the clerk to serve subpoenas, the showing as to them is legally incomplete, viewed from the standpoint of a formal showing for continuance on legal grounds. The showing as a whole made a case for the exercise of a sound discretion by the judge.

A case ought to be continued, in order that a party may get material witnesses, even if they have not been subpoenaed, if the party has not had a reasonable time in which to procure their testimony. However, it appears in this case that the only testimony the accused desired from these witnesses was as to his general good character. He had witnesses present who did testify as to his good character, though perhaps the testimony of the absent witnesses might have been more desirable in this respect, since they had known the accused for a longer time than did the witnesses who testified. But the state made no attack on his general character. So far as the record discloses, the state conceded that he bore a good reputation. The insistence of the state was that, despite his good general reputation, he had made a number of distinct sales of liquor to different persons; and this the state proved by a number of witnesses, whose credibility is in no wise attacked. This evidence is so strong that it is hardly reasonable to believe that the accused would have been acquitted if every man in the state had testified that he bore a good reputation. In the light of this, the alleged error as to the judge's abusing his discretion in refusing a continuance is not deemed sufficient to justify a reversal.

Judgment affirmed.

(10 Ga. App. 37)

**CARSWELL v. STATE** (No. 3,417.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

**1. VOLUNTARY HOMICIDE.**

The court did not err in charging the law of voluntary manslaughter.—*Gann v. State*, 30 Ga. 67.

**2. CRIMINAL LAW (§ 1172\*)—HARMLESS ERROR.**

The defendant cannot complain that the court gave in charge to the jury section 71 of the Penal Code of 1910. This instruction was manifestly favorable to the accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3160; Dec. Dig. § 1172.\*]

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Ben Carswell was convicted of homicide, and brings error. Affirmed.

Adams & Flynt and John R. Cooper, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

**RUSSELL, J.** Judgment affirmed.

(10 Ga. App. 9)

**WESLEY v. BOYD** (No. 3,162.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

**COURTS (§ 217\*)—APPEAL—CASES OR QUESTIONS CERTIFIED.**

The material question in the case is controlled by *Brandon v. Fritchett*, 126 Ga. 286, 55 S. E. 241. The plaintiff in error has requested that the question involved be certified to the Supreme Court, in order that a motion to review and overrule that case may be presented; but, since there appears no reasonable ground for a belief that the Supreme Court would recede from its former decision, the request is denied. See, also, the recent decision of the Supreme Court in *Kaigler v. Brannon*, 72 S. E. 400, decided October 12, 1911.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 217.\*]

Error from City Court of Griffin; W. M. Clark, Judge.

Action between G. B. Wesley and D. Boyd. From the judgment, Wesley brings error. Affirmed.

T. E. Patterson, for plaintiff in error. J. D. Boyd and Cleveland & Goodrich, for defendant in error.

**POWELL, J.** Judgment affirmed.

(10 Ga. App. 45)

**ATLANTIC COAST LINE R. CO. v. THOMAS** (No. 3,510.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

**RAILROADS (§ 417\*)—OPERATION—INJURIES TO ANIMALS—DUTY OF RAILROAD.**

This case is on all fours with the case of *Georgia Railroad Co. v. Wall*, 80 Ga. 202, 7 S. E. 639, so far as controlling principles are

concerned. The chief physical difference between the two cases is that in the case cited the engineer's vision was obscured by fog, while in the case at bar it was obscured by falling rain and the natural accumulation of mist on the front window of the cab. The law expects railroad companies to run their passenger trains on schedule, so far as they may be able to do so; and they are not ordinarily required, when it is foggy or raining, to reduce their trains to such a rate of speed as that the engineer may be in a position to discover live stock on the track in time to prevent injuring them.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1484-1487; Dec. Dig. § 417.\*]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action by J. R. Thomas against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Bennet & Long, for plaintiff in error. H. B. Austin and M. Baum, for defendant in error.

POWELL, J. Judgment reversed.

(10 Ga. App. 13)

HYLAND CHEMICAL CO. v. GODDARD.  
(No. 3,318.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 78\*)—DECISIONS REVIEWABLE—OVERRULING DEMURRER.

This writ of error challenges the correctness of the judgment overruling a demurrer to a plea. There was no final judgment, and the case is still pending in the lower court. Under the repeated rulings of this court and the Supreme Court, the writ of error will be dismissed as premature. Civil Code 1910, § 6138; Case Threshing Machine Co. v. Hodges, 9 Ga. App. 722, 72 S. E. 189, and cases there cited.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 78.\*]

Error from City Court of Griffin; J. J. Flynt, Judge.

Action by the Hyland Chemical Company against L. W. Goddard. From a judgment overruling a demurrer to a plea, the plaintiff brings error. Writ of error dismissed.

Scott & Davis and C. G. Mills, Jr., for plaintiff in error. Cleveland & Goodrich, for defendant in error.

HILL, C. J. Writ of error dismissed.

(10 Ga. App. 34)

FULLER v. STATE. (No. 3,446.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 728\*)—TRIAL—ARGUMENT OF COUNSEL—ACTION OF COURT.

While the argument of the solicitor as to the withdrawal from the case of some of the defendant's attorneys of record was highly improper, yet the refusal to declare a mistrial is not reversible error, in the light of the failure

of the defendant to make objection until after the court had begun his charge, coupled with the curative effect of the instructions given to the jury to disregard the argument.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1689-1691; Dec. Dig. § 728.\*]

2. CRIMINAL LAW (§ 828\*)—TRIAL—INSTRUCTIONS—REQUESTS.

There was no error in admitting the evidence over the objection urged. The charge was full and fair. If a charge on circumstantial evidence was desired, there being direct as well as circumstantial evidence, a written request to that effect should have been duly made. The evidence plainly indicated guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2007; Dec. Dig. § 828.\*]

Error from City Court of La Grange; Frank Harwell, Judge.

Jim Fuller was convicted of crime, and brings error. Affirmed.

M. U. Mooty, E. A. Jones, and Arthur Greer, for plaintiff in error. Henry Reeves, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 12)

SOUTHERN RY. CO. v. BROWN.  
(No. 3,219.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 1001\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

The evidence seems to preponderate against the verdict; but as the charge of the court was free from error, and as there was some evidence to support the verdict, the judgment is affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001.\*]

Error from Superior Court, Franklin County; D. W. Meadow, Judge.

Action by F. L. Brown against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. G. & Julian McCurry, W. R. Little, and Geo. L. Goode, for plaintiff in error. S. B. Swilling and Dorrough & Adams, for defendant in error.

POWELL, J. Affirmed.

(10 Ga. App. 48)

RAYFIELD v. STATE. (No. 3,530.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW (§ 1172\*)—POSSESSION OF STOLEN GOODS—INSTRUCTIONS.

Where the undisputed evidence shows that the defendant was in possession of the stolen goods on the very night of the burglary, it is not prejudicial error requiring a new trial that the judge, in charging the jury as to the presumption raised from such possession, left out

the word "recent." The error in the charge was immaterial, and harmless as to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.\*]

## 2. ACCOMPLICE EVIDENCE.

The testimony of the accomplice was fully corroborated, and the verdict of guilty authorized.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Marion Rayfield was convicted of burglary, and brings error. Affirmed.

W. D. Nottingham and W. A. McClellan, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 21)

CARR v. STATE. (No. 3,349.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

INDICTMENT AND INFORMATION (§ 148\*)—DEMURRER—SUFFICIENCY.

There was no error in overruling the general demurrer, and the special demurrer was not well taken.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 495; Dec. Dig. § 148.\*]

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

C. D. Carr was convicted of crime, and brings error. Affirmed.

W. W. Bennett and J. C. Bennett, for plaintiff in error. J. H. Thomas, Sol. Gen., for the State.

RUSSELL, J. Carr was indicted under section 186 of the Penal Code of 1910. The indictment is substantially in the language of the Code section, but the defendant's general demurrer raises the contention that the statute itself is illegal, void and unconstitutional. Nowhere does the demurrer refer to any provision of the Constitution of which the statute is violative, and this is the only way in which a decision of the question can properly be invoked. It does not appear clearly from the order whether the judge passed on the special demurrer, but it is without merit.

Judgment affirmed.

(10 Ga. App. 33)

TOLVER v. STATE. (No. 3,441.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

## 1. CIRCUMSTANTIAL EVIDENCE.

The circumstantial evidence was sufficient to corroborate the confession and authorize the verdict of guilty.

## 2. LARCENY (§ 59\*)—CRIMINAL LAW (§ 1169\*)—EVIDENCE OF VALUE.

In a prosecution for simple larceny, where it appears that the goods alleged to have been

stolen were sold, and thus had some value, it is unnecessary to prove the price paid or the exact quantity. From legally admitted evidence it appears that the goods claimed to have been stolen had some value. The fact that other evidence as to value was illegally admitted will not, in the absence of other error, authorize a reversal of the judgment refusing a new trial.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 154, 155; Dec. Dig. § 59;\* Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Sam Tolver was convicted of larceny, and brings error. Affirmed.

Goodwin & Wood, for plaintiff in error. J. E. Hyman, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 8)

WILENSKY v. CENTRAL OF GEORGIA  
RY. CO. (No. 2,101.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 91\*)—TRANSPORTATION OF GOODS—ACTION FOR BREACH OF CONTRACT.

The Supreme Court (72 S. E. 418), in answer to the question certified to it by this court, having held that a shipper, who is both consignor and consignee, cannot maintain an action ex contractu against a carrier for the value of goods consigned to it for shipment and not delivered, and which the carrier tendered at destination in a damaged condition, but refused to deliver without payment of the usual freight charges, notwithstanding the damage to the goods amounted to more than the freight charges, and the shipper demanded that the damages to the shipment be offset against the freight bill, it follows that the trial judge did not err in sustaining the certiorari.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 91.\*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by H. Wilensky against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jesse M. Wood, for plaintiff in error. Payne, Little & Jones, and M. F. Goldstein, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 70)

HARRIS v. STATE. (No. 3,675.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

## 1. CRIMINAL LAW (§ 923\*)—NEW TRIAL—DISQUALIFICATION OF JUROR.

If one of the jurors who convicted the accused was the first cousin of the prosecutor, this would be a valid ground for a new trial, provided the fact of relationship was unknown to the accused and his counsel at the time of the trial (Brown v. State, 28 Ga. 439; Bullard v. Trice, 63 Ga. 165), and provided, further, that this ground of the motion is shown to be true, either by accompanying affidavits, or by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



recitals in the motion verified by the trial judge. In this case the fact of the relationship is not shown, and the trial judge expressly refuses to verify the recital of the fact of the relationship in the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2225-2237; Dec. Dig. § 923.\*]

**2. CRIMINAL LAW (§§ 719, 730\*)—TRIAL—ARGUMENT OF COUNSEL—ACTION OF COURT—NEW TRIAL.**

In a prosecution for the sale of intoxicating liquors, where only one sale was proved, and the character of the accused was not put in issue, it was improper for the solicitor general, in the concluding argument, to refer to the accused as "this notorious character, this notorious blind tiger," and, on objection made to such language, it was the duty of the judge to reprimand the solicitor general and instruct the jury to disregard the improper reference to the accused. *Miller v. State*, 8 Ga. App. 540, 69 S. E. 922. Where, however, the improper language is used and objected to, and the judge stops the solicitor general and reprimands him in the hearing of the jury, by saying, "Mr. Solicitor, that is an improper argument," and counsel for the accused makes no other request to the court, either to declare a mistrial or to instruct the jury to disregard the improper language, and rests content with the reprimand as made, a new trial will not be granted on this ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1869; Dec. Dig. §§ 719, 730.\*]

**8. ADMISSIBILITY OF EVIDENCE—SUFFICIENCY OF EVIDENCE—NO ERROR.**

The testimony admitted over objection was wholly irrelevant, immaterial, and harmless. The verdict is supported by the evidence, and no error of law appears.

Error from City Court of Greenville; H. H. Revill, Judge.

London Harris was convicted of the sale of intoxicating liquors, and brings error. Affirmed.

N. F. Culpepper, for plaintiff in error. J. E. Justiss, Sol., for the State.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 27)

**ALEXANDER v. STATE. (No. 3,413.)**  
(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

**1. SUFFICIENCY OF EVIDENCE.**

The evidence authorized the verdict.

**2. REFUSAL OF NEW TRIAL—NO ERROR.**

There was no error, in view of the counter-showing made by the state, in refusing to grant a new trial because of the alleged newly discovered evidence.

Error from City Court of Tifton; R. Eve, Judge.

Sam Alexander was convicted of selling intoxicating liquors, and brings error. Affirmed.

R. D. Smith, for plaintiff in error. Jas. H. Price, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 45)

**TENNESSEE OIL & GAS CO. v. AMERICAN ART WORKS. (No. 3,515.)**

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

**1. COURTS (§ 189\*)—DEFAULT JUDGMENT—OPENING OR VACATING.**

Under the act of December 13, 1902 (Loc. Acts 1902, p. 117), any default entered by a judge of the city court of Atlanta may be opened upon the terms and conditions stated in that act, provided the motion to open the default is made before final judgment is rendered.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.\*]

**2. COURTS (§ 189\*)—DEFAULT JUDGMENT—OPENING OR VACATING.**

If both default and final judgment have been rendered, the defendant cannot have the default opened without first vacating the judgment. While the court has power over any judgment during the term at which it is rendered, still a judgment should not be set aside for insufficient reason, even though the application to set it aside is for the purpose of allowing the default on which the judgment is based to be opened.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 189.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the American Art Works against the Tennessee Oil & Gas Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. A. Stephens and Walter McElreath, for plaintiff in error. Walter C. Hendrix, and Mayson & Johnson, for defendant in error.

POWELL, J. [1] The suit was brought in the city court of Atlanta. Under the practice in that court, a case is in default unless the defense is filed on or before the first day of the term to which the case is returnable, and verdict and judgment in undefended cases may be rendered at the first term of the court. Formerly there was no provision for opening a default once suffered in this court, but under the act of December 13, 1902 (Loc. Acts 1902, p. 117), any default entered by the judge of the city court of Atlanta may be opened "during the term at which such default is entered, upon payment of all costs, or in the discretion of said judge"; and he may open it after the expiration of the term at which the default is entered, "upon the same terms and conditions as may judges of the superior courts of this state" open defaults. In this case default was suffered, and during the same term of the court verdict and final judgment were entered against the defendant; and later during the same term the defendant appeared and paid all the costs, and moved to open the default, and tendered an apparently meritorious defense, and gave as his excuse why the defense had not

been filed sooner that an attorney had been employed to represent the defendant, and that he through inadvertence had failed to file the defense in time. If final judgment had not been entered in the case, the motion to open the default would have been sufficient; for, under the act of 1902, the defendant is entitled to open the default, as such, at any time during the first term of the court, by paying the costs.

[2] But this relates to the opening of the default as such. Here the case had passed beyond the stage of mere default. It was necessary for the defendant to get rid of the judgment which had been finally rendered in the case. During the term at which judgment was rendered, it still rested largely in what is called "the breast of the court"; that is to say, the court still had general control over it for the purpose of setting it aside or modifying it. But a judgment once regularly rendered should not be set aside captiously, or unless the party moving to set it aside shows some good reason why it was improvidently rendered. In this case no such reason was shown. In principle, this case and the case of *O'Connell v. Friedman*, 118 Ga. 831, 45 S. E. 668, are identical, though they differ somewhat as to the facts presented. In *Mathews v. Bishop*, 106 Ga. 564, 32 S. E. 631, the difference between opening a default and opening a final judgment rendered at the first term in the city court of Atlanta was pointed out, and it was there held that the judgment should not be vacated, unless the defendant showed a valid excuse for failing to appear and plead at the proper time. Since the judgment of default could not be set aside without the final judgment first being vacated, and since the motion set up no sufficient reason for vacating the judgment, the court properly denied the motion. Judgment affirmed.

(10 Ga. App. 59)

**JONES v. STATE** (No. 3,580.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW (§ 304\*)—JUDICIAL NOTICE—"GREENBACK."**

"The courts judicially know that the term 'greenback' is the popular name used to designate a certain species of the currency of the United States."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700-717; Dec. Dig. § 304.\*

For other definitions, see Words and Phrases, vol. 4, pp. 3164, 3165.]

**2. ROBBERY (§ 24\*)—SUFFICIENCY OF EVIDENCE.**

The evidence amply authorized the verdict of guilty, and no error of law appears.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 32-36; Dec. Dig. § 24.\*]

Error from Superior Court, Dougherty County; Frank Park, Judge.

Rebecca Jones was convicted of robbery, and brings error. Judgment affirmed.

Rebecca Jones was convicted of robbery. The evidence introduced by the state tended to show that she had conspired with certain other negroes to entice the prosecutor under a railway trestle, where he was robbed of \$135. The defendant admitted the robbery, and admitted her presence, but denied that she took part therein. She stated that she and the defendant were passing under the trestle, when the defendant was robbed by others, and that as soon as they grabbed him she broke and ran. There was also evidence from which the jury could have found an alibi. The man who was robbed identified the defendant as the one who had enticed him under the trestle, and testified that before they got there she waited until one of the men, who she says did the robbing, could join them. He testified, also, that she participated in the actual robbery itself.

R. J. Bacon, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

**RUSSELL, J.** [1] 1. The man robbed testified as follows: "I was robbed of \$135 of lawful money. It was greenback money, and would pass. It was my individual money, and it was all paper money, greenbacks in fives and tens." It is claimed that there is a variance in this proof from the allegation in the indictment, which charged the robbery of \$135 of lawful money. "The courts judicially know that the term 'greenback' is the popular name used to designate a certain species of the currency of the United States." *McDonald v. State*, 2 Ga. App. 633 (2), 58 S. E. 1067.

[2] 2. The evidence practically demanded the verdict of guilty. The charge was free from error. The assignments of error based on the failure of the judge to charge the principles of law therein contained show that no written requests were submitted, and in the absence thereof the defendant cannot complain.

Judgment affirmed.

(10 Ga. App. 68)

**RHODES v. STATE** (No. 3,671.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**HOMICIDE (§ 98\*)—ASSAULT WITH INTENT TO KILL—ELEMENTS OF DEFENSE.**

If one whose premises are invaded by a riotous mob, who lay siege to his habitation and continue their rioting, shoots into the mob and wounds one of its members, he does not commit the offense of assault with intent to

murder; and this law is applicable, irrespective of any racial difference between the parties. [Ed. Note.—For other cases, see Homicide, Cent. Dig. § 128½; Dec. Dig. § 98.\*]

Error from Superior Court, Greene County; Jas. B. Park, Judge.

Will Rhodes was convicted of assault with intent to kill, and brings error. Reversed.

Jos. P. Brown and Brown & Shipp, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

POWELL, J. For purposes of the ruling which we are going to make, the facts of this case may be stated as follows: A white boy had struck a negro boy with a rock. On a subsequent night a crowd of negro men—some six to ten of them—organized themselves into a party, and, without any warrant or authority, went out hunting for the white boy. They went to various houses of white persons in the community, where the boy who did the striking with the rock was supposed to be, but where, in fact, he was not, took white men out of their houses, and compelled them to go with them, fired pistols, made riotous noises, and finally came to the home of the defendant, a white man, at whose house he and a number of friends he had called in were sitting quietly reading. They demanded that he come out, and, when he refused to do so, surrounded the house. Some one within fired on the party outside, and several shots from the outside party were fired toward the house. After the besieging party had remained around the house for about 30 minutes or more, and after one branch of their party had brought the defendant's brother on some pretext to this place, and when, in his endeavor to escape, he had been shot at and mortally wounded, some one within the house, alleged to have been the defendant, fired a shotgun, hitting one of the negroes in the leg; and for this offense, under these circumstances, this defendant has been convicted of assault with intent to murder.

Now, let him who will cry out "Impossible!" "Monstrous!" "Unheard of!" or what he pleases. The only difference in the suppositious case which has just been stated and the case at bar is that it was a negro boy who struck the white boy with a rock, and that it was a white crowd who were spreading terror among the negroes, and that the defendant is a negro, and not a white man, and that the man who was shot is a white man, and not a negro. It would be folly to speak of the equality of all men before the law, if we should allow this conviction to stand. We would have to write a racial exception into that section of the Code (Penal Code 1910, § 72) which provides that it shall be justifiable to shoot, and even kill, to prevent a forcible attack and invasion upon the property or habitation. These white men, or boys, as the

case may be (for the record does not disclose their ages), had no right in the world to enter upon this defendant's premises in the riotous and tumultuous manner in which they did. Their excuse that they were out hunting for a negro boy who had hit a white boy in no wise mitigates their offense, which under the law was nothing less than riot. They were not officers; they had no warrant; the person for whom they were looking was not even upon the premises of the defendant; and no reasonable cause whatever for suspecting he was there was shown. It was error even for the court to submit to the jury instructions on the subject of right to arrest without warrant, for no such issue was raised by the evidence. It is very probable that this instruction induced the jury into rendering the verdict which strikes us as so manifestly wrong.

Judgment reversed.

(10 Ga. App. 17)

BRIGHT v. STATE. (No. 3,823.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

LARCENY (§ 30\*)—INDICTMENT—INDEFINITENESS.

An indictment for simple larceny, charging that the defendant, "on the 19th day of October, 1910, in the county aforesaid, of the personal goods of W. T. Lockett then and there being found, to wit, 100 pounds of seed cotton, of the value of \$10," is insufficient, as against a special demurrer calling for a more definite description of the property claimed to have been stolen.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 64-75; Dec. Dig. § 30.\*]

Error from City Court of Albany; D. F. Crosland, Judge.

General Bright was convicted of larceny, and brings error. Reversed.

R. J. Bacon and Ben T. Burson, for plaintiff in error. J. W. Walters, Jr., for the State.

RUSSELL, J. The only question raised by the bill of exceptions is the sufficiency of the indictment, under which the defendant was tried and convicted, as against the special demurrer filed thereto. The material portions of the indictment are as follows: "On the 19th day of October in the year of our Lord one thousand nine hundred and ten, in the county aforesaid, of the personal goods of W. T. Lockett then and there being found, to wit, 100 pounds of seed cotton, of the value of \$10." The defendant demurred, on the ground that the property alleged to have been stolen was not described with sufficient definiteness and particularity.

We are of the opinion that the point is good. Where timely demand is made by special demurrer, the defendant is entitled to have such a definite and particular description of the property as will enable him

to know the exact transaction in which the state claims he violated the law. In some way the particular property alleged to have been stolen must be described. It is not good merely to charge the defendant with having stolen a chair, a shovel, a table, a watermelon, or a pocketknife. The marks, quality, or kind of the property must be incorporated in the description, or the transaction in some way individualized. Merely to charge the defendant with having stolen "seed cotton," without even saying whether it is long or short staple, or without in any way informing him of the locality from which it is claimed he stole the cotton, is too vague, general, and indefinite to withstand a timely special demurrer. *Roberts v. State*, 83 Ga. 369, 9 S. E. 875; *Melvin v. State*, 120 Ga. 490, 48 S. E. 198; *Ayers v. State*, 3 Ga. App. 305, 59 S. E. 924.

Judgment reversed.

(10 Ga. App. 38)

**RENFROE v. STATE.** (No. 3,486.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW (§ 170\*)—FORMER JEOPARDY—TRIAL ON VOID ACCUSATION.**

A plea of former jeopardy cannot be predicated on the fact that the defendant had previously been put on trial under a void accusation. Such an accusation being an absolute nullity, the defendant could not waive the defects therein and consent that the trial proceed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 312-321; Dec. Dig. § 170.\*]

**2. CRIMINAL LAW (§ 824\*)—TRIAL—INSTRUCTIONS—REQUESTS.**

The evidence amply authorized the verdict of guilty, and no error of law appears. The charge requested was substantially embodied in the general charge, and the omission to define an unlawful arrest, in the absence of any request upon that subject, is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. § 824.\*]

Error from City Court of Sandersville; *E. W. Jordan*, Judge.

Leon Renfro was convicted of crime, and brings error. Affirmed.

*J. J. Harris* and *W. E. Armistead*, for plaintiff in error. *J. E. Hyman*, Sol., and *M. L. Gross*, for the State.

**RUSSELL, J.** Judgment affirmed.

(10 Ga. App. 24)

**BRANTLEY v. STATE.** (No. 3,367.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**1. ASSAULT AND BATTERY (§ 91\*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.**

The evidence amply authorized the verdict of guilty.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 136; Dec. Dig. § 91.\*]

**2. CRIMINAL LAW (§ 634\*)—TRIAL—CONDUCT IN GENERAL—ABSENCE OF JUDGE.**

Under the rulings of the Supreme Court it was not reversible error for the trial judge to leave the bench during the argument of counsel and step into an adjoining room for a few moments without the consent of counsel; it appearing that he was all the time within hearing, and that no motion for mistrial was made, nor any other objection urged at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1461-1464; Dec. Dig. § 634.\*]

Error from Superior Court, Fulton County; *Geo. L. Bell*, Judge.

*J. K. Brantley* was convicted of assault, and battery, and brings error. Affirmed.

*John Y. Smith*, for plaintiff in error. *Hugh M. Dorsey*, Sol. Gen., and *Lowry Arnold*, Sol., for the State.

**RUSSELL, J.** [1] 1. The defendant was convicted of assault and battery. His brother, several days before the alleged assault, had been arrested for selling intoxicating liquor. The defendant and the brother met the policeman who had made the arrest, and the defendant caught him by the arm and said: "What in the hell did you mean by turning up my brother?" The defendant and the brother then caught the policeman by each arm, and the three began walking down the street until they came to a street corner, near which there is a dark underpass. While they were walking down the street, several other boys were in the rear, yelling, "Kill him! Hit him! Knock him in the head!" When the corner was reached the policeman refused to go any further, whereupon he was struck in the head with some hard substance like knucks. The blow came from the rear, and the policeman could not tell who hit him. At the trial in the recorder's court the defendant admitted that he did it. In his statement during the present trial he failed to deny any of the facts stated above, except the actual hitting, and explained that the reason he took all the blame in the recorder's court was because he thought the fine there imposed would be the end of the matter. Under the undisputed evidence the defendant was guilty. The jury were authorized to infer that seizing the policeman's arm in anger (as evidenced by the language used) was an assault and battery. Furthermore, even if the defendant did not strike the blow, he was so connected with it as to be an accomplice, and as such equally guilty with the principal offender for the misdemeanor there committed.

[2] 2. The only other error complained of in the certiorari, which was overruled by the judge of the superior court, is that during the argument to the jury the judge of the criminal court absented himself from the courtroom for a few moments without the consent of counsel and without sus-

pending the trial. He was all the time within hearing of what was taking place in the courtroom. We do not approve the judge's conduct, but neither the defendant nor his attorney made any objection at the time. It is undoubtedly true that the trial should be had in the immediate presence of the judge, and when he wishes to leave the bench for any purpose, even for the briefest space of time, he should suspend the trial. As Judge Bleckley says: "His immediate presence tends to preserve the legal solemnity and security of trial, and upholds the majesty of law." *Hayes v. State*, 58 Ga. 35, 49. In the case of *Horne v. Rogers*, 110 Ga. 362, 370, 35 S. E. 715, 49 L. R. A. 176, Justice Cobb made a thorough review of all the cases on the subject and said: "The mere absence of the judge during the progress of the trial, when no objection is made, will not necessarily require the granting of a new trial, when the absence is only for a few moments and for a necessary purpose; and, in order for such absence to become reversible error, it must appear, not only that objection was made to the judge's failure to suspend the trial, but that the absence of the judge resulted in some harm to the losing party. \* \* \* If it were an open question, we would hold that the presence of the judge at all stages of the trial is absolutely necessary to its validity, and that the absence of the judge from the trial without suspending the same for any length of time, no matter how short, or for any purpose, no matter how urgent, would vitiate the whole proceeding, whether objection was made by the parties interested or not, and whether injury resulted to any one or not. The judge is such a necessary part of the court that his absence destroys the existence of the tribunal, and public policy demands that the tribunal authorized to pass upon the life, liberty, and property of the citizen should be constituted during the entire trial in the manner prescribed by law. The great weight of authority is in harmony with this view. The very definition of trial carries with it the idea of the superintendence of a judge."

In view of the fact that the evidence in this case practically demands a verdict of guilty, and that no objection was made to the irregularity at the time, the conduct of the judge is not cause for a new trial.

Judgment affirmed.

(10 Ga. App. 20)

PATTEN v. STATE. (No. 3,340.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 586\*)—CONTINUANCE—DISCRETION OF COURT.

Motions for continuance, made at the term at which the indictment is found, while addressed to the discretion of the court, stand upon a different footing from such motions made at a

subsequent term. In such cases the discretion of the court should be liberally exercised in favor of a fair trial, no less than that the trial should be speedy, and every facility should be afforded a defendant for presenting his defense as fully as he might be able to do were the case tried at a subsequent term. Reasonable opportunity for the defendant to prepare his defense should not be sacrificed in the interest of speed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1311; Dec. Dig. § 586.\*]

Error from Superior Court, Ware County; T. A. Parker, Judge.

H. N. Patten was convicted of a violation of the prohibition law, and brings error. Reversed.

Jno. J. Moore, for plaintiff in error. M. D. Dickerson, Sol. Gen., for the State.

RUSSELL, J. On December 6th a presentment was returned, charging the defendant with a violation of the prohibition law. Fifteen days later, to wit, December 21st, he was put upon trial. The man to whom it was claimed he had sold the liquor was named Best. The defendant filed a motion for a continuance, in which it was shown that, on the day after the presentment was returned, his attorney had a subpoena issued for Best, and placed it in the hands of the sheriff for service. Two or three days later it was learned that Best had left the county, and was in Savannah. The defendant's attorney immediately had another subpoena issued, which was placed in the hands of the sheriff of Chatham county, who located Best, and requested that \$5 be sent for his expenses, stating that Best would leave on the next train after its receipt. The money was sent, and Best failing to arrive within two or three days thereafter, the defendant's attorney, on December 15th, had an attachment issued for him, but he had not been located. Best was only temporarily absent from the county, and the defendant expected to have him present at the next term of the court. Best would swear that the defendant did not sell him any liquor; that several days before the arrest the defendant made a trip to Jacksonville, Fla., on business, and Best gave him some money with which to purchase a pint of whisky; that the defendant did not in any way get or retain any benefit or profit out of the transaction, and acted purely and simply as the agent of Best in purchasing the whisky at Jacksonville. It was further shown that Best was the only witness to these facts. These facts were substantially undisputed, except that the state proved that an attachment had been issued from a justice's court against Best, indicating that he was removing permanently from the county.

It will be seen that, if the jury should credit Best's testimony, the defendant was entirely innocent. The evidence relied on by the state was circumstantial, and the testi-

mony sought to be elicited from Best presented a theory strongly indicating innocence. As between a speedy and a fair trial, speed should yield to fairness. The defendant was put upon trial just 15 days after he was accused, and we think has been denied his right to have presented to a jury of his peers testimony which was in all probability accessible, and which, if believed, would have shown his innocence. While we recognize that continuances are matters resting largely in the discretion of the trial court, still, at the first term, that discretion should be liberally exercised in favor of a fair trial, and every facility should be afforded the defendant for presenting his defense as fully as he might be able to do were the case tried at a subsequent term. *Brooks v. State*, 3 Ga. App. 458, 60 S. E. 211. The interests of justice would not have suffered by giving the defendant the right to have the jury hear the testimony of the only person who really knew whether he was guilty or innocent. The evidence against the defendant is weak, and if his full defense had been heard the result might have been different.

Judgment reversed.

(10 Ga. App. 78)

**HENDON v. STATE.** (No. 3,718.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**KIDNAPPING (§ 5\*)—ELEMENTS OF OFFENSE—FORCE—MALICE—FRAUD.**

In prosecutions under Penal Code 1910, § 110, for the inveigling of a child, it is necessary for the state to show that the accused either "forcibly, maliciously, or fraudulently" enticed or carried the child away. Where the child alleged to have been inveigled is above the age of discretion, though under the age of 18, these elements are not sufficiently made out by showing that the child went away in company with the defendant, especially where the state's own evidence shows that the child itself went of its own free will and accord, and not as the result of any inveigling on the defendant's part. [Ed. Note.—For other cases, see Kidnapping, Cent. Dig. § 11; Dec. Dig. § 5.\*]

Error from Superior Court, Cobb County; N. A. Morris, Judge.

Essie Hendon was convicted of inveigling a child from its parents, and brings error. Reversed.

Clay & Morris, for plaintiff in error. J. P. Brooke, Sol. Gen., for the State.

**POWELL, J.** This case presents about the most horrible and disgusting record we have been called upon to review since our service upon this bench began. Its disgusting details are utterly contrary to all that we are accustomed to. We have considered the case carefully. The record contains many exceptions to rulings of the court and to instructions to the jury, but none of these are well taken. The case was fairly and ably tried.

We are always reluctant to set aside a verdict deliberately returned by a jury and approved by a court, on the ground that there is no evidence to support it, and are especially reluctant to do so where the record is otherwise so free from error as the one before us. But we have read this record over and over again, and the evidence is wholly insufficient to support the conviction.

The accused was charged with a violation of Penal Code 1910, § 110, which provides: "Any person who forcibly, maliciously, or fraudulently leads, takes, or carries away, or decoys or entices away, any child under the age of eighteen years from its parent or guardian, or against his will, or without his consent, is guilty of kidnapping." The child alleged to have been inveigled was a girl about 17 years old, the daughter of a poor white farmer who lived in the country between Marietta and Atlanta. He had, as a farm hand, a negro boy, who slept in a shed room in his house. This girl and the negro boy worked together in the field and in some way, not disclosed by the record, he managed to become criminally intimate with her. One night, after she was somewhat advanced in pregnancy, her father missed her from home. He tracked her to a spot at a branch near by, and found that she was there joined by another woman, and then both were tracked to a point on the street car line between Marietta and Atlanta. It was shown that the other track was that of the defendant in this case, who was a sister of the negro boy already mentioned. In fact, earlier during the same night this negro woman had come to the prosecutor's house, had called for her brother, and had told the prosecutor that she wanted him because one of her children was sick. It may be stated just here that this negro boy came back and went to work next morning, but a little later in the day fled, and has not been heard of since. The next morning after the night on which the girl was missed from her father's house, she and the defendant were seen to take a train together in Atlanta for Knoxville, Tenn. They went together into a coach assigned to colored people. The porter seemed to suspect that the girl was a white girl, and, apparently having some curiosity as to why she should be riding with a negro woman, asked them about it, and the girl told him that she was a negro girl. At Blue Ridge, on the way to Knoxville, the negro woman gave the porter money with which he bought lunches and brought them in to the girl and the defendant. When they arrived at Knoxville, the porter consented to secure lodging for the negro woman, but refused to have anything to do with the white girl, and she went into another portion of the city and secured lodgings. A little later the police arrested the two in different parts of the city.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Now, if this were all the testimony, there might be enough to justify a strong suspicion that this negro woman had decoyed this white girl away in order to shield her brother from the crime he had committed—a crime which, though punishable by only a small penalty, so far as the law is concerned, would probably have been dealt with much more severely by members of the community if once it became known. But the state did not stop there. It brought the girl herself to the witness stand. She confessed her miserable condition, and stated on the stand that she herself had appealed to this sister of the man who had been a partner with her in her unspeakable crime, and had persuaded this woman to take her to Knoxville, Tenn. The girl herself was ignorant and untraveled, and did not know how to get away from home. The negro boy had furnished the girl with \$13. She gave this to the negro woman and told her to purchase the necessary tickets. The understanding between them was that when they got to Knoxville, and the girl secured a lodging place, this negro woman would wait on her there. According to the girl's testimony, however, she never saw anything more of the defendant from the time they last separated at the train until after they were arrested a few days later. If the state's circumstantial evidence made out even such a prima facie case of kidnapping or inveigling as to put upon the defendant the burden of explaining the circumstances, the state's own testimony as it fell from the mouth of this witness, the girl herself, furnished the explanation, and absolutely destroyed whatever approach to a case the state had previously made. The defendant's own statement of the affair was similar to the girl's.

It is insisted (though there is no direct proof of the fact in the record) that this girl is weak and unlettered, and that the defendant is a shrewd and designing woman, and that the girl, even when she was testifying, was so far under the influence of this woman that she lied as to the salient facts of the case. Be this as it may, the state is not in a position to assert it here. The state could not make out a case without putting the girl on the stand, under all the circumstances. If the actual truth is different from what it appears to be according to this record, this unfortunate state of affairs comes about through the inability of the state to show the truth—a state of affairs that often occurs in the ordinary administration of the criminal law. With this girl testifying as she does, we do not see how the state can make out a case, unless it obtains some further evidence than that now apparently at its command. So long as the state is under the necessity of supplementing its circumstantial evidence with the testimony of the girl, it is obliged to adopt the theory of the case shown by the girl's testimony. This proposition involves no contradiction of the

doctrine that where the state has two witnesses, and one of them makes out a case and the other states facts to the contrary, the state may nevertheless ask for and sustain a conviction on the testimony of the first witness, if it is believed by the jury. The girl's testimony in this case does not contradict the circumstances by which the state makes its first approach toward a proof of the case. Her testimony is consistent with all these things—that she left her father's house when she heard the defendant call the negro boy; that she went to the branch, just as her father says she went; that she met the defendant, and that they walked to the car line; that they came on to Atlanta, and that they took the train for Knoxville; that she furnished the negro woman money which the negro boy had furnished her. All these things the girl herself directly testified to, and yet says that she herself was the movant in the entire matter. She testified only under the compulsion of the court at the instance of the state; but, when she did testify, she absolutely ruined the state's case.

If this woman is guilty, the state has not proved it; for it is material in a prosecution of this kind for the state to show that the defendant "forcibly, maliciously, or fraudulently," led, took, or decoyed away the child. Now, as to a child under the age of discretion, it might be sufficient merely to show that the child ran away from home and was materially assisted by the defendant in getting away. A child of tender years is not supposed to have sufficient will and judgment to direct an affair of that kind; but this girl was above the age of discretion, was about 17 years old, was about to become a mother, was in a condition that demanded action on her part, and, if she is telling the truth about it, she did what was most natural—appealed to this woman to go away with her and help her shield her disgrace. If this is all the defendant did (and it is all that the proof shows that she did), she is guilty of no crime. The shockingness of the situation, the natural feeling that somebody ought to be punished on account of this unnatural state of affairs that was existing, doubtless led the jury to convict, notwithstanding the evidence is as we have stated it. Detestation for crime too often causes men's minds to rush to conclusions of guilt as against any one charged with complicity in the transaction. But, horrible as this affair is, there can be no relaxation of that most essential rule by which the liberty of all of us is guarded, namely, that no person shall be convicted on suspicion alone, nor held accountable to the law for a crime which the state is unable to prove by either direct or circumstantial testimony. Solely for the lack of evidence to support the verdict, the judgment is reversed.

Judgment reversed.

(10 Ga. App. 41)

**PHELPS v. STATE (No. 3,492.)**

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)***PARENT AND CHILD (§ 17\*)—CRIMINAL LAW (§ 150\*)—“ABANDONMENT OF CHILD”—CRIMINAL RESPONSIBILITY—LIMITATIONS.**

Abandonment, as a criminal offense, contains two essential ingredients: Separation from the child, and failure to supply its needs. The offense is not complete until there is a conjunction of these two ingredients, as mere absence from one's child is not of itself a criminal offense. The crime of abandonment begins and continues as long as there is a failure on the part of the father to perform his parental duty, and consequent dependence of the child. Where it appears that an absent father has for the two years immediately preceding the finding of the accusation against him failed and refused to provide for his dependent child, the time when the original separation took place is entirely immaterial. The continuing dependency of the child vitalizes the offense, and the fact that the absence, and even the dependency, began more than two years prior to the accusation, affords no ground for the interposition of the statute of limitations.

[Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 17;\* Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. § 150.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 4-13; vol. 8, p. 7359.]

Error from Superior Court, Butts County; Robt. T. Daniel, Judge.

John Phelps was convicted of abandonment, and brings error. Affirmed.

H. M. Fletcher, for plaintiff in error. J. W. Wise, Sol. Gen., for the State.

**RUSSELL, J.** The only question involved in this case is whether the offense is barred by the statute of limitations. The defendant in the court below was charged with the offense of abandonment, and claims an acquittal for the reason that the evidence shows that it has been four or five years since he left his wife and child, or since he furnished the child anything. The wife of the defendant, however, testified that she had repeatedly, within the last two years, asked the defendant to do something for his child, and that within the two years he each time refused her request. A majority of the court think the determination of the point at issue depends upon the nature of the ingredients necessary to constitute the offense of abandonment, and we are of the opinion that abandonment is a continuing offense, at least until the defendant has once been convicted thereof. We hold that the facts of this case distinguish it from the case of *Gay v. State*, 105 Ga. 599, 31 S. E. 569, 70 Am. St. Rep. 68, and that the ruling in that case is not binding as a precedent. The precise point, and the only point, presented for the decision of the Supreme Court in the *Gay Case*, supra, was whether one who had once been convicted of abandoning his child could thereafter be again convicted of abandoning the same

child. Whatever else is said in the opinion in a general way, in reasoning as to the nature of the offense of abandonment, can, we respectfully insist, be treated as mere obiter in arguendo. It is not authority. The usual cogent reasoning of the distinguished Justice who wrote the opinion (being beside the question to be decided) does not appeal persuasively to the majority of this court. To say the least of it, it would seem to be bad policy to apply the statute only to the father who might return to his child and attempt to repair, in some degree, the wrong he had done it, and, on the other hand, to reward the heartless father, who callously abandoned his offspring to its fate forever.

Moreover, if precedents are to be consulted, we think it is clearly to be inferred from the rulings in *Bennetfield v. State*, 80 Ga. 107, 4 S. E. 869, *Bull v. State*, 80 Ga. 704, 6 S. E. 178, and *Brown v. State*, 122 Ga. 568, 50 S. E. 378, as well as the rulings of this court in *Moore v. State*, 1 Ga. App. 502, 57 S. E. 1016, *Cleveland v. State*, 7 Ga. App. 622, 67 S. E. 696, and *Ware v. State*, 7 Ga. App. 797, 68 S. E. 443, that abandonment is not only an offense which requires the conjunction of two essential elements, but that it is necessarily a continuing offense, so far at least as the element of dependency is concerned. From a review of the decisions in each of the above-stated cases, we are constrained to believe that it would never do to hold that a father who had left his child in a dependent condition should be allowed to take advantage of his own wrong by pleading the statute of limitations, and setting up that the neglect of his offspring, though flagrant, had continued for such a length of time that the offense was barred by the statute of limitations. A father who wilfully and voluntarily abandons his children is not guilty of any offense merely because he leaves them. If he has them properly maintained and cared for, even if he be absent, he violates no statute law. Certainly, then, the statute of limitations does not begin to run from the time when the father separates himself from his children. *Brown v. State*, 122 Ga. 570, 50 S. E. 379.

“Abandonment does not mean merely going away from destitute and dependent children, though absence is a necessary element to constitute the crime.” Intention is so essentially a part of every crime, and particularly that of abandonment, that the wilfulness and voluntariness which is involved in this section of the Code is accentuated where there is, as in the case now before us, evidence of a demand upon the father for the support of his child, and a refusal to comply, and this within two years before the prosecution. As held in *Moore v. State*, 1 Ga. App. 502, 57 S. E. 1016, quoting from the language of Judge Bleckley in *Bull v. State*, 80 Ga. 704, 6 S. E. 178: “A father



who within this state willfully and voluntarily abandons his child, \* \* \* and persists in the abandonment afterwards, leaving it in a dependent condition, \* \* \* is guilty." And in the Bull Case, supra, Judge Bleckley uses this language: "That a father begins to abandon his child some months before it is born will not excuse him for persisting in the abandonment and failing to furnish it with the necessities of life." From this language we think it is clearly to be inferred that the Supreme Court recognizes the act of abandonment as being a continuous act. There is in the Gay Case no reference to the Bull Case, and no overruling of the doctrine which clearly runs through it. In the Brown Case, supra, it appears that the trial court not only refused to charge that the defendant would not be guilty unless he left his children in a dependent and destitute condition at the time of the abandonment, but that, instead thereof, the court instructed the jury that "if the defendant willfully and voluntarily abandoned his children, and after said abandonment the children became in a dependent and destitute condition, and the defendant continued to willfully and voluntarily abandon said children, and refused to support them, he would be guilty," and this charge was approved by the Supreme Court. In reference to the exceptions to the charge above quoted, Justice Lamar held: "The charge of the court was correct."

To our minds it is perfectly clear that abandonment, as a criminal offense, includes two essentials: The voluntary separation of the father from his child (whether he leaves the child or sends it away), and failure to provide for it the support which the law obligates him to give. A father who leaves his children in a dependent condition, though it be for several years, but who, for the period of two years prior to an accusation being preferred against him, cares for their needs, may plead the bar of the statute of limitations; but an absent father, who for two whole years prior to the accusation for abandonment leaves his offspring dependent and in want, so that this condition exists at the very time that the accusation is being preferred, cannot, in our judgment, successfully interpose to the prosecution the bar of the statute, or otherwise defend himself.

Judgment affirmed.

POWELL, J. (specially concurring). There is a strong appearance of validity in the argument that the case of Gay v. State, 105 Ga. 599, 31 S. E. 569, 70 Am. St. Rep. 68, is controlling here; but I am not so sure that that case and this one are not distinguishable as to be willing to dissent. The opinion of Judge RUSSELL certainly leans toward giving the law a very salutary interpretation, and I think that, wherever

a doubt exists as to the meaning of a law, the judge should strive to give it that construction which makes it most effective. The offense of abandonment created by our statute consists of two elements: The desertion, an act of the father; and dependence, a condition of the child. The two must concur before there is any crime. The Gay Case holds that as to the first element (desertion) the act is not a continuous one, and that when a person is once convicted he cannot be tried again until this element occurs again, and that it cannot occur again until the father goes back to his family and leaves anew. The other element, the condition on which the desertion must operate, the state of the child's dependency, is a thing continuous in its nature. If this alone constituted the offense, it would not be barred, so long as it continued to exist. Coker v. State, 115 Ga. 210, 41 S. E. 684. Since the offense now before us consists of these two diverse elements, the position taken in the opinion in chief—that while a conviction will bar future prosecutions till the element of desertion occurs anew, the statute of limitations does not bar the offense, because one of its elements, the condition of the child, remains continuous—strikes me with such force that I am not willing to dissent from it.

(10 Ga. App. 11)

AVERY & CO. v. T. I. THOMASON & SON.  
(No. 3,242.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1151\*)—AFFIRMANCE—CORRECTION OF ERROR.

The errors assigned as to rulings upon the trial and as to charges of the court are not well taken. There is sufficient evidence to support the verdict, subject only to a small error in calculation, which may be cured by direction given in connection with the judgment of this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.\*]

Error from City Court of Bainbridge; J. G. Cranford, Judge.

Action by Avery & Co. against T. I. Thomason & Son. Judgment for plaintiffs for less than the amount claimed, and they bring error. Affirmed, with direction.

J. C. Hale, for plaintiffs in error. R. G. Hartsfield, for defendants in error.

POWELL, J. According to the allegations of the defendants' plea, they owed the plaintiffs only \$4.66, and for that sum the jury rendered their verdict—the verdict being plainly intended as a finding upon this plea. There are a number of assignments of error in the record, relating to rulings of the court upon the evidence and to instructions

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to the jury; but no material error in this respect appears. It does appear, however, that the calculation by which the amount of \$4.66 was arrived at is incorrect. The plea shows this on its face. The amount really left due upon the note was \$10.68, and for this sum a verdict against the defendants was demanded. The whole question involved in the trial was where a certain credit of \$300 should have been placed, and, after placing this credit as claimed by the defendants, there was still left due on the note \$10.68. Ordinarily this court has no power by direction to increase the size of a verdict; but inasmuch as, under the pleadings, a verdict of \$10.68 could have been directed (since, when the defendants' plea is properly construed, it admits a liability of that amount), and as the verdict has properly settled the only issue in the case, we do give direction that the trial judge modify the judgment in the lower court, so as to allow the plaintiffs a recovery of \$7.36 principal, \$2.35 interest to judgment, and 97 cents attorney's fees, with interest thereon from the date of the trial.

Judgment affirmed, with direction.

(10 Ga. App. 77)

**MATHIS v. STATE.** (No. 3,693.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**CRIMINAL LAW (§ 552\*)—EVIDENCE—WEIGHT AND SUFFICIENCY.**

The circumstances relied upon to support the verdict, weighed most strongly against the accused, are not incriminatory in character, and are only sufficient to raise a suspicion of guilt; and suspicion alone, however strong and apparently well founded, has no probative value as evidence, and a verdict based thereon, without more, is contrary to law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. § 552.\*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Eli, alias Kid, Mathis was convicted of crime, and brings error. Reversed.

Sharp & Sharp, for plaintiff in error. John W. Bale, Sol. Gen., for the State.

**HILL, C. J.** Judgment reversed.

(10 Ga. App. 78)

**WOOTEN v. STATE.** (No. 3,701.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**CRIMINAL LAW (§ 1159\*)—APPEAL—REVIEW—QUESTIONS OF FACT.**

The exceptions to the charge of the court are not well taken. Under the state's testimony, the homicide was strongly mitigated, but not entirely justifiable; under the defendant's statement, it was justifiable. The jury took the state's theory of the transaction, and

convicted the accused of the offense of voluntary manslaughter. There being some evidence to support the verdict, this court has no power to set it aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Error from Superior Court, Rabun County; J. B. Jones, Judge.

Martha Wooten was convicted of voluntary manslaughter, and brings error. Affirmed.

T. L. Bynum, R. E. A. Hamby, and W. S. Paris, for plaintiff in error. Robt. McMillan, Sol. Gen., for the State.

**POWELL, J.** Judgment affirmed.

(10 Ga. App. 12)

**HUNNICUTT v. GRAVES.** (No. 3,297.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**1. FORMER DECISION CONTROLLING.**

The law applicable to the issues made by the evidence in this case was fully stated in the opinion of this court when the case was here before. *Graves v. Hunnicutt*, 8 Ga. App. 99, 68 S. E. 558.

**2. APPEAL AND ERROR (§ 1099\*)—REVIEW—SUCCESSIVE WRITS OF ERROR.**

Where a case has been before this court on assignment of error to a judgment awarding a nonsuit, and the judgment has been reversed because in the opinion of the court there was some evidence which, under the law, would have authorized a verdict for the plaintiff, and on the second trial the evidence for the plaintiff is substantially the same as it was on the first trial, and the evidence in behalf of the defendant goes only to the extent of raising a conflict on issues of fact, and no error of law is complained of, no question is presented for decision in this court, and the verdict for the plaintiff will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by A. Graves against C. W. Hunnicutt. Judgment for plaintiff, and defendant brings error. Affirmed.

C. L. Pettigrew, for plaintiff in error. Burton Cloud and Geo. Gordon, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(10 Ga. App. 34)

**COLLINS v. STATE.** (No. 3,443.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)*

**1. CRIMINAL LAW (§ 1035\*)—SEQUESTERATION OF WITNESSES—WAIVER—OBJECTIONS.**

At the beginning of the trial the defendant, through his attorney, invoked the rule as to the sequestration of the witnesses. The prosecutor remained in the courtroom while another witness for the state was being examined. The defendant complains this was error requiring a

new trial; that the prosecutor should have been examined first, or should have been required to leave the room during the examination of the other witness. The trial judge certifies that he did not know the prosecutor was in the room during the examination of the witness; that neither the defendant nor his attorney made any objection thereto at the time. *Held*, a new trial will not be granted. The failure of the defendant and his attorney to call the attention of the court to the presence of the prosecutor, or to request that he be examined first, constitutes a waiver of his right to a strict sequestration.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1035.\*]

**2. CRIMINAL LAW (§ 828\*)—INSTRUCTIONS—WRITTEN REQUESTS.**

The defendant claimed he acted in self-defense. The law relating thereto was properly given in charge to the jury. If the defendant desired more detailed instructions as to his contentions, he should have made written requests therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2007; Dec. Dig. § 828.\*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Zeddie Collins was convicted of crime, and brings error. Affirmed.

Evans & Evans, for plaintiff in error. J. E. Hyman, Sol., for the State.

**RUSSELL, J.** Judgment affirmed.

(10 Ga. App. 36)

**SMITH v. STATE.** (No. 3,468.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(*Syllabus by the Court.*)

**ARREST (§ 63\*)—CRIMINAL LAW (§ 368\*)—AUTHORITY TO ARREST WITHOUT WARRANT—ASSAULT—EVIDENCE.**

The record discloses no reversible error.

[Ed. Note.—For other cases, see Arrest, Dec. Dig. § 63.\* Criminal Law, Cent. Dig. §§ 806, 812, 815, 821; Dec. Dig. § 368.\*]

Error from Superior Court, Dougherty County; Frank Park, Judge.

Griggs Smith was convicted of assault and battery, and brings error. Affirmed.

The defendant was convicted of assault and battery. It appears from the evidence that he and his son were making a disturbance on the streets of Albany by cursing one another, that easily within hearing were some females, that one or two citizens had caught hold of the defendant's son, and that a crowd had assembled. A policeman arrived, and the defendant was pointed out to him as being the one who was "raising Cain"; and before the policeman had said a word the defendant hit him with a flint rock weighing 5 or 6 pounds. The rock was thrown a distance of about 4 feet, and struck the police-

man in the forehead, making a gash about 2½ inches long all the way to the skull. The policeman did not have a warrant for the defendant.

R. J. Bacon and Ben T. Burson, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

**RUSSELL, J.** (after stating the facts as above). 1. Complaint is made of the admission of the following evidence: One of the bystanders, as a witness for the state, was asked: "When Mr. Perry [the policeman] got there, what was going on? What was the defendant doing, and what trouble, if any, in which he was connected, was in progress?" The witness answered: "Him and his son was cursing one another." The defendant objected to this evidence because the policeman had previously testified that at the time of his arrival the defendant was standing by his wagon, and was doing nothing illegal, so far as he saw; and therefore it is contended, there being no disturbance so far as the policeman saw, it was immaterial what the defendant was doing. We are of the opinion that, if the defendant was creating a breach of the peace in the policeman's physical presence, he would have a right to make the arrest without a warrant, whether he heard the cursing or not. The crime was being committed in his presence, whether he knew the full extent of it or not. *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613; *Porter v. State*, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730; *Jenkins v. State*, 3 Ga. App. 146, 59 S. E. 435.

2. Exception is taken to the admission of evidence as to what was said by the defendant and a bystander just as the rock was being hurled. We think this evidence was admissible as a part of the *res gestæ*.

3. It appears that after the defendant threw the rock he ran, pursued by the policeman, who fired several shots, and finally succeeded in arresting the defendant. It is claimed that the defendant was justified in resisting the arrest, which it is claimed was illegal, and the evidence shows he used no more force than was necessary; subsequent events showing that the force he used was not even sufficient to prevent the arrest. What happened to the defendant after he had committed a second crime cannot be set up as justification for resisting an illegal arrest for the first one. The jury was authorized to infer both that the arrest was legal and that, even if illegal, the defendant used no more force than was his legal right under the circumstances.

Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(10 Ga. App. 1)

**YATESVILLE BANKING CO. v. FOURTH NAT. BANK. (No. 3,147.)**

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)***1. BILLS AND NOTES (§ 434\*)—PAYMENT—FORGED INDORSEMENT—RECOVERY OF MONEY PAID.**

Where the drawee of a negotiable instrument pays it to a person holding it through and under a forged indorsement of the payee's name, he may (subject to certain limitations) recover back from the person receiving the money on the paper the sum so paid, either in an action in the nature of an action of money had and received, or in an action upon the warranty implied from the presentation of the instrument that the indorsements thereon are genuine, or in an action upon an express warranty that the indorsements are genuine, if such an express warranty has been made.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1268-1274; Dec. Dig. § 434.\*]

**2. BILLS AND NOTES (§ 434\*)—RIGHTS OF PARTIES—RECOVERY OF MONEY PAID.**

If the person presenting and receiving payment on a negotiable instrument bearing the forged indorsement of the payee is himself innocent of the forgery, it is incumbent on the person who has so paid to give to the person to whom the payment has been made notice of the forgery within a reasonable time after discovering it. If he fails in this duty, the person so paid may, when sued for reimbursement by the person who has done the paying, set up, as a defense to the action, any loss that has been occasioned to him by reason of the failure to give timely and reasonable notice. However, as lack of notice, followed by loss, is an affirmative defense, it is not necessary for the plaintiff to negative it in his petition.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1268-1274; Dec. Dig. § 434.\*]

**3. BILLS AND NOTES (§ 434\*)—RIGHTS OF PARTIES—RECOVERY OF MONEY PAID.**

The person paying a negotiable instrument upon the express warranty of the person presenting it that all prior indorsements are genuine (the warranty being written on the instrument itself) may recover from his warrantor, if it turns out that the indorsement of the payee is forged, without showing that he has returned or tendered the instrument to him, notwithstanding some of the signatures on it may be genuine, and the instrument may not be worthless from a commercial standpoint. The person who has thus paid out the money on the instrument bearing the forged indorsement and the warranty may hold it as evidence until reimbursement has been made or tendered.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 434.\*]

**4. PLEADING (§ 35\*)—SURPLUSAGE—REPRESENTATIVE CHARACTER OF PARTY.**

"The mere fact that a plaintiff in his pleadings declares his intention of suing for the use of a third person does not raise any question as to the liability, either of the plaintiff or of the defendant, to such third person. The words declaring an intention to use the recovery for the benefit of another are, as to the defendant, harmless surplusage. He is not concerned in what disposition is to be made of the recovery."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76-80; Dec. Dig. § 35.\*]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Yatesville Banking Company, for use, etc., against the Fourth National Bank. Judgment for defendant, and plaintiff brings error. Reversed.

The Yatesville Banking Company brought suit against the Fourth National Bank, and laid two counts in the petition. The substance of these counts may be stated thus: In the first count it is alleged that the plaintiff sues for the use of McNeice and certain other persons, whose names are set out, and that the defendant is liable to the plaintiff in the sum of \$3,612, because, on July 7, 1907, the plaintiff issued a certain cashier's check for that sum of money, payable to North Penn Iron Company. That on or about July 10, 1907, the defendant notified the plaintiff that it (defendant) had paid this cashier's check upon the order of the payee, and it was held as a demand against the plaintiff. That upon receipt of this notification the plaintiff paid to the defendant the sum of money above named, and received from the defendant the cashier's check, when, as a matter of fact, the defendant had not paid, and never has paid, the amount of the check to the payee or his order, the indorsement of the name of the payee being a forgery; also that the usees named "have jointly paid unto the petitioner the sum of three thousand six hundred twelve dollars (\$3,612) to indemnify petitioner for the sum aforesaid paid defendant." That plaintiff has demanded of defendant the sum sued for, and payment thereof has been thereupon refused. In the second count it is alleged that the plaintiff sues for the use of the same persons. That the check was issued, the indorsement of the payee forged, and payment of it with this forged indorsement was requested by the defendant. That the plaintiff paid to the defendant the amount of \$3,612, receiving from the defendant therefor the original check, together with the defendant's guaranty in the following words: "Pay to the order of any bank or banker. Prior endorsement guaranteed. Fourth National Bank of Atlanta, July 13, 1907. Chas. I. Ryan, Cashier." That, being induced by this guaranty and relying upon the same, the plaintiff paid the amount of the cashier's check to the defendant. That the guaranty has failed, and that the plaintiff has lost the sum of \$3,612 thereby. That "the usees have jointly paid unto petitioner the three thousand six hundred twelve dollars (\$3,612), to indemnify petitioner for said loss." A copy of the check is set forth as an exhibit, and it appears that in addition to the indorsement, "North Penn Iron Co.," there are two other indorsements prior to the indorsement of the Fourth National Bank—those of John A. Stewart and Stewart & Davis. The defendant filed a general demurrer, which the court sustained; and to this judgment the plaintiff excepts.

Scott & Davis, for plaintiff in error. Rosen & Brandon, for defendant in error.

POWELL, J. (after stating the facts as above). The demurrer was general, but the defendant in error alleges the following grounds why it should have been sustained: (1) That it is not alleged that reasonable notice of the forgery was given to the plaintiff, and that reasonable demand for the return of the money was not made; (2) that the cashier's check turned over to the plaintiff was not returned or tendered to the defendant before the suit was brought; (3) that it appears that the money paid out by the Yatesville Banking Company was repaid by the usees named in the action, before this suit was brought, and that the voluntary payment by the usees furnishes no right of recovery for this use.

Certain propositions are undisputed: (1) That the cashier's check stands as if it were a negotiable promissory note of the bank by which it was issued; (2) that the issuing bank stands thereto in the dual relation of drawer and drawee.

[1] It is also conceded (3) that ordinarily the bank issuing the cashier's check, and having paid it upon forged indorsement, would not be held chargeable with any notice that the indorsement was a forgery, and that ordinarily it could recover, from one to whom it had paid the money on the faith of the forged indorsement, the amount which it had thus improperly paid out on the check. The case before us, therefore, narrows to a decision upon the special points already mentioned.

[2] 2. As to the first point really in issue: The law is that, where a person has paid a negotiable paper to another on a forged indorsement, and the latter is innocent of the forgery, it is incumbent upon the person so paying to give notice of the forgery to the other person within a reasonable time after discovery of the fact; and he may lose his right of action for failure to give the notice, provided that his laches in this respect has subjected the other to loss. What is reasonable notice in such a case is generally a question for the jury.

After stating a somewhat contrary doctrine, asserted by some of the courts, Daniel, in his work on Negotiable Instruments (5th Ed.) § 1372, says: "But there is high authority for the more liberal, and, we think, wiser and juster doctrine that the demand for restitution may be made within a reasonable time after the forgery is discovered, and that the mere space of time is not important, provided it be clearly shown that the holder will be put to no more liability, trouble, or expense by a restoration than if it has been called for on the day of payment. Nor does the circumstance that there are genuine indorsers prior to the holder, but subsequent to the forged name, seem to us to alter the case. Their indorsement

of the instrument being a warranty of its genuineness, they would not be entitled to notice, as it was not genuine in all respects; and, besides the right to sue them as indorsers, the holder, on being compelled to refund the money, could recover back the amount paid by him to his predecessor, and so on, until the instrument rested where the loss should fall."

We have no doubt that this states the correct doctrine. The defendant in such a case, having received from the plaintiff to his use and benefit money to which he is not entitled, would primarily be subject to an action at law (generally to an action in the nature of an action for money had and received), to be brought at any time within the statute of limitations, but commercial usage, as well as a principle of natural justice, would require the person who had thus paid out the money not to remain quiescent when, by so doing, he would deprive the other person who, too, had been an innocent victim of the forgery of any reasonable means by which he might recoup his loss; and a failure to exercise reasonable diligence in giving this notice ought to and will deprive him of the right to maintain his action, if because of his failure in this respect the loss does ensue. But two things (both failure to give the notice and loss on the part of the other person, occasioned thereby) should concur before this right of action, arising as it does *ex æquo et bono*, should be lost to the person who has been caused to pay the money improperly.

The duty to give the notice does not arise until the forgery has been discovered, and may be exercised then, or within a reasonable time thereafter. It does not appear from the petition in this case when the plaintiff discovered the forgery, nor when the demand for repayment was made upon the defendant, though it is alleged in general terms that it was demanded, or, as it is stated in one of the counts, was "formally" demanded. The petition would have been subject to special demurrer on the ground that this information was not given specifically, but the general demurrer raises no such question. Further, we are of the opinion that it is not necessary for the plaintiff in such a case to make it appear that his notice of the forgery and demand for repayment were given at such a time as that no loss to the defendant occurred from the failure, and that the petition would not be subject to general demurrer raising this question, unless the petition on its face affirmatively disclosed that loss had ensued. As Cowan, J., said, in *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 291: "I am not willing to concede that delay in the abstract, as seems to be supposed, can deprive the party of his remedy to recover back money paid under the circumstances before us." It would be an affirmative defense, which the defendant might set up by way of avoidance of liability, to say that this notice came at

such a time and with such lateness that he was subjected to a loss which would not have ensued if it had been given timely. Such a defense is in the nature of a plea of recoupment, in which the defendant sets off damages ensuing from the plaintiff's neglect against the damages which he caused to the plaintiff by reason of his false presenting of the paper.

[3] 3. As to the second reason asserted for the sustaining of the demurrer—that the plaintiff brought suit without first offering to return the cashier's check: The defendant in error cites two cases (*Coolidge v. Brigham*, 1 Metc. [Mass.] 547, and *Bassett v. Brown*, 105 Mass. 551). The last case cited is hardly in point, except in so far as it lays down the general doctrine that restoration is a condition precedent to rescission for fraud. The *Coolidge* Case is a leading case (frequently cited, but often distinguished) in support of the proposition that, where one party receives from another a paper which, though it is in some of its features a forgery, nevertheless has legal validity as against some of the parties thereto, there must be a return of the paper before there can be a rescission of the transaction in which it is involved. The point in that case is that such a paper is not one of those wholly valueless articles which need not be returned as a condition precedent to rescission. In that case the plaintiff, having taken, in payment for a bill of goods, a draft bearing a forged indorsement, but also bearing a genuine indorsement, attempted, upon discovery that his title to the instrument was infected with forgery, to bring assumpsit for the goods without returning the forged paper to the defendant from whom he obtained it. The court held that he could not maintain the action in this form; that he had no right to maintain assumpsit for the goods without rescinding the other transaction; and that that transaction could not be rescinded without the return of the paper, since the paper had some commercial value, irrespective of the fact that one of the indorsements thereon was a forgery. But the court before concluding the opinion pointed out that the defendant, by virtue of the indorsement which he had put upon the paper, had warranted that the previous indorsements were genuine, and upon this view of the case the court held that the plaintiff might sue the defendant upon this warranty without returning the paper, and allowed him to amend his declaration and to proceed accordingly. To quote the language of the court itself: "The plaintiff was at liberty to restore the note to the defendant, or to retain it and resort to his action on the warranty. \* \* \* A new trial, therefore, will be granted, with liberty for the plaintiff to amend his declaration by counting on the warranty; he paying the defendant his costs of the former trial and of the present term."

In this case the suit was upon the war-

ranty, not merely arising by implication, but expressly contracted for in the indorsement of the defendant upon which the plaintiff paid the money. This guaranty is essentially the cause of action set out in the second count, and, under the very authority of the chief case relied on by the defendant in error, the plaintiff had the right thus to sue without returning this paper. In the present case, there is a very plain reason why any other rule would be unjust, for upon this paper was the written evidence by which the plaintiff should support his cause of action; it was the written embodiment of the defendant's guaranty. If the defendant had offered to repay the money upon the surrender of this paper, it would have been the duty of the plaintiff to surrender it; but when the defendant refused to pay we know of no reason in law or in common sense why the plaintiff should be required to give up his evidence, even though by his retention of the paper he might deprive the defendant of that evidence which the defendant might need if he sought to hold the previous indorsers liable to him. It must be kept in mind that if the defendant had discharged its obligation, under the circumstances, of repaying the money to the plaintiff, it would have been at once the duty of the plaintiff to have put the defendant in possession of this evidence, which the defendant might need for his further protection.

[4] 4. As to the third objection—that it appears that the plaintiff has not suffered loss because the persons named as usees have repaid to it the money which it paid out to the defendant: Counsel for the defendant in error cites a number of cases which all recognize the well-established rule that a person making a voluntary payment cannot recover it; and these authorities would be more or less pertinent if these usees were suing the plaintiff and attempting to recover back the money, but just how it can affect the defendant's rights in this case we do not see. The allegation as to the acts of the usees and as to the facts that they had paid to the plaintiff an amount sufficient to indemnify it against loss is pure surplusage. The suit merely tests the right of the plaintiff to recover. The usees could not sue upon the guaranty, as they were not parties to it. "The mere fact that a plaintiff in his pleadings declares his intention of suing for the use of a third person does not raise any question as to the liability, either of the plaintiff or of the defendant, to such third person. The words declaring an intention to use the recovery for the benefit of another are, as to the defendant, harmless surplusage. He is not concerned in what disposition is to be made of the recovery." *Norcross Mfg. Co. v. Summerour*, 114 Ga. 156, 39 S. E. 870 (3). Just what would have been the effect on the plaintiff's cause of action if these usees had unconditionally paid it the loss which the

defendants' act had occasioned, it is unnecessary for us to say; for it is not so asserted in the petition. It is merely alleged that these usees have paid over the amount of money represented by the check to the plaintiff's bank to be held to indemnify it against loss. Why they paid it, or what connection they had with the transaction, is not disclosed. They may have been insurers; they may have been stockholders subjected to liability, or directors held for neglect in the matter, or what not; the record is silent, and we cannot say. All we are called upon to say is that the petition does not disclose enough to show that they have deprived the plaintiff of his cause of action, so as to subject the petition to general demurrer.

In this connection, it is perhaps proper to notice as a part of the general discussion of this question that, if the usees, from whatever motive, bought up the plaintiff's right of action and failed to secure such an assignment thereof as would be enforceable in a court of law, the proper method to bring the suit would be for the present plaintiff to sue for the use of the usees, naming them, since their right of action in such a case could not otherwise be asserted in a court of law in this state. Under the practice here, where a transaction is such as to confer upon a party merely an equitable title to a chose in action, he cannot sue thereon in his own name, but must sue in the name of the party in whom the right of action rests, and his own name may or may not be used as usee, accordingly as the plaintiff may elect.

After carefully considering the whole case, we have come to the conclusion that the general demurrer should not have been sustained. The defendant may have open to it one or more of the defenses which it has attempted to assert under the demurrer, but these should be set up by plea or answer, and demurrer is inadequate to raise them.

Judgment reversed.

(10 Ga. App. 85)

WALKER v. STATE. (No. 3,730.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The evidence authorizes the conviction.

2. INSTRUCTIONS.

The charges complained of were not erroneous.

3. CRIMINAL LAW (§ 804\*)—TRIAL—ORAL INSTRUCTIONS—"CHARGE."

Under Penal Code 1910, § 1056, where the judge is requested to put his "charge" in writing, he violates the statute, and a new trial must be granted, if he gives to the jury any instruction, not in writing, as to how they shall

consider the case to be submitted to them, or how they shall make a verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1948-1957; Dec. Dig. § 804.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1064-1072; vol. 8, pp. 7599, 7600.]

Error from Superior Court, Jasper County; J. B. Park, Judge.

Tom Walker was convicted of crime, and brings error. Reversed.

Doyle Campbell, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

POWELL, J. [3] Only the proposition stated in the third paragraph of the syllabus seems to require elaboration. Section 1056 of the Penal Code of 1910 is as follows: "The judges of the superior, city, and county courts shall, when the counsel for either party requests it before argument begins, write out their charges and read them to the jury, and it shall be error to give any other or additional charge than that so written and read." The judge in the present case was duly requested to put his charge in writing, and did so. Before beginning to read from his charge, he addressed the jury, telling them in substance that he was about to read them the charge, and that as he read it to them they should bear in mind that it was not intended as expressing or intimating any opinion of the facts of the case. This statement was omitted from the written charge.

"The words 'charges' and 'charge' in [the section quoted] of the Code embrace any and all final instructions addressed by the court to the jury for the purpose of governing their action in making or aiding to make a final disposition of the case in favor of one litigant or the other." *Harris & Mitchell v. McArthur*, 90 Ga. 216, 15 S. E. 758. In *Black's Law Dictionary* the word "charge," as related to the common-law practice, is defined as follows: "The final address made by a judge to a jury trying a case, before they make up their verdict, in which he sums up the case and instructs the jury as to the rules of law which apply to its various issues, and which they must observe in deciding upon their verdict, when they shall have determined the controverted matters of fact." The term "charge" is not generally considered as embracing such rulings or directions as the court may give prior to the beginning of his final address to the jury. See *Millard v. Lyons*, 25 Wis. 516. The Georgia statute has by the courts of this state been construed a little more strictly against the judge than similar statutes in other states have been construed by their courts. In the *Harris* Case, just cited, our court held that the statute prevented the judge from directing a verdict otherwise

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

than by a written direction," while *Grant v. Connecticut Mutual Ins. Co.*, 29 Wis. 125, holds to the contrary. Cf. *Burns v. State*, 89 Ga. 527, 15 S. E. 748, holding that a mere oral direction to the jury as to the form in which they shall write their verdict was violative of the statute, with *Bush v. State* (Tex. Cr. App.) 70 S. W. 550, holding that the bare statement to the jury of the penalty authorized by the statute was not a charge within the meaning of a similar law prevailing in that state.

Still, with all this strictness with which this statute has been construed in Georgia, there are, of reason and necessity, certain directions which the court may give to a jury which do not fall within any fair definition of the word "charge." For example, suppose the evidence in a case to be over and the arguments of counsel concluded at a late hour in the day. The judge decides not to charge the jury until after supper. He turns to them and orally informs them of this purpose, and instructs them not to enter upon a consideration of the case until they shall have received his charge, and commends to them those other observances which are ordinarily commended to the jury by the judge when they are being detained not in the presence of the court. Certainly such a direction as this would not be considered as a part of the charge of the court, within the purview of our statute. Likewise, if the judge, having committed his charge to writing and being about to read it to the jury, should, prefatory to the reading of it, ask the jury to give him their careful attention. A number of similar directions can be conceived of which would in no fair sense be considered as a part of the charge, and which would not be violative of the letter or the spirit of the law, though orally given. On the other hand, it is equally easy to conceive of instructions or directions that the court might give to the jury, though not formally or explicitly given as a part of the final charge, which would be within at least the spirit, if not the letter, of the Code section. For instance, say that the judge in the supposed case taken above, where the judge is about to adjourn in the late afternoon for the purpose of delivering his charge after supper, should, before taking the recess, say to the jury, if the case were a prosecution for homicide, something like this: "This is an important case, one that is a little unusual, in that the testimony does not present the usual issues made in a murder case, but presents only one issue, murder or nothing, and in order that I may have time the more accurately to prepare instructions on this subject, we will now take a recess," etc. It will be seen that what is apparently a mere direction on the part of the court is in fact a substantial instruction upon the issue that will be later submitted to them,

and in such a case we have no doubt that the judge violates the statute.

The direction complained of in the present instance was not strictly a part of the charge of the court, but was a direction given preliminary and prefatory to his reading the charge to them; but it was an instruction of final nature, an address by the court to the jury for the purpose of governing their action in making or aiding to make a final disposition of the case. It was equivalent to an instruction that the jurors were judges of the facts, that the court had no inclination or intention of encroaching upon their province in this respect, and that nothing in the language about to be said should be so construed. We cannot escape the conclusion that the law was violated. The statute itself, it will be noted, specifically and expressly states that "it shall be error to give any other or additional charge than that so written and read." If it were an open question, we would not hesitate to hold that this statute is not so mandatory in its terms as to prevent an application of the doctrine of harmless error; but an examination of the cases—cases absolutely controlling on this court—will disclose that we are not at liberty to take this view of the matter. Indeed, when we recall that the very object of the Legislature's passing the statute was to cut out the possibility of those unseemly controversies between court and counsel as to what the court in fact did say to the jury, there is good reason for saying that the legislative object cannot be accomplished, unless a new trial is granted for every nonobservance of the statute. There is no consistency in our requiring other men to obey the letter and the spirit of the law, irrespective of their personal views as to its wisdom, if we are not willing to follow our precepts by our example under like conditions. The law commands us to grant a new trial, and for this reason alone we obey.

Judgment reversed.

(10 Ga. App. 82)

LANGSTON v. STATE (No. 3,726.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

HOMICIDE (§ 255\*)—VOLUNTARY MANSLAUGHTER—EVIDENCE.

No error of law appears, and the verdict is supported by some evidence.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 539-541; Dec. Dig. § 255.\*]

Error from Superior Court, Cherokee County; N. A. Morris, Judge.

Will Langston was convicted of voluntary manslaughter, and brings error. Affirmed.

Howell Brooke and Gober & Griffin, for plaintiff in error. J. P. Brooke, Sol. Gen., for the State.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



HILL, C. J. The facts of this case present another of the daily occurring instances showing the monstrous and measureless evil of intoxicating liquors. This hydra-headed and remorseless monster, with ceaseless and tireless energy, wastes the substance of the poor, manufactures burdensome taxes for the public, monopolizes the valuable time of the courts, fills jails, penitentiaries, and asylums, ruins homes, destroys manhood, terrorizes helpless women and innocent children, baffles the church, and mocks the law, and, answering its inexorable demands, "each new morn new widows mourn, new orphans cry, new wrongs strike Heaven in the face." These are the products of a curse imposed, not by the decree of God, but self-inflicted by the voluntary conduct of man, its weak and wicked victim. Judges of criminal courts, speaking from official experience, have grown weary in calling attention to the drink habit as the principal cause of crime, and nothing that the writer could say would add to this manifest truth. But I cannot refrain from saying that, after five years' observation of the cases that have been before this court, three-fourths of the crimes are due directly or indirectly to the excessive use of intoxicants, and that, if the church and the state and public sentiment could unitedly make Georgia sober, the prisons would be vacant, the chain gangs empty, and cities, towns, and country would be filled with prosperous people and happy homes. The grand English premier did not exaggerate when he declared that "greater calamities have been inflicted on mankind by intemperance than by the three great historic scourges, war, pestilence, and famine," and that this evil was "the measure of a nation's discredit and disgrace."

We have been led to say this much because of the sad tragedy disclosed by the horrible facts of this record. A husband, "beastly drunk," goes to his home at night, finds his sick wife in bed, and with brutal curses and violent threats to kill drives her into the night and from home. The accused, their 19 year old son, resents this cruel treatment of his mother, and reproaches his father for his brutal language and cruel conduct. The father, frenzied with liquor, immediately turns on his son, curses him, knocks him down with a chair, cuts him with a knife, and threatens to kill him. The son (as he contended, in self-defense, but, as found by the jury, under the excitement of passion aroused by these attacks) picks up a rock from the floor, where it was placed to prop open the door, hurls it at his father, hits him on the head, and from the wound thus inflicted death ensues on the following day.

A careful review of the evidence convinces us that it largely preponderates in favor of the plea of self-defense. Yet we cannot say that the verdict of voluntary

manslaughter is not supported by some slight evidence, and to this standard of mental conviction we must come before we would be authorized to set aside the verdict on the general grounds. The evidence in support of the verdict is that the son, angered by his father's conduct, "cursed him back," did not decline the struggle and leave the house, and, according to one witness, threw the rock after he had been knocked down and cut, and when his father, although continuing to curse him and threatening to take his life, was not actually advancing upon him and manifesting a present intention to carry out his threats; in other words, that it was a case of mutual combat, and the accused threw the fatal stone with David-like precision and force, angered and provoked by the previous attacks, when there was no actual or apparent necessity for him to have done so in self-defense.

We do not hesitate to state that if it were our province, or we had the right to weigh the evidence and decide the issue of fact, we would grant another trial, because the evidence in favor of the plea of self-defense is so strong, and that in support of voluntary manslaughter, or any other offense, is so weak. Entertaining this opinion of the evidence, we have most carefully examined the assignments, to find, if we could, any material legal error. We have failed in our search. The assignments of error of law consist of objections to several excerpts from the charge. Separately considered, these excerpts contain no material error, and raise no novel, doubtful, or interesting question of law. When they are examined in connection with the entire charge, we are forced to the conviction that the law was fully, fairly, and correctly presented on every issue made by the evidence.

The attending physician testified that shortly before his death the decedent had several convulsions, and he "apprehended" that death would soon follow. This opinion, especially the apprehension of the physician, was admitted in evidence over the objection of the accused. We think the evidence was competent; but, even if not, its admission was harmless error. The decedent did shortly die, and, according to the opinion of the physician, his death was caused by the wound on the head inflicted by the accused.

The evidence showed that the decedent was a man of great violence when under the influence of liquor, and that he was much larger and stronger than the accused. It is contended by learned counsel that the trial judge, without request, should have instructed the jury "as to the law touching the violent character of the deceased and the great disparity in his size and that of the accused." We have no clear opinion or exact knowledge as to what would be the law on this subject that the judge was called upon to charge.

and we have received no assistance from learned counsel on this point. We are therefore inclined to think that the jury, especially where a mutual combat or struggle was shown, could be safely relied upon to deal with these questions without the aid of any rule of law. The violent character of one party, and the relative strength and size of two parties engaged in a mutual combat, or where an assault and struggle took place, so forcibly and necessarily illustrate the issue of guilt or innocence that he would be a profoundly stupid juror who would not give these questions full weight and significance, even without any suggestion from the court as to his right to do so.

We repeat that we affirm the judgment because we find no legal error in the trial, and there is some slight evidence to support the verdict. We doubt not that the learned trial judge, if he has not already imposed a merciful sentence, will do so, and will humanely temper justice with a large and generous clemency.

Judgment affirmed.

(10 Ga. App. 61)

MORSE v. STATE. (No. 3,640.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 805\*)—INSTRUCTIONS—USE OF TECHNICAL TERMS.

It is not error for the judge to charge the jury that "evidence may be autoptic preference," when the meaning of the technical words is clearly made known to the jury in plain, understandable language.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 805.\*]

2. CRIMINAL LAW (§ 762\*)—INSTRUCTIONS—EXPRESSION OF OPINION.

Whether a judge, by language used in his charge to the jury, violates the provisions of the Code, by intimating or expressing an opinion as to what has been proved, will be determined in the light of the entire context; and, though it appears that the language, standing alone, might convey an intimation of the judge's opinion on one of the facts of the case, still if, from an examination of the entire context, it appears that the language was in fact hypothetical, no infraction of the statutory limitation upon the judge's power will be declared, unless, indeed, the very ambiguity of the language is such as naturally to leave upon the minds of the jury the impression that the judge was in fact intimating or expressing an opinion upon some issuable phase of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1754-1769; Dec. Dig. § 762.\*]

3. INTOXICATING LIQUORS (§ 239\*)—ILLEGAL SALE—INSTRUCTIONS—INSPECTION OF LIQUOR SOLD.

Where, in a case involving the question as to whether a certain liquid is an intoxicating liquor, the state introduces in evidence the liquor itself, it is proper for the court to instruct the jury that they may make personal inspection of the liquid, may apply their own senses to it, may look at it, smell of it, taste of it, and thereby determine whether it is or is not

an intoxicating liquor, subject to the limitation that they must not drink such a quantity as that, if it were intoxicating liquor, it would make them drunk.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 239.\*]

4. CRIMINAL LAW (§ 878\*)—EVIDENCE—SEPARATE COUNTS.

A general verdict of guilty, upon an indictment containing two counts charging different offenses, which are in fact, as well as in theory, separate transactions, cannot be sustained, where there is no evidence to support a prosecution upon one of the counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098-2101; Dec. Dig. § 878.\*]

(Additional Syllabus by Editorial Staff.)

5. WORDS AND PHRASES—"AUTOPTIC PREFERENCE."

The expression "autoptic preference" means "real evidence," or "demonstrative evidence"; the word "autoptic" being a good word, with pride of ancestry, though without hope of posterity, but the word "preference" is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father.

Error from Superior Court, Bibb County; W. H. Felton, Judge.

John Morse was convicted of violation of a prohibitory law, and brings error. Reversed.

Jesse Harris, C. A. Glawson, and John P. Ross, for plaintiff in error. W. J. Grace, Sol. Gen., for the State.

POWELL, J. Morse was tried on an accusation containing two counts, the first of which charged the sale of intoxicating liquors, and the other of which charged the keeping of liquors on hand at his place of business.

[1] The first assignment of error is that the court erred in charging the jury as follows: "Evidence may be autoptic preference." Error is assigned as to this charge on two grounds: (1) That the statement is abstractly incorrect; and (2) that it is misleading. Considering these points in reverse order, we may say (to borrow a Hibernicism from the private vocabulary of an ex-justice of the Supreme Court of this state) that the language excepted to is neither leading nor misleading.

[5] As to the other objection—that the language is abstractly incorrect—if incorrectness from a legal standpoint is intended, the objection may be disposed of by citing Wigmore on Evidence, § 1150 et seq. If philological incorrectness is referred to, the objection is more tenable; for, while "autoptic" is a good word, with pride of ancestry, though perhaps without hope of posterity, the word "preference" is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father (see Wigmore on Evidence, § 1150, note 1). Despite all this, we cannot brand the statement as reversible error. This court is

rather liberal in allowing the judges on the trial benches the privilege of big words. Cf. *G., F. & A. R. Co. v. Sasser*, 4 Ga. App. 276, 61 S. E. 505, wherein we refused to reverse the judgment because a judge of a city court used the word "obvious" in his charge to the jury.

Now, lest our manner of treating this exception be regarded as a reflection upon the very able judge of the superior court whose language is under review, let us hasten to explain that the language is all right—that to quote the excerpt alone does him injustice. During the progress of the trial, certain bottles and their contents had been introduced in evidence and were given the jury for their consideration, and the necessity was upon the judge of explaining to the jurors what use they could make of this class of testimony. As to such evidence the older writers used the phrase "real evidence"; but Professor Wigmore in his wonderful treatise, has pointed out that this is not an accurate expression, and has coined a new phrase, "autoptic proference," to express it. Following Wigmore, Judge Felton used this expression, and then most clearly explained and illustrated to the jury, in plain, simple, homely language, just what the big words mean.

[2] 2. The next assignment of error is that the judge, in making this explanation and in applying it to the facts of the present case, intimated or expressed an opinion as to one of the essential elements of the case. Vast quantities of what purported to be intoxicating liquors were found in and about the defendant's place of business. Along with the other evidence, the state introduced two baskets containing half-pint bottles, some labeled "rye whisky," some "gin," and some "peach brandy," and containing liquors resembling in color and odor the intoxicating liquor indicated by the labels on the respective bottles; also a barrel similarly filled. The defendant introduced no testimony, and made no statement in his own behalf to the jury; but he did contend, through his counsel, that the state had not proved that the contents of the bottles were in fact intoxicating liquors. The judge charged the jury that the state had introduced this physical evidence as "autoptic proference"; that the jury had the right to examine it, and, from an examination thus personally to be made by the jurors, determine whether the bottles in fact contained intoxicating liquor or not; and, in this connection, the court said to the jury: "In this case the state has presented in court that which the state claims is whisky. You have a right to examine it, and look at it, and test it, and determine for yourselves whether or not it is whisky. It has been offered for that purpose, and you have a right to so examine it. \* \* \* It is brought into court in order that the jury may have an opportunity of determining, by the application of their own

reason and judgment, that that which the state contends is a fact, to wit, that this evidence offered here is, in point of fact, whisky. You have a right, and the state has given you the opportunity, to determine it. I don't mean by that that you have a right to go out there and get drunk on this. I have no reason to presume any such men would do any such act."

The specific contention is that the judge by the use of the words: "I don't mean by that that you have a right to go out there and get drunk on this. I have no reason to presume any such men would do any such act"—intimated the opinion that, if the jury drank enough of the liquor, they would get drunk, and, therefore, the opinion that the liquor was intoxicating. At first blush, the point appears to be well taken; but, when it is considered in the light of the whole context (that portion of it which has just been quoted, as well as other portions not quoted), we are not certain that the criticism is well taken. The judge was speaking from a hypothetical standpoint, and was endeavoring to convey to the minds of the jury, by a series of illustrations, what use they might make of the physical evidence before them. His statement, properly construed, was simply equivalent to his saying to the jury that wherever the state contends that a certain liquid introduced in evidence before the jury is whisky, and the accused contends that it is not, the jury would have the right to look at it, smell of it, and taste of it, but not to put it to the test of drinking such a quantity of it as that, if it were an intoxicating liquor, it would make them drunk. Of course, one way of determining whether a liquid could intoxicate or not would be to drink a quantity of it and see whether it produced that effect, and the judge was merely explaining to the jury that this test, while perhaps a logical one, was so inconsistent with their duties as jurors that no reasonable man would probably conclude that he, while serving as a juror, would have the right to make it. If this is a correct construction to put upon the judge's language, there was no error in it. However, it will not be necessary for us to rule upon it directly and concretely, for the reason that a new trial is to be granted in the case upon another ground, and it is not at all likely that exactly the same words will be used again; and if there be any such ambiguity in the language as that it would as likely mislead the jury into thinking that the judge was expressing an opinion, it is not likely that the same words will be used again, since attention has been called to the matter.

[3] 3. One of the exceptions in the record challenges the correctness of the instruction, so far as it lays down the proposition that the jurors have the right to inspect,

smell, and taste a liquid introduced in evidence before them for the purpose of determining whether or not it is intoxicating liquor. We realize that some courts of high standing have held that the jurors cannot make any such tests. Some courts say that the jurors may look at it and smell of it, but not taste of it. We believe the true rule to be that they may do all these things. We cannot see why the sense of taste or the sense of smell does not stand upon the same footing in this respect as the sense of sight. As to the determining of the nature and character of some physical things, the sense of sight may be the superior; but as to liquors it is not. With some men the sense of smell is as to liquors the most accurate; with others, the sense of taste. After more or less practical experience, a person with any fair sense of smell can determine, not only whether a liquid is or is not whisky, but also, with a very fair degree of accuracy, what kind of whisky it is, what grade of whisky it is, and what its constituent elements are; that is to say, the approximate ratio, if it be a blend, in which different kinds of liquids have entered into its preparation. It is certainly in the interest of truth—the supreme object of all legal investigation—to let the jurors, who are the final arbiters of the question, apply to its solution the most accurate sense they are capable of applying. In this connection, however, a limitation must be noticed as to liquids claimed to be intoxicating. The very nature of the juror's office and of the effects produced by intoxication make it inappropriate, and, indeed, illegal, that the jury should apply the supreme test of drinking such a quantity of the liquor as to make themselves liable to intoxication; if it, in fact, be of an intoxicating character.

In this connection, one of the present justices of the Supreme Court tells an amusing incident which occurred during his administration upon the trial bench. A case came before him for trial, involving the question as to whether certain almonds, which had been delivered upon a contract of sale, came up to sample. There were introduced in evidence two little sacks of almonds, one containing the sample and the other containing almonds taken from what had been delivered or tendered upon the contract. The judge learnedly instructed the jury as to how they should proceed with their consideration of the testimony, and instructed them upon the duty of "digesting" all the evidence and thus reaching a true verdict. They stayed out all night, and next morning came in with a verdict.

As the jury filed in and indicated their willingness to report, the judge directed the foreman to hand all the papers in the case, together with the exhibits, to the clerk. The foreman replied, "Your honor, here are all the papers, but the jurors got hungry last night and digested the exhibits." This illustrates that the jurors must not make too free a use of the real evidence before them for their consideration. It must be kept in mind, too, that there is a great difference between allowing the jurors to exercise their primary senses of sight, taste, smell, etc., upon real objects introduced before them, and allowing them to make experiments (and to drink the liquor, to see if it be intoxicating, is an experiment) with these objects during their deliberations out of the presence of the court.

There are a number of other assignments of error upon the charge of the court, but we need not discuss them in detail; for they present no new questions, and none of them are meritorious.

[4] 4. There is, however, a compelling reason why a new trial should be granted. As we have already said, the indictment contained two counts—the one charging an illegal sale of liquor, and the other charging the keeping on hand of intoxicating liquor at the defendant's place of business. The jury found the defendant guilty upon both counts; that is to say, they returned a general verdict of guilty, which means in such cases guilty upon both counts. The evidence is overwhelming, so far as the defendant's guilt on the second count is concerned, but there was no evidence whatever as to a sale. The proof would have fully justified a finding (if such an issue had been before the jury) that the accused had the liquors for the purpose of illegal sale; but proof of mere preparedness to commit a crime is not sufficient proof to show that the crime has in fact been committed. The conviction upon the first count cannot be sustained. This being so, the verdict is without evidence to support it. The error is not harmless, for under the indictment and the verdict the defendant could be sentenced to the maximum punishment for each offense, and the sentences might be made cumulative. The two counts stand just as if they were two indictments; and the right to impose sentence, where the verdict is general in such a case, is the right to sentence as for two separate and distinct offenses. The law in this respect is well established. *Hall v. State*, 8 Ga. App. 747, 70 S. E. 211; *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917; *Driver v. State*, 112 Ga. 220, 37 S. E. 400.

Judgment reversed.

(10 Ga. App. 50)

**BROWN v. STATE.** (No. 3,568.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

*(Syllabus by the Court.)***1. HOMICIDE (§ 255\*) — VOLUNTARY MANSLAUGHTER—EVIDENCE.**

On the trial of an indictment for murder, where the offense of voluntary manslaughter is reasonably deducible from the evidence or the defendant's statement to the jury, considered separately or together, a charge on the law of voluntary manslaughter, and a verdict for that offense, were authorized. *Cain v. State*, 7 Ga. App. 24, 65 S. E. 1069; *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540; *Bell v. State*, 130 Ga. 865, 61 S. E. 996; *Strickland v. State*, 133 Ga. 76, 65 S. E. 148.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 255.\*]

**2. CRIMINAL LAW (§ 742\*) — EVIDENCE — IMPEACHMENT—EFFECT.**

The credibility of a witness is exclusively for determination by the jury, and, although a witness may have been successfully impeached, it is left to the discretion of the jury to decide whether his testimony has been corroborated; and, while it would be their duty to disregard entirely the testimony of an impeached witness, unless corroborated, yet they have the right to believe the evidence of a witness, notwithstanding the impeachment, and in the absence of any corroboration. Section 5884, Civil Code 1910, is not intended as an abridgment of the absolute right of the jury to determine as to the credibility of witnesses.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1138, 1719-1721; Dec. Dig. § 742.\*]

**3. HOMICIDE (§ 122\*)—PROTECTION OF CHILD—RIGHTS OF FATHER.**

The right of a parent to protect and defend his minor daughter from seduction or debauchery exists under the law of the state without other qualification than that stated in the statute, to wit, that the act of the parent must be one of *protection* or *defense* against *intended* or *progressing* wrong, and not in punishment or revenge for a past injury. A charge to this effect was applicable to the facts of this case.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 177-181; Dec. Dig. § 122.\*]

**4. INSTRUCTIONS.**

The excerpts from the charge embraced in the sixth and seventh grounds of the motion for a new trial correctly state the law as repeatedly decided by the Supreme Court, and were pertinent and applicable to the evidence.

**5. CRIMINAL LAW (§ 668\*) — STATEMENT OF ACCUSED.**

The right of the accused to make to the jury a statement in his defense is strictly a personal privilege, granted by the statute, and, whether written or oral, the statement must be read or spoken by the accused, and not by his attorney.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1584-1590; Dec. Dig. § 668.\*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Bill Brown was convicted of voluntary manslaughter, and brings error. Affirmed.

See, also, 135 Ga. 656, 70 S. E. 329.

Herbert L. Grice, H. E. Coates, and W. L. & Warren Grice, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

HILL, C. J. Brown was indicted for murder, and was convicted of voluntary manslaughter. His motion for a new trial having been overruled, the case is here for review.

In addition to the usual general grounds, the motion for a new trial contains the following assignments of error:

(1) Under the evidence the killing was either murder or justifiable homicide, and the verdict for manslaughter is contrary to law.

(2) The evidence of only one witness proved the guilt of the accused, and, this witness having been successfully impeached in several material particulars, and the evidence of this one witness not having been corroborated in any material particular, as required by section 5884 of the Civil Code of 1910, there was no credible evidence to support the verdict.

(3) The evidence did not authorize a charge on the law of voluntary manslaughter.

(4) Because the court charged without qualification or explanation that parents and children may mutually protect each other, and there was no evidence to support such charge.

(5) Because the court charged that "a parent may protect his minor daughter from debauchery to the same extent that a husband would be allowed to defend and protect the chastity and virtue of his wife." This was error, for the reason that the evidence did not show that the deceased was engaged in protecting either his wife or his daughter from debauchery.

(6) Because the court charged: "So, if the deceased, Nelson Spivey, assaulted the defendant on the ground that the defendant was committing a sexual act with the daughter of Nelson Spivey, if this was being done, it would be justifiable; but what was done in the past, and to avenge such conduct after its occurrence, the deceased, Nelson Spivey, would not have a right under the law to make the assault and attack upon the defendant, and the defendant would not be deprived of his right of self-defense to resist and repel the assault." There was no evidence of the hypothetical recital in this charge, and it was calculated to injure the defense.

(7) On this subject the court further charged: "That is to say, in the case now on trial, before Nelson Spivey would have been authorized to make an attack upon the defendant, it must appear from the evidence that the defendant and the daughter of Nelson Spivey were then in the act of having sexual intercourse, or that the situation was such at that particular time that, as a reasonable man, Nelson Spivey could not tell whether it was just over, or just about to begin. Under these conditions, a party would have a right to make an assault, even to taking life, and the party against whom the assault was

made would not have the right to resist him, even by taking his life." Error because this statement, without qualification, is not the law of Georgia; and also because there was no evidence to justify the charge, and it was calculated to injure the defendant before the jury."

(8) Because the court charged the jury on the subject of the impeachment of witnesses by proof of contradictory statements, not made under oath, and by proof of bad character, and the weight to be given the testimony of such witnesses, when there had been no attempt by either side to impeach any witness by either of these methods. This was calculated to confuse the jury in weighing the evidence of Della Spivey; a witness for the state, who, as movant insists, had been impeached by proof of perjury, and there was no evidence to justify this charge.

(9) At the conclusion of the evidence, the accused stated that his statement to the jury, made on the previous trial, had been written out by the official stenographer, and he desired to make the same statement on the present trial, and his attorney would read it for him. The solicitor general admitted that the statement proposed to be read was the one which the accused had made at the previous trial, but objected to counsel's reading it. The court sustained the objection, and said to the accused that he could go on the stand and make to the jury just such statement as he saw fit, and the accused did so. It is insisted that this ruling was error, because it deprived the accused of the right, given him by law, "to make to the court and jury such statement in the case as he may deem proper in his defense."

The evidence, substantially stated, is as follows: On the night of the homicide, Nelson Spivey was at home with his wife and several children. About 7 o'clock, a little son came into the room, and told his father that "Della is over yonder in that house with Bill." Della was a daughter, about 17 years old, and Bill was the accused. The house alluded to was a vacant house in a field nearly a quarter of a mile from the home of the deceased. Immediately on getting this information, the decedent took his whip and went out. In 10 or 15 minutes, a shot was heard coming from the direction of the vacant house. Members of the family went towards this house in a few minutes, and found the body lying in a path going by the vacant house, and about 30 feet away from the door. He had been killed by a bullet through the breast.

The girl Della testified that she and Bill (the accused) were sitting on the floor in the vacant house alone, engaged in conversation, when her father suddenly appeared in the door; that she jumped up and ran out by her father, and had gone some little distance, when she heard the report of a gun in the direction of the house from which she had run; that she saw a pistol in the pocket

of the accused while they were sitting on the floor talking; that neither her father nor the accused spoke while she was present, and she noticed nothing in her father's hand when he appeared. She did not know what occurred between the two after she ran away and just previous to the fatal shot. She testified that the accused and herself had not been guilty of any immoral conduct, and were not in the house for that purpose. On cross-examination, she testified that, while she did not remember the details of her testimony on the previous trial, the account she then gave of the occurrence just before the homicide was not the truth; that she was then "scared," as she had never before been in a courthouse, but that now "I am trying to tell this thing like it was." It may be here stated that the only material conflict in her evidence on this trial and the previous one was as to the place where the accused and herself were talking when they were interrupted by the sudden appearance of her father. She then testified that they were standing in the path near the vacant house, and that a third person was present. The remainder of her evidence on both trials is substantially the same. Whatever was said or done by either the accused or the decedent at the time of the homicide is not disclosed by the evidence.

The accused, in his statement to the jury, said that he and a companion met Della in the pathway going by the vacant house; that they stopped and spoke to her; that he was about to pass on, when she told him that she had something to tell him; and that while they were talking the decedent came up to them and asked what they were doing there, and he replied, "Nothing"; that Della ran away, and her father struck him on the head with a whip; that he "broke and ran," and the decedent pursued him, strikingly him repeatedly with the whip. "I fell, and he wore his whip out on me, so he could not use it; broke it up. He run his hand in his pocket and got out his knife, and opened it with his teeth, and, as he got it open, I shot him. That is just the way it was."

Two witnesses in behalf of the accused testified that the body of the decedent was found about 30 or 40 yards from the old vacant house in the path leading by the house through the field; that about 30 yards from the house and 40 yards from where the body was found the appearance of the ground indicated that a struggle had taken place; that a broken whip was on the ground by the body, and an open knife was in the left hand of the decedent. No powder stains were found on the clothing of the decedent.

Several of the grounds of the motion for a new trial relate to the same subject, and we will group them and decide the questions raised in the light of the evidence.

[1] 1. Could the jury reasonably deduce from the evidence and the statement of the accused the crime of voluntary manslaughter?

The evidence alone does not clearly show the grade of the offense; indeed, it does not conclusively prove any offense. The killing by the accused is reasonably inferable from all the circumstances, but what immediately preceded the killing, or what caused it, is more or less a matter of speculation, so far as the evidence discloses. The only witness for the state saw the pistol in the pocket of the accused. She saw her father enter the door, but did not see any weapon in his possession. She immediately fled, and, when some distance from the scene, heard the report of the pistol. The struggle between the two men took place outside the house. The condition of the ground, the broken whip, the open knife, the bullet in the breast of the deceased, proved a struggle. The particulars of this struggle must be left to conjecture, except as stated by the accused to the jury. This statement had such force only as the jury think it right to give it. Penal Code 1910, § 1036. They had the exclusive right to reject it altogether, or accept it altogether; to believe it in part, or disbelieve it in part.

In the exercise of this unlimited discretion, they chose to accept as the truth that part of the statement which authorized the verdict of voluntary manslaughter. They accepted the statement of the accused that the decedent was striking him with the whip. They rejected the statement that the accused did not shoot until the decedent drew his knife and opened it with his teeth, and was about to cut him. They probably rejected entirely the statement relating to the knife. There were circumstances that indicated that the knife defense was fabricated. It was not found by those who first reached the dead man. Its appearance was coincident with the appearance of the friends of the accused. It was found opened in the open left hand of the decedent, and no powder burn or stain was found upon the clothing of the decedent. The jury doubtless thought that the whipping was not an attempt to commit a felony, and therefore the killing was not justifiable, but was an assault sufficient to arouse the excitement of passion and to reduce the crime to manslaughter. If they had concluded that the whipping by the outraged parent, of the man who was apparently intending to debauch his young daughter, was fully warranted, and that the accused had no rights under the law, this court would have approved. If they had thought that the attempted seducer of the daughter should have submitted to the just chastisement inflicted by the angry father, and, without violent resistance," writhed in grace and groaned in melody," keeping time to the crack of the whip, and that the killing of the father by the wrongdoer was murder, the finding would have been in accord with law and justice. The verdict of voluntary manslaughter was not only fully warranted

by the circumstances, and that portion of the statement of the accused which the jury believed, but was largely tempered by mercy.

[2] 2. (2, 8) The evidence of the girl, Della Spivey, was immaterial and irrelevant as relating to the verdict for manslaughter. As above suggested, what she testified on this trial, or the first trial, did not present any theory upon which the grade of the homicide could have been satisfactorily determined. But the credibility of the testimony was entirely for the jury. It was for them to decide whether she was telling the truth on this or on the former trial. Suppose the jury believed her statement that she was "scared" when she testified on the previous trial, but was now telling the truth, would they not have had the right to do so? While section 5884, Civil Code 1910, declares that, "if a witness swear willfully and knowingly falsely, his testimony ought to be disregarded entirely, unless corroborated by circumstances, or other unimpeached evidence," yet the jury may credit even an impeached witness without any corroboration. The whole question of the credibility of witnesses is wisely left to the jury under any and all circumstances, and, though Ananias and Sapphira spoke again, the law would not strike them dead, but would leave their testimony to be weighed and accepted or rejected by the jury. In this case, there were circumstances of corroboration.

[3] 3. (4, 5) It is said in the fourth and fifth grounds of the motion for a new trial that the court erred in charging, "without qualification or explanation, that parents and children may mutually protect each other and justify the defense of the person or reputation of the other;" and also "that there was no evidence to justify this charge." This excerpt is in the exact language of the statute. Penal Code 1910, § 74. We are not aware of any qualification of this mutual right, except that stated in the statute, that the act must be in "protection" or in "defense"; and certainly the statement of this right with the statutory qualification needs no other explanation. We think, also, that the facts fully justified the instruction. If the time ever comes when a father would be authorized to protect and defend his child of tender years, both in her person and reputation, from the machinations of the wicked, it would be when she was absent from home at night in a vacant house, alone with a man armed to prevent interference, and with evil and criminal intent. Under such circumstances, it would be the duty of the parent to protect his child against her own evil inclinations, and to defend her from the wicked designs of the man.

[4] 4. (6, 7) These grounds of the motion for new trial object to excerpts from the charge where the judge applies concretely to the facts of this case the general principle that a father would have the right to protect and defend his daughter from in-

tended debauchery. These excerpts state the law as construed and declared by the Supreme Court in many decisions, notably in *Hill v. State*, 64 Ga. 453; *Gossett v. State*, 123 Ga. 431, 51 S. E. 394; *Drysdale v. State*, 83 Ga. 744, 10 S. E. 358, 6 L. R. A. 424, 20 Am. St. Rep. 340; *Wilkerson v. State*, 91 Ga. 734, 17 S. E. 990, 44 Am. St. Rep. 63; *O'Shields v. State*, 125 Ga. 310, 54 S. E. 120; *Mize v. State*, 135 Ga. 291, 69 S. E. 173. It is insisted, however, that the principle of law which entitles a parent to protect and defend his minor daughter from an intended or progressing wrong of debauchery, and, under such circumstances deprives the wrongdoer of his right of defense, was not applicable to the evidence; that if the accused was guilty of the criminal act of fornication with the minor daughter it was over before the father appeared on the scene, and that the assault which the father made on the accused was not in protection or defense, but in punishment of a past wrong, and therefore the accused had a right to defend himself from the assault and attack of the father. In *Drysdale v. State*, supra, it is held that "a husband may attack for intimacy with his wife in his presence, raising a well-founded belief that the criminal act 'is just over, or about to begin,' and the adulterer, though in danger, has no right to defend himself by using a deadly weapon." In *O'Shields v. State*, supra, the expression, "just over, or about to begin," was construed to refer to a state of facts and circumstances which left doubtful in the mind of the husband the stage of the proceedings which his arrival interrupted. The facts and circumstances of this case proved very clearly that a criminal act had been committed or was intended. Whether it was "just over, or about to begin," was not so clear; but they were surely sufficient to justify in the mind of the father a doubt as to the "stage of the proceedings his arrival interrupted." Where a father finds his 17 year old daughter in a vacant house alone at night, away from any nearby habitation, in company with a man fully armed for any emergency, and she immediately flees from the scene, we think the law would be very lenient with the father, and readily give him the benefit of any doubt that the incriminatory circumstances might raise in his troubled and outraged mind. We think the facts and circumstances authorized the trial judge to charge the principle laid down in the *Drysdale Case*, supra, as interpreted in the *O'Shields Case*, supra.

It is insisted that the trial judge, in this connection, committed the same error for which the Supreme Court granted another trial in *Brown v. State*, 135 Ga. 656, 70 S. E. 329. There are two reasons why this contention is not sound: First, the evidence in this record is substantially different from the former trial. Here the minor daughter was found under the circumstances narrated

above with the accused in an old vacant house, some distance from any other habitation, and the circumstances left in doubt the question whether the act of debauchery was "just over, or about to begin." On the former trial, the girl was found in the road, talking to the accused, and a third person was nearby, and there could have been no doubt that if any immoral act had been committed it was completed before the decedent appeared on the scene, for the only inference deducible from the evidence on the first trial was that the immoral act, if it occurred, took place before the accused and the girl left the old house, and the homicide took place in the road near the old house. The second reply to this contention is that the jury in the first trial deprived the accused entirely of his right of self-defense, and found him guilty of murder. On this trial, while they concluded that he was not entirely justifiable in defending himself from the attack of the father, they yet reduced his offense to manslaughter because of such attack.

[5] 5. The right given by the statute to the accused "to make to the court and jury such statement in the case as he may deem proper in his defense" is strictly a personal right. He can write it out and read it to the jury, or he can make it orally; but he must read it or speak it. He cannot delegate this act to his attorney. There are several reasons why it might in some instances defeat the ends of justice, by misleading the jury as to the truth, if the statement of the accused could be read by his attorney. The arts of expression frequently give undue weight to words. It is said of the great preacher, Whitefield, that he could thrill an audience by a most insignificant word. Even his interjections, his "Ah!" of pity, and his "Oh!" of appeal to the sinner, were words of tremendous power, and formed a most effective weapon in his pulpit artillery. The actor, Garrick, himself a marvellous master of expression, said that he would "give a hundred guineas if he could utter the word 'Oh!' as Whitefield did." And so an eloquent attorney by potent elocution and the trick of emphasis, when speaking as the accused, might in some cases, by the mere utterance of the words, "Gentlemen of the jury, before God I protest my innocence," mislead them into thinking that he was really speaking the truth. And, on the other hand, the hesitating manner of one on trial, caused by consciousness of guilt, sometimes of itself would indicate to the jury the truth. The statute, however, is so explicit that it is hardly necessary to give any reason in support of the opinion here expressed. There was no error in refusing to allow the attorney for the accused to read his statement to the jury, although he avouched it as in truth his statement, and although it was admitted that, at the previous trial, he made the statement proposed to



be read by his attorney, and that it was correctly taken down and written out by the official stenographer. The accused was not deprived of his right by this ruling. The judge informed him of his right, and he availed himself of it.

We have given to this case most careful consideration, and are satisfied that no error was committed, and that the verdict was as favorable to the accused as, under the law and the evidence, he had the right to expect.

Judgment affirmed.

(10 Ga. App. 70)

FITZGERALD v. STATE (No. 3,687.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

**1. DISORDERLY HOUSE (§ 4\*)—ELEMENTS OF OFFENSE—"LEWD HOUSE."**

A house may be a "lewd house," within the purview of section 382 of the Penal Code of 1910, which makes it criminal for any person to maintain a lewd house or place for the practice of fornication and adultery, though the house may be devoted chiefly to the carrying on of some other vocation (a boarding house or hotel, for example), if lewd women are accustomed to frequent there and to carry on their practices.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 4, 9-13; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4109.]

**2. DISORDERLY HOUSE (§§ 4, 16\*)—ELEMENTS OF OFFENSE—KNOWLEDGE—EVIDENCE.**

In order to convict an innkeeper of maintaining a lewd house, on the theory that, along with other guests, he allows lewd women to stop at his inn and ply their vocation, it is necessary to show that the innkeeper had knowledge, actual or implied, of the unlawful practices that were going on. Such knowledge may be shown directly or circumstantially, and, where the accused himself was in personal charge of the inn, one of the methods by which he may be charged with this knowledge is to show that his house had acquired a general reputation in the community of being a place in which fornication and adultery were commonly practiced; the sufficiency of such testimony being for the jury.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 4, 9-13, 21-25; Dec. Dig. §§ 4, 16.\*]

**3. DISORDERLY HOUSE (§ 16\*)—EVIDENCE—RELEVANCY—REPUTATION.**

It is no ground for the exclusion of the testimony of one who swears that he knows the general reputation of a house, or of a person, as to lewdness, that he cannot tell the number of persons whom he has heard speak of the matter, or give the names of those from whose conversation he has gained his knowledge of the general reputation as to which he testifies. His examination and cross-examination go to the jury together, to be given such weight as it seems to them to be entitled to under all the circumstances disclosed by his testimony as a whole.

[Ed. Note.—For other cases, see Disorderly House, Dec. Dig. § 16.\*]

**4. CRIMINAL LAW (§§ 419, 420\*)—EVIDENCE—HEARSAY.**

"The hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted." Words may constitute conduct, and, when that conduct is otherwise

relevant in the case, the fact that the person used these words may be proved, notwithstanding the ordinary rule against the admission of hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.\*]

**5. DISORDERLY HOUSE (§ 17\*)—CRIMINAL PROSECUTION—EVIDENCE.**

It is not necessary, in order to make out the offense specified in Penal Code 1910, § 382, that the state should show any particular act of fornication or adultery to have been committed, if the evidence, either directly or circumstantially, is such as to satisfy the jury that the house was kept and maintained as a lewd house; that is, if, notwithstanding lack of proof as to any particular act, the circumstances are such as to satisfy the jury that the practice of fornication and adultery actually went on in the house.

[Ed. Note.—For other cases, see Disorderly House, Cent. Dig. §§ 28-29; Dec. Dig. § 17.\*]

(Additional Syllabus by Editorial Staff.)

**6. WORDS AND PHRASES—"GENERAL REPUTATION."**

"General reputation" is what people in a community commonly say about a thing.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3077.]

Error from City Court of Valdosta; J. G. Cranford, Judge.

J. Z. Fitzgerald was convicted of maintaining a lewd house, and brings error. Affirmed.

Whitaker & Dukes and E. K. Wilcox, for plaintiff in error. Jas. M. Johnson, Sol., for the State.

POWELL, J. The defendant was indicted for violating section 382 of the Penal Code of 1910, which makes it a misdemeanor for any person "to maintain and keep a lewd house or place for the practice of fornication or adultery, either by himself or others." The state relied on what is the usual method of proof in such cases, namely, proof by witnesses that the house in question had a general reputation of being a lewd house, and that certain women who lodged there from time to time had a general reputation of being lewd women, supplemented by proof of certain specific acts of conduct which took place from time to time, and which were indicative of the fact that fornication was probably going on in the house. Only one act of sexual intercourse was directly proved, and it was not shown that the defendant personally knew of this act. The house in question was operated by the accused as a restaurant and lodging house, or a cheaper form of hotel. The proof showed that some good people lodged there from time to time, and that some lewd women stayed there at periods of greater or less duration. The defendant and his son personally conducted the house and looked after the comfort of the the guests.

[1] One of the points stressed in the argument raises the question as to whether a house devoted chiefly to other purposes may

also be a lewd house, within the purview of the statute. It is insisted that merely for an innkeeper to furnish lodging to guests of a lewd character, who, with his knowledge or by his connivance practice fornication in the house during their stay there, more or less transient, does not render the proprietor indictable for maintaining a house for the practice of fornication. We think that a house may be a lewd house, within the purview of the statute, although it is devoted also to other purposes; and if an innkeeper furnishes lodging to lewd guests, and allows them, with his knowledge or acquiescence, to carry on their unlawful practices in his house, he is guilty of violating the statute, notwithstanding the greater portion of his guests may be decent people, and notwithstanding the greater portion of the business carried on in the house may be of a legitimate nature.

[2] 2. In order to convict the proprietor of a lodging house of maintaining it as a lewd house, it is necessary to show, directly or circumstantially, that he knew of the lewd practices which were going on therein, or, if he did not positively know it, that he was in possession of such facts as to charge him with what is commonly known as "constructive knowledge." He cannot shut his eyes to what was going on around him, for the purpose of avoiding knowledge, and then defend on the ground of his lack of knowledge. The plaintiff in error contends that the evidence was insufficient to charge him with knowledge in the present case; no actual knowledge being directly shown. After carefully reading the record, we cannot sustain this contention. In the first place, it is shown that the house had achieved a general reputation in the community of being a lewd house, and that the accused himself personally conducted the place. This alone would be sufficient to authorize the jury to believe that he had such knowledge of the situation as to charge him with culpability. The most common method of making out a prima facie case against a person for maintaining a house of this kind is to show that the house bears such a general reputation in the community, and that the accused, being the proprietor, was a member of the community. Proof of this kind alone has been held sufficient to convict, doubtless on the theory that a person living in a community would hardly be ignorant of a condition which relates to his own affairs and which has become so public and notorious as to become a matter of common information. It is possible, though hardly probable, that such a course of conduct could habitually take place in a house which a person was managing as to call the attention of the community to its lewd character, and as to make it a matter of general reputation in the community, without that person knowing something of this conduct. At any rate, it is almost always considered by the courts as sufficient proof to convict (so far as this element of

the case is concerned) to show that the house bears the general reputation of being a lewd house. Besides that, in this case there were certain transactions between women and men which occurred in the presence of the accused, and which ought to have informed any reasonable man that his house was being used for purposes of prostitution. Indeed, in the light of all the evidence, it is hardly probable that the things could have taken place which the witnesses swear took place without a reasonably watchful innkeeper knowing that lewd women were making a resort of his house for the purpose of carrying on their practices.

[3] 3. A motion was made to exclude the testimony of a certain witness, who, on direct examination, had testified that the reputation of the house was bad, and that the general reputation of the women who stayed there was that they were lewd, and, on cross-examination, testified that he had heard people on the streets talking about it; that he could not tell how many, but that he was sure there were as many as half a dozen, and maybe more; that he could not be exact as to how many; and that he knew nothing of the place of his own knowledge. The objection to this testimony was that the witness disclosed that he did not have such a knowledge of the general reputation of the place as to make his testimony admissible on that subject. We think that his testimony was properly admitted. The witness qualified by stating that he knew the general reputation. This rendered his testimony prima facie admissible. It was allowable for the accused, on cross-examination, to show the extent of his knowledge as to the general reputation, and if the cross-examination had disclosed that he had no knowledge of the general reputation of the place, it would have been the duty of the court to exclude the testimony. We do not think that the cross-examination in this case was such as to disclose the witness' lack of knowledge on the subject of the reputation of the place.

[8] General reputation is what people in a community commonly say as to a thing. A person may know it, without having talked to very many in the community. He may know it without being able to give the names of any great number of persons with whom he has conversed on the subject. For instance, there are many of us who know that this man or that bears a good or bad general reputation in the community, and yet, if we were called upon to give the names of those persons with whom we had discussed the character of the person in question, we would find it difficult to furnish the names. The common consensus of popular opinion on the subject may be firmly fixed in our minds, though we have forgotten or are unable to recall the separate transactions or conversations from which we gained our knowledge of the matter.

[4] 4. The court permitted a witness to tes-

tify that he was on a train one day coming into Valdosta (where the house in question was located); that he sat on a seat to himself; that a woman came up and engaged him in conversation, and asked him where he was going; that he told her that he was going to Valdosta; that she said she was going there, too; that he asked her if she was going to visit relatives; that she said, "No," that she was up "on a pleasure trip," and stopping at the defendant's house; that she then said "I charge \$2 for my pleasure." He further testified that when the train reached Valdosta the woman got off and did in fact go to the house of the defendant. This testimony, so far as it related to the conversation on the train, was objected to on the ground that it was hearsay, and the court overruled the objection. One of the ways of proving that a house is a lewd house is to prove that it is frequented by lewd women. Of course, for a lewd woman to go to a house on a single occasion would not characterize it as a lewd house; and if this evidence, which was objected to, stood alone, there would be no doubt that it would be wholly inadequate to authorize a conviction. It would be necessary to show many other things, one of which would be knowledge, actual or constructive, on the part of the accused that this woman who went to his house was a lewd woman. This testimony, if admissible at all, was only a link in the chain of circumstantial evidence. It must be remembered, however, that the state would be permitted to show by a number of different witnesses that on a number of separate occasions individual lewd women went to the defendant's place, for the purpose of showing that they went there in such numbers as that he must have known that his house was being used as a lewd resort. Therefore the real point raised by the objection before us for decision is whether the woman's language, used on the train, could be proved for the purpose of showing that she was in fact a lewd woman.

The defendant contends that her conversation (in the absence of the defendant) could not be proved for the purpose of showing the lewdness of her character—that it was mere hearsay. As Professor Wigmore says in his work on Evidence (section 1768): "The prohibition of the hearsay rule, then, does not apply to all words of utterances merely as such. If this fundamental principle is clearly realized, its application is a comparatively simple matter. The hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted." Words, like acts, may constitute conduct, and the expression, "verbal acts," is not uncommonly found, and it is used to express the notion of words having probative value as conduct. Now, if this woman in question had been guilty of lewd conduct on the train, had committed such acts as in the

minds of all reasonable men would have characterized her as a whore, certainly the state could have proved those acts, though committed outside of the defendant's presence, for the purpose of showing that she was a lewd woman, and could have coupled this with other evidence showing that this woman, thus proved lewd, had subsequently stayed in the defendant's house. Indeed, in the present case, the state proved the lewdness of a number of boarders at the defendant's inn by showing that they had previously resided in known lewd houses, and counsel seem to have conceded that this form of proof was allowable. The language a woman uses may tend to characterize her as a whore with almost the same certainty as lascivious conduct short of the very criminal act itself. To the ordinary man's mind, for a woman to approach him and to solicit him to have sexual intercourse with her for money would prove her character as a public prostitute, just as much as it would for her to be seen in a lewd house, or to be seen making any of those lascivious displays of herself which are commonly understood as portraying the arts and artifices of a whore. The state in this case puts in evidence this woman's words, in which she says to a stranger, whom she approaches upon the train, that she sells what she called "her pleasure" for \$2, not for the purpose of proving as the ultimate fact that the woman did sell "her pleasure" for \$2, but for the purpose of proving the character of the woman who thus used language consistent only with the abandoned state of mind of the public prostitute. We think that in this view of the case the evidence was admissible as verbal conduct, as a link in the chain of circumstances by which the guilt of the accused was to be proved. Furthermore, even if there be any doubt about the soundness of this conclusion, the result would be the same; for the admission of this testimony, even if erroneous, is, in the light of the whole testimony in the record, merely such an immaterial incident upon the trial as not to require a new trial.

[5] 5. Exception is taken to the following charge of the court: "It is not necessary, in order to make out the offense charged, that the state shall prove that any particular act of fornication or adultery was committed, if you are satisfied that the house was kept as a lewd house." Counsel cite *Coleman v. State*, 5 Ga. App. 766, 64 S. E. 828. In that case the court charged the jury that "It is not necessary for the state to prove that there were acts of adultery or fornication committed at such house." The court further charged the jury that "it would be sufficient if the state proves to your reasonable satisfaction that she [the accused] bears the general reputation of being a lewd woman, and that the house or place kept by her bears the general reputation of being a lewd house or place of prostitution, and that the women

there at that house bear the general reputation of being lewd women, and that men were seen to frequent the place by day and by night." This court held that the charge just quoted was erroneous, that it was necessary for the state to prove that acts of adultery and fornication were committed at the house, and that it was not sufficient for the state merely to convince the jury that the house or the women bore the reputation of being lewd. We pointed out that the ultimate thing which the jury were required to find, before they could lawfully convict the defendant, was that the house was devoted to the practice of adultery or fornication, and that while that fact may be proved by the reputation which the house and its inmates bore, together with corroborative circumstances, and without proof of specific acts of adultery or fornication, still that unless the jury, from this reputation and the other corroborative circumstances, believe that the practices referred to really went on, they would not be authorized to convict. It seems to us that the present charge very clearly conveyed to the minds of the jury the exact distinction which the court made in that case, namely, that they could convict, though the state did not prove any particular act of fornication or adultery, if the evidence satisfied them that the house was kept and maintained as a lewd house; that is to say, as a house in which fornication or adultery was actually practiced. The Coleman Case and the cases therein cited clearly show that a conviction may be had in such cases without proof of any particular act of fornication or adultery, and that to show that a house is maintained and kept as a lewd house is sufficient to authorize the jury to believe that, despite the state's failure or inability to show a particular act, the unlawful practice was nevertheless carried on. After carefully considering the alleged errors, we find no reason for the granting of a new trial.

Judgment affirmed.

(10 Ga. App. 35)

GORDON v. STATE. (No. 3,453.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 785\*)—TRIAL—INSTRUCTIONS—IMPEACHMENT OF WITNESSES.

There was no error in charging the jury that, when a witness has been impeached by contradictory statements previously made, he may be sustained by proof of general good character.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 785.\*]

2. CRIMINAL LAW (§ 553\*) — EVIDENCE — WEIGHT AND SUFFICIENCY — IMPEACHED TESTIMONY.

The evidence authorized the verdict, and no error of law appears.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1252; Dec. Dig. § 553.\*]

(Additional Syllabus by Editorial Staff.)

3. WITNESSES (§ 361\*) — IMPEACHMENT—CORROBORATION—COMPETENCY OF EVIDENCE.

Though witnesses state they do not know that they are acquainted with the general character of the prosecutor, yet if they state that they have been acquainted with him for a long time, or for a given number of years, and that they never heard any one speak ill of him, these facts show substantially that they do know his general character sufficiently to qualify them to swear that they would believe him on oath in a court of justice.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1167–1175; Dec. Dig. § 361.\*]

Error from City Court of Dublin; K. J. Hawkins, Judge.

George Gordon was convicted of an unlawful sale of intoxicating liquor, and brings error. Affirmed.

Adams & Flynt, for plaintiff in error. Geo. B. Davis, Sol., for the State.

RUSSELL, J. [1, 3] 1. A witness for the state testified that the defendant had sold him a quart of liquor. The defendant sought to impeach this witness by proving certain contradictory statements previously made. The state sought to sustain him by proof of general good character, and introduced witnesses who swore that they had known the witness from his boyhood, and, so far as they knew, his reputation was good, and they would believe him on oath. One of the witnesses had lost track of him for two or three years previous to the trial. The judge charged the jury as follows: "I charge you that, when a witness has been impeached by contradictory statements previously made, he may be restored by proof of general good character." The criticism of the charge is that there is no testimony in the case to authorize it; the insistence being that the state wholly failed in its attempt to prove general good character. "Although witnesses may state they do not know that they are acquainted with the general character of the prosecutor, yet, if they state they have been acquainted with him for a long time, or for a given number of years, and that they have never heard any one speak ill of him, these facts show substantially that they did know his general character sufficiently to qualify them to swear that they would believe him on oath in a court of justice." *Hodgkins v. State*, 89 Ga. 761, 15 S. E. 695. See, also, *Watkins v. State*, 82 Ga. 231, 8 S. E. 875, 14 Am. St. Rep. 155.

[2] 2. Although the only witness for the state to the main fact was impeached by contradictory statements previously made, the jury nevertheless had a right to believe his testimony, which made a clean case of guilt.

Judgment affirmed.

(90 S. C. 30)

**SHIRED v. NESBIT et al.**

(Supreme Court of South Carolina. Nov. 11, 1911.)

**1. WILLS (§ 821\*)—CHARGE ON LAND DEVISED.**

A will giving testator's land to his sons, but directing that they take care of the widow and permit her to live at the family home, and providing that at her death the sons should divide the property equally, charged the land with the widow's care.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114-2119; Dec. Dig. § 821.\*]

**2. WILLS (§ 452\*)—CONSTRUCTION.**

Testator will be presumed to have intended to leave his widow without means of support only when that intention is clearly expressed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 968-970; Dec. Dig. § 452.\*]

**3. WILLS (§ 821\*)—DEVISE—CHARGES.**

Under a devise of all of testator's lands to his sons, who were charged to "take care" of the widow, her abandonment of the family home did not waive her claim for support; the requirement for support not being expressly made conditional on her living there.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 821.\*]

**4. WILLS (§ 821\*)—DEVISE—CHARGES—EX-TENT.**

Under a devise of all of testator's property to his sons, who were charged with the care of his widow, such charge upon the devise was not limited to the rental value of the land.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 821.\*]

**5. WILLS (§ 718\*)—DEVISES—CHARGES—EX-TENT.**

By accepting a devise coupled with an obligation, one binds himself to discharge such obligation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1717-1721; Dec. Dig. § 718.\*]

**6. WILLS (§ 821\*)—DEVISES—CHARGES—EX-TENT.**

Under a devise of land worth from \$125 to \$150 to testator's sons, who were charged with the "care" of the widow, it will not be presumed that testator intended to impose upon the sons the entire burden of supporting the widow without regard to her own exertions; the testator, his widow, and the sons all being very poor, and earning their living by daily labor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114-2119; Dec. Dig. § 821.\*]

**7. WILLS (§ 821\*)—DEVISES—CHARGES—EX-TENT.**

Under a devise of land to testator's sons, who were charged with the care of testator's widow, such charge extends to the whole estate, including the income, as well as the land itself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114-2119; Dec. Dig. § 821.\*]

**8. WILLS (§ 821\*)—DEVISES—INCOME—MEAS-URE.**

In enforcing a charge upon a devise, the rental value of land will be taken as the measure of its income, in the absence of evidence of actual income.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114-2119; Dec. Dig. § 821.\*]

Appeal from Common Pleas Circuit Court of Greenville County; Ernest Gary, Judge.  
"To be officially reported."

Action by Caroline Shired against C. D. Nesbit and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Wm. G. Sirrine, for appellants. Adam C. Welborn, for respondent.

WOODS, J. Henry Shired died on January 12, 1902, leaving a will in which he disposed of his property in these words: "Item one. I will and bequeath to my sons William and Fletcher Shired all my property both real and personal. Item two. It is my will that my sons, William and Fletcher Shired, shall take care of my beloved wife Caroline Shired, and allow her to live at my home, and at her death the said William and Fletcher shall divide my property equally between themselves."

The property consisted of a half-acre lot near the town of Piedmont, on which the testator resided, and household furniture; the latter being of insignificant value. The widow retained her residence on the lot for a few months after her husband's death, and then moved to the home of a son by a former marriage, where she still resides. William and Fletcher Shired, sons of the testator by a former marriage, held the land under the will until December, 1908, when by separate deeds they conveyed it to the defendant C. D. Nesbit. Some time after Nesbit acquired title, the widow, Caroline Shired, brought this action against William and Fletcher Shired and the grantee, Nesbit, alleging in substance that by accepting the devise under the will William and Fletcher Shired had undertaken to furnish her with a reasonable support, and that the land was charged therewith, and that the defendants William and Fletcher Shired had not contributed anything to her support, and had not allowed her to live in the house. The defense consisted of a general denial, and the allegation that the plaintiff, by voluntarily abandoning the premises, had forfeited whatever claim she may have had.

The cause was referred to the master, who, after taking testimony, reported that the land was charged with the support of the widow, and that, considering the humble station in life of the testator and his family, he did not intend that the widow should receive for her support from the sons more than the rental value of the land, which he found to be \$36 per annum. The master recommended a sale of the land for the payment of the accrued charge; the purchaser to take the land subject to the charge in favor of the widow of \$36 per annum for her future support. The circuit judge on hearing the case held \$150 per annum to be a reasonable support for the widow, and decreed that she should have judgment against William and Fletcher Shired for arrears of

her support at the rate of \$150 per annum, commencing six months after the date of the death of the testator. On all other points, the report of the master was confirmed. The appeal brings up for review all the issues passed on by the master and the circuit court.

[1, 2] First. Did the will of the testator charge the land with the care of his widow? It will be observed that the whole estate was devised to the sons, and, unless it was charged with the care of the widow, then she was left without any means of support. Such an intention should be attributed to the testator only when clearly expressed. The context, read in the light of the circumstances, must be construed to mean that the sons held the estate subject to the charge for the care of the widow. *Bank of Florence v. Gregg*, 46 S. C. 169, 24 S. E. 64; *Dixon v. Roessler*, 76 S. C. 415, 57 S. E. 203; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138.

[3] Second. The abandonment by the widow of the house did not constitute waiver or abandonment of her claim to be taken care of, for the requirement that the sons should take care of her was not made conditional on her living at the home.

[4, 5] Third. The obligation imposed by the will on the sons was not limited to the rental value of the land. The rule is that one who accepts a devise coupled with an obligation binds himself by his acceptance of the devise to discharge the obligation. *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Dodge v. Manning*, 11 Paige (N. Y.) 834; *Steele v. Korn*, 137 Wis. 51, 118 N. W. 207, 120 N. W. 261, 129 Am. St. Rep. 1051; *Case v. Hall*, 52 Ohio St. 24, 38 N. E. 618, 25 L. R. A. 766; *Davidson v. Coon*, 125 Ind. 497, 25 N. E. 601, 9 L. R. A. 584, and note; 2 Jarman on Wills, 584. Hence, when the sons accepted the devise, they assumed the personal obligation to take care of the widow during her life, and the plaintiff is entitled to a judgment against them for the aggregate arising from an allowance of a reasonable sum for each year's support.

[6] There is a total lack of evidence as to what is necessary to "take care of" the widow in the sense in which the testator used that expression. The only shred of evidence touching the subject is the statement by the witness Searight "it takes about \$150 a year to support her." But we think the record clearly shows that the testator had no intention of imposing on his sons the entire burden of supporting his widow without respect to her own exertions. The testator and his family were very poor, living in the humblest circumstances by their labor, and the widow still earns wages as a laborer. The only direct evidence of the value of the lot disposed of in the devise is that it is worth

about \$125 to \$150. The defendant Nesbit testified that he paid \$175 for it, a price in excess of its value, because it adjoined his land. The witness Searight gave it as his opinion that the house and lot would rent for \$75 per annum, but he gave no reason whatever for this opinion. Even if the value of the property be placed as high as \$175, the charge of \$150 per annum against the sons to "take care of" the widow is out of proportion when set against such valuation; for the property would be entirely consumed by the charge for support in less than two years. It is clear, in view of the small value of the property and the station and habits of life of the parties concerned, that in requiring the sons to "take care of my beloved wife" the testator contemplated exertion on her part and contribution to her support by her own labor. But there is no evidence whatever of the earning capacity of the widow, and nothing in the record upon which a just conclusion can be reached as to what amount the sons should contribute to her support.

[7, 8] Fourth. Under the rule laid down in *Dixon v. Roessler*, 76 S. C. 415, 57 S. E. 203, the charge for the care of the widow extends to the whole estate—to the income derived from the land, as well as to the land itself—and the defendant C. D. Nesbit is liable to the plaintiff for the income received by him since his purchase. There was no evidence of the income actually received by Nesbit from the property. The master and the circuit judge agreed in the view that \$36 a year was a fair rental value of the land, and there is nothing in the evidence warranting the court in disturbing this conclusion. In the absence of evidence of the actual income, the rental value will be taken as the measure of the income from the property. *Griffin v. Griffin*, 82 S. C. 256, 64 S. E. 160.

It is the judgment of this court that the judgment of the circuit court be set aside, and the cause remanded for the purpose of taking evidence and ascertaining what sum should be allowed to take care of the widow.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(39 S. C. 574)

JONES v. WILLIAMS et al.

(Supreme Court of South Carolina. Nov. 7, 1911.)

1. SPECIFIC PERFORMANCE (§ 131\*)—DECREE—CONSTRUCTION.

In a suit for specific performance of a contract with defendant K. to exchange lots, in which plaintiff claimed that defendant W. had purchased K.'s lot with notice of the contract, the decree adjudged that the contract between plaintiff and defendant K. was valid, and that defendant W. had notice of plaintiff's rights when accepting a deed, and that plaintiff was entitled to specific performance, and directed

K. to make a good title to plaintiff on plaintiff making good and sufficient title to him (K.) to her lot." The decree further provided that the court would not then "pass upon the validity of plaintiff's title, because it has not been brought into court, and because it may be necessary that testimony be taken respecting its validity," and directed that plaintiff file her proposed deed in court, and that defendants within a certain time give notice of their acceptance or rejection of the title tendered, accompanied by their grounds of refusal, if they refused the deed. The decree further provided that the deed from K. to W. "be and is hereby canceled and annulled," but also permitted any party to apply for such further orders as might be necessary to carry out the provisions of the decree. *Held*, that the cancellation of K.'s deed to W. was not to be effective until it was ascertained that plaintiff could give good title to the property to be conveyed by her.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 131.\*]

## 2. APPEAL AND ERROR (§ 80\*)—DECREES APPEALABLE—FINAL DECREES.

Since the decree did not adjudicate that plaintiff had a marketable title to her lot, or the ultimate right of title to the lot conveyed by defendant K. to defendant W., either as between such defendants or as to plaintiff's rights, and did not operate to cancel the deed to W. until it was ascertained that plaintiff could give good title, the decree was not final as to the ultimate right of specific performance, so as to be appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 494-509; Dec. Dig. § 80.\*]

## 3. PLEADING (§ 236\*)—DISCRETION OF TRIAL COURT—ALLOWING AMENDMENTS.

The requirement of the decree, in a suit for specific performance of an agreement to exchange lots, that defendant serve upon plaintiff within a stated time any objections to plaintiff's title to her lot, required such objections to be set up by a pleading, so that there was no abuse of discretion in permitting grounds of objection served upon plaintiff within the stated time to be amended by adding other grounds, in the absence of a showing that defendant knew of such additional grounds when the original grounds were served, especially as plaintiff had better sources of information as to any defects in her title than defendant, and did not offer to show her chain of title.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 236.\*]

## 4. SPECIFIC PERFORMANCE (§ 95\*)—DEFENSES—OBJECTIONS TO TITLE—LACHES.

It was as much plaintiff's duty to show a good title to her lot, in a suit to compel specific performance of an agreement to exchange lots, as it was defendant's duty to point out defects in plaintiff's title; and plaintiff cannot complain that defendant was negligent in pointing out defects in plaintiff's title, if she herself did not ascertain such defects before defendant discovered them.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 95.\*]

Appeal from Common Pleas Circuit Court of Williamsburg County; John S. Wilson, Judge.

"To be officially reported."

Action for specific performance by Ella F. Jones against A. H. Williams and another as A. H. Williams & Co. and others. From an order granting a temporary injunction to preserve the status quo pending the suit, and an order allowing amendment of defendants'

grounds of refusal to the acceptance of plaintiff's deed, plaintiff appeals. Orders affirmed, and appeals dismissed.

Willcox & Willcox and Henry E. Davis, for appellant. W. L. Bass and Walter Hazard, for respondents.

JONES, C. J. This is an action seeking the specific performance of a contract between the plaintiff, Ella F. Jones, and the defendant C. M. Kelly, for the conveyance of a certain lot of land belonging at the time of the contract to the defendant Kelly, in exchange for a certain other lot of land alleged to belong to the plaintiff. A. H. Williams & Co. were made parties defendant as the grantees of the same lot in question; the allegation being that the said A. H. Williams & Co. had accepted a deed for the said premises with notice and knowledge of the contract between Kelly and the plaintiff. For what purpose or with what object the defendant Hall was made a party does not appear from the record, other than is shown by the statement that he acted as agent for the defendant Kelly in making the sale of the said lot to his codefendants, A. H. Williams & Co.

The cause was heard by Judge D. A. Townsend, who made a decree, January 22, 1903, adjudging that a valid contract had been made between the plaintiff and the defendant Kelly for the exchange and conveyance of the said lots, respectively, by each to the other; that the defendants A. H. Williams & Co. had accepted, with notice of the rights of the plaintiff, a conveyance from the defendant Kelly of the lot contracted by the latter to be conveyed to the plaintiff, adjudging that plaintiff is entitled to specific performance of the contract, and directing that defendant Kelly make good and sufficient title to plaintiff for said lot "on her making good and sufficient title to him (C. M. Kelly) to her lot, the lot last described in the complaint." But by the terms of the said decree Judge Townsend expressly declined to pass upon the question as to whether the plaintiff could make a good and sufficient title to her lot, declaring that he would not then "pass upon the validity of plaintiff's title, because it has not been brought into court, and because it may be necessary that testimony be taken respecting its validity." By the same decree, it was further directed that the plaintiff should file her proposed deed for her lot with the clerk of said court, within a time fixed, "deed to remain in the custody of clerk until the further order of this court," and the defendants were required within a period named to notify their acceptance or rejection of such title so tendered, "and if they refuse said deed the grounds of refusal shall be served along with the notice."

Leave was also therein granted to any par-

ty to apply to the court, or to a judge at chambers, "for such further orders as may be necessary to carry out the provisions of this decree." The decree further declared "that the deed of conveyance of the lot in question from C. M. Kelly to A. H. Williams & Co. be and is hereby canceled and annulled," but it is apparent from the general tenor and terms of the decree as a whole that this pronouncement of the decree was predicated entirely upon the right of the plaintiff to a specific performance, and that this latter right was held to be dependent upon her ultimate ability "to make good sufficient title to her lot," which she had contracted to convey in exchange. No adjudication appears to have been made by this decree of any rights or equities existing between the defendant C. M. Kelly and A. H. Williams & Co., arising out of the sale and conveyance of the Kelly lot by the former to the latter.

In compliance with the requirements of that decree, the plaintiff filed her proposed deed, and the defendants in due time served a notice of refusal to accept the deed, accompanying the same with a statement of certain grounds for such refusal, setting up alleged defects in the title of the plaintiff to the lot, objecting that the deed should be made to defendants A. H. Williams & Co., and not to defendant C. M. Kelly, and reserving or attempting to reserve the right "to add further grounds of refusal, if any be discovered." A notice by defendant of intention to appeal from the decree of Judge Townsend was duly served, but the appeal was afterwards formally abandoned.

On October 11, 1905, by consent of all parties, an order of reference was made "to take the testimony upon the objections of defendants to accepting plaintiff's deed of conveyance," but no further proceedings were thereafter had in the cause until the year 1910. It appears, however, from the letters and affidavits in the record that during this interval some efforts looking to a statement of the matter in controversy out of court were made by the counsel for the plaintiff, upon the one hand, and the defendants Williams & Co., upon the other.

Some attempt having been made or negotiations begun between the plaintiff and the defendant C. M. Kelly for an exchange of deeds for the lots in question out of court and in disregard of any rights of A. H. Williams & Co., on the 25th of April, 1910, upon the motion of the defendants last named, a temporary restraining order to preserve the status was granted by Judge Wilson, and a rule issued, requiring the plaintiff and the defendant C. M. Kelly to show cause why an injunction against the execution and delivery by the one to the other of them of any deeds for the lots in question should not be continued until the final decree in this suit. Upon hearing the return to this rule, and the affidavits in support of and against the granting of such injunction, which affidavits set

forth substantially the facts and proceedings already recited, Judge Wilson granted an order, continuing in full force the injunction against the execution of the deeds until the further order of the court, but requiring the execution of a proper injunction bond by the defendants A. H. Williams & Co. Upon the same day (May 11, 1910) this order was granted, an order was made, with the consent of the attorneys for all parties, substituting a new referee, instead of the one named in the order of October 11, 1905, already mentioned.

Thereafter, on August 4, 1910, upon due notice, and upon affidavits made by the defendants, who are members of the firm of A. H. Williams & Co., and by the attorneys representing the said defendants, an order was made by Judge Wilson, allowing the said defendants to amend the notice and grounds of refusal to accept the deed filed by plaintiff in pursuance of the decree of Judge Townsend already mentioned; the amendment so granted being the addition of an objection that such deed could not operate to convey a good title, for the reason averred that said plaintiff was and is seised merely of an estate for the life of another in the said premises, and was and is not seised of a fee-simple title therein. In support of the motion of such leave to amend, affidavits, as stated, were submitted to the general purport that the said defendants Williams & Co. had been misled by the acts, conduct, and assurances of the defendant C. M. Kelly into the belief that he was defending in this action the title which he had executed to the said defendants Williams & Co., that the change of attitude of the defendant C. M. Kelly in the case had only recently been apparent, and that the defect in the title of the plaintiff to the lot in question, now sought to be made an objection to the acceptance of the deed by the plaintiff therefor, had been discovered for the first time on the day before such affidavits were made. There are also averments of facts in the affidavits, tending to excuse any delay on the part of the defendants A. H. Williams & Co. in bringing the cause to a final hearing.

The plaintiff now appeals, both from the said order of injunction and from the order allowing the amendment to the grounds of refusal to accept the plaintiff's deed, upon several exceptions to each order.

Considering first the grounds of appeal from the order of injunction, the question substantially presented by these exceptions is as to how far Judge Townsend's decree is to be regarded as a final adjudication of the rights of the parties to this action. Without stating in detail the contentions of the appellant upon this point, analysis of the decree in question will show that it did adjudge that the plaintiff is entitled to a specific performance of the agreement for the exchange of the lot involved in this controversy, provided the respective titles to the same be found to be marketable. But it is apparent upon a



consideration of the entire decree that it was not thereby adjudicated that the plaintiff then had a marketable title to the lot to be conveyed by her, since the question as to the title to this lot was thereby expressly reserved for future determination, and a reference was therein directed for the ascertainment of the facts in this particular. It cannot be said that this decree finally adjudicates the matter of the ultimate right of title to the lot which had been conveyed by the defendant Kelly to the defendants Williams & Co., either as between the said defendants themselves or as regards the rights of the plaintiff.

[1] It is further apparent from the general tenor of the whole decree that the phrases used therein with reference to the cancellation of the deed from the defendant Kelly to the defendants Williams & Co. were intended merely as an expression of the right to which the plaintiff would be entitled in this particular, upon its finally being made to appear that the plaintiff could convey a good title to the lot contracted to be transferred by her in exchange. It is manifest that the language referred to was not intended as a determination of the rights of the defendants Kelly and Williams & Co. as between themselves; and that the cancellation was not proposed to be effective until it should be ascertained that the plaintiff could give a good title to the property to be conveyed by her.

[2] It is clear that there has been no final determination of the rights of the parties, in so far as the ultimate right to specific performance is concerned, and the decree therefore is not a final decree in this particular. Where a decree, even though it does adjudicate some of the issues in a cause, leaves other issues open for future determination, and where the ultimate rights of the parties are left dependent upon the conclusion to be reached upon such unadjudicated issues, it cannot be said that such decree is a final determination of the rights of the parties. *Cauthen v. Cauthen*, 70 S. C. 167, 49 S. E. 821; *Lowndes v. Miller*, 25 S. C. 119; *Adickes v. Allison*, 21 S. C. 259; *Donaldson v. Banks*, 4 S. C. 106. The exceptions to the order of injunction must therefore be overruled, and the appeal from said order is dismissed.

As to the appeal from the order allowing the amendment to the grounds of objection by the defendant to the title tendered by the plaintiff, but three specifications of alleged error appear to be presented for consideration.

The first contention on the part of the appellants as to this order is that the defendants A. H. Williams & Co. are now precluded from testing the validity of plaintiff's title to the lot to be conveyed by her, by reason of the alleged adjudication by the decree of Judge Townsend with regard to the right to the cancellation of the deeds of

C. M. Kelly to the said defendants, in consequence whereof it is claimed by appellant that A. H. Williams & Co. have no interest in the premises in question, and therefore no right of objection to the title to be executed by the plaintiff for the lot to be conveyed by her. The conclusions already announced, however, as to the true purport of the decree of Judge Townsend, shows that no such adjudication of the rights of the said defendants has been made, but that the right to cancellation of the deed to said Williams & Co. was to be dependent upon the question reserved for future determination as to whether the plaintiff could give good title to the lot to be conveyed by her. Indeed, the contention of the plaintiff upon this point is at war with the express terms of the decree of Judge Townsend, which makes use of the plural word "defendants" in describing those who are to have the right to serve notice of objections to the title to be tendered by plaintiff, and does not even by implication limit the right to make such objections to the defendant C. M. Kelly.

[3] It is further urged by the appellant that the allowance of the amendment to the grounds of objection by defendants to the plaintiff's title to the lot in question is in effect a modification of the decree of Judge Townsend, for the reason that by the decree defendants were required to serve upon the plaintiff a notice of such grounds within a limited time, which has long since expired. As to this proposition, it is to be noted that certain "grounds" were served along with the notice of objection and within the time limited by the decree, and it is further to be observed that there is nothing in the terms of the decree which can be construed as declaring that defendants should be precluded thereafter from interposing additional grounds which might subsequently be discovered. The requirement as to the service of the grounds of objection to the plaintiff's title cannot be regarded otherwise than as being in the nature of a direction that the defendant should set up such objections by pleading the same; and such pleading, like all other pleadings in the cause, would be subject to amendment at the discretion of the court.

It is true that it was held in *Brown v. Easterling*, 59 S. C. 472, 38 S. E. 118, that, where by order of one circuit judge a demurrer to a complaint is sustained and leave granted plaintiff to serve an amended complaint within a limited time, a succeeding circuit judge had no power to extend such time and permit such amended complaint to be served at a later date, where the application for such extension is made after the expiration of the time originally fixed; but the question here presented is materially different, as here the defendants did serve the notice and grounds of objection within the time required, and merely sought leave thereafter to amend the same by setting up

an additional ground of objection, not known to defendants or their counsel at the time the original grounds were served. Under these circumstances, in the absence of any showing that defendants or their counsel had knowledge of such additional ground at the time of such original service, it cannot be said that any lack of sound discretion was shown in permitting such amendment, especially in view of the fact that plaintiff had better sources of information than the defendants as to the existence of any defect in her own title, and also for the reason that, using the phrase of Judge Townsend's decree, the plaintiff has not "brought her title into court," which is to say that no offer to show a chain of title has ever been made by her. The case is strictly analogous to that of an amended pleading ordered to be served by a certain day and actually so served, as to which it cannot with any show of reason be contended that no further amendment thereof could ever thereafter be allowed, even to set up facts bearing on the issue which were discovered subsequent to such former amendment.

There is no showing in this case of an abuse of discretion in granting the motion for such leave to amend, but, on the contrary, the amendment allowed appears to be in furtherance of justice. No trial of the issue as to the sufficiency of plaintiff's title has ever been had, and, so far as appears, no reference has ever been held under the order requiring the taking of the testimony upon that issue; and there is no showing that any material delay or other injustice will result from the granting of the order allowing such amendment. No reason has been shown, therefore, for an interference by this court with the discretion exercised by the circuit judge in making such order. *Hall v. Woodward*, 30 S. C. 564, 9 S. E. 684; *Stallings v. Barrett*, 26 S. C. 474, 2 S. E. 483; *Trumbo v. Finley*, 18 S. C. 305; *Chichester v. Hastie*, 9 S. C. 330.

[4] As to the matter of alleged negligence and laches, and as to the alleged lack of good faith on the part of the defendants in applying for leave to make such amendment, there is no showing of a lack of good faith in the particular charged and no proof of such negligence or laches as would defeat the right to set up the matter of defense sought to be interposed. Indeed, in so far as concerns the matter of the delay in bringing the cause to a final determination upon the unadjudicated issues, the record does not show that the parties defendant are in any greater fault than the party plaintiff; and, as to any alleged negligence or laches in the matter of discovering and bringing to the attention of the court the defect now alleged to exist in the plaintiff's title, it was as much the duty of the plaintiff to show a good title, as it was that of the defendant

to point out any defects therein, and the plaintiff had at least an equal opportunity with the defendant to discover such defects. If she did not ascertain the defects in the title now alleged by the defendants at any time prior to the pointing out thereof by the defendants, she cannot complain that the defendants were any more negligent than herself; if she did previously know that such defect existed, she failed herself to do her duty, as good faith required her to bring it promptly to the attention of the court. If no such defect, however, exists in the title of the plaintiff no harm can result from the allowance of the amendment, since the issue as to the sufficiency of the title made by the objections originally filed has never yet been tried.

The orders of the circuit court are affirmed, and the appeals dismissed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 14)

#### STELTS v. MARTIN et al.

(Supreme Court of South Carolina. Nov. 11, 1911.)

#### 1. MORTGAGES (§ 58\*)—REQUISITES—ATTESTATION.

A mortgage not attested by two witnesses is invalid as a legal mortgage, but must be sustained as an equitable mortgage, if actually signed and intended.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 153, 154; Dec. Dig. § 58.\*]

#### 2. WITNESSES (§ 159\*)—COMPETENCY—TRANSACTION WITH DECEDENT.

Under Code Civ. Proc. 1902, § 400, prohibiting a party to testify to transactions with his adversary's decedent, etc., plaintiff could not testify on an issue of execution of a mortgage that he saw the deceased mortgagor execute the mortgage.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 604, 666-669, 671-682; Dec. Dig. § 159.\*]

#### 3. MORTGAGES (§ 74\*)—EXECUTION—EVIDENCE—SUFFICIENCY.

Evidence held to show that decedent signed a mortgage, intending it as such.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 172; Dec. Dig. § 74.\*]

#### 4. LIMITATION OF ACTIONS (§ 22\*)—FORECLOSURE OF MORTGAGE.

A mortgage invalid as a legal mortgage through insufficient attestation, but enforceable as an equitable mortgage, is governed by Code Civ. Proc. 1902, § 111, limiting the time to suits on sealed instruments, other than notes or bonds to pay money only, to 20 years, and not by the 6-year statute.

[Ed. Note.—For other cases, see *Limitation of Actions*, Dec. Dig. § 22.\*]

#### 5. HUSBAND AND WIFE (§ 48\*)—MORTGAGES—PAYMENT—PRESUMPTIONS.

Payment of a mortgage from wife to husband cannot be presumed from his failure to sue to foreclose before or after their separation until her death.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 48.\*]

**6. HUSBAND AND WIFE (§ 176\*)—MORTGAGE BY WIFE—PURPOSE.**

Evidence held to show that a wife's mortgage was given for the benefit of her separate estate, as affecting its validity.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 176.\*]

**7. BONDS (§ 135\*)—AMOUNT OF RECOVERY.**

Generally recovery on an obligation cannot exceed the penal sum stated therein.

[Ed. Note.—For other cases, see *Bonds*, Cent. Dig. §§ 241, 243, 239; Dec. Dig. § 135.\*]

**8. MORTGAGES (§ 489\*)—RECOVERY—AMOUNT.**

A mortgage for the "penal sum of eight hundred dollars" for payment of that amount, "with interest" at a specified rate, is enforceable for the full principal and interest.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1425-1430; Dec. Dig. § 489.\*]

Appeal from Common Pleas Circuit Court of Abbeville County; R. C. Watts, Judge. "To be officially reported."

Action by W. E. Stelts against W. B. Martin and another. Judgment for defendants, and plaintiff appeals. Reversed.

W. N. Graydon, for appellant. W. P. Greene, for respondents.

WOODS, J. The plaintiff, W. E. Stelts, commenced this action on June 15, 1910, against W. B. Martin and Pearl M. Beckwith, devisees under the will of Ina H. Stelts, and W. B. Martin, as executor, to foreclose a mortgage alleged to have been executed by Ina H. Stelts on September 1, 1889. On hearing the pleadings and the testimony taken by the master the circuit court held that, as the mortgage had not been executed as required by law, it could have force only as an equitable mortgage, and that for that reason it became barred by the statute of limitations six years after its maturity. As this conclusion, if correct, was decisive, the circuit judge did not consider the other questions of law made in the pleadings and argument now brought to this court in the exceptions of the plaintiff and the additional grounds for sustaining the judgment submitted by counsel for the defendant W. B. Martin. The defendant Pearl M. Beckwith not only filed no answer to the complaint, but in her testimony admitted that the claim of the plaintiff was just, and expressed her intention to pay her share of it without respect to the result of the litigation. The defendant appeared at the references and in court by counsel, but was not present and offered no evidence. The plaintiff and Mrs. Ina H. Stelts were husband and wife. W. B. Martin and Mrs. Beckwith are children of Mrs. Stelts by a former marriage.

Taking up the points in logical order, without respect to whether they are made in the exceptions or the additional grounds for sustaining the judgment, we consider, first, whether there was evidence that Mrs. Stelts executed a paper having the effect

of either a legal or an equitable mortgage. The plaintiff failed to produce the paper or the persons whose names are written as witnesses on the copy in the clerk's office, or to account for the absence of the witnesses, and, when sworn as a witness, the plaintiff admitted that Mrs. Julia Williams, whose name appears on the record along with that of Mrs. Sassard who did sign as a witness, was not present when the paper was executed. Whatever presumption there may have been of the due execution of the paper from its record was thus destroyed by the direct admission of the plaintiff.

[1] The execution not having taken place in the presence of two witnesses, and not being attested by the signatures of two witnesses, the paper cannot be held to be a valid legal mortgage. But if it was actually signed by Mrs. Stelts as a mortgage, and intended to secure a debt of \$800, it must be treated as an equitable mortgage binding on the parties. *Bryce v. Massey*, 35 S. C. 127, 14 S. E. 768; *Creech v. Long*, 72 S. C. 23, 51 S. E. 614.

[2] On this question of fact, the testimony of the plaintiff that he was present and saw the paper executed was clearly incompetent under section 400 of the Code of Procedure of 1902. All that the plaintiff says with respect to the execution of the paper must therefore be excluded from consideration, as relating to a transaction between himself and his deceased wife. The subject has been considered and the rule of exclusion stated in *Merck v. Merck*, 89 S. C. 347, 71 S. E. 969.

[3] But in letters to Mrs. Beckwith, introduced by the plaintiff, the defendant Martin admitted that his mother signed the paper, received the consideration, and intended to execute a valid mortgage; and Mrs. Beckwith admitted on the witness stand the validity of the plaintiff's claim. From this evidence no other fair inference can be drawn than that Mrs. Stelts signed the paper, and that she intended it to be, according to its purport, a valid mortgage on the property described in favor of the plaintiff for \$800.

[4] We are unable to agree with the circuit judge that a paper, in form a mortgage and lacking a witness or a seal or other formal requisite of a legal mortgage, but valid between the parties as an equitable mortgage, is barred by the statute of limitations six years after its maturity. The paper is more than "a sealed note or personal bond for the payment of money only." It is a sealed instrument importing an obligation to pay money and a lien as between the obligor and obligee upon the land to secure payment. This being so, in a controversy between the obligor and obligee, the action does not fall under the six year statutory

limitation, but under section 111 of the Code of Civil Procedure, providing a limitation of 20 years in "an action upon a sealed instrument other than a sealed note or personal bond for the payment of money only." The instrument was dated September 1, 1889, and fell due according to its terms on the 1st day of December, 1890. The action, having been commenced on June 15, 1910, was not barred by the statute above cited.

Nor is the defendant aided by section 2449 of the Civil Code of 1902, providing that "no mortgage, or deed having the effect of a mortgage, no judgment, decree or other lien on real estate shall constitute a lien upon any real estate after the lapse of twenty years from the date of the creation of the same. \* \* \*" It was decided by a divided court in *Lyles v. Lyles*, 71 S. C. 391, 51 S. E. 113, that the period of 20 years commences to run, not from the date of the mortgage, but from its maturity.

[5] Defendant's counsel further contends that the case is one where the court should infer payment from lapse of time, coupled with other circumstances leading to that inference. Plaintiff, the mortgagee, and his wife, the mortgagor, lived together many years after the paper was executed. Certainly payment could not be presumed from plaintiff's failure to bring an action of foreclosure against his wife while he was living with her. Nor is it to be presumed from his failure to sue his wife after their separation, which occurred six or seven years before the action was brought, for nonaction might well be attributed to delicacy of feeling. So, also, the failure to produce the paper is entitled to little weight as evidence of payment in view of plaintiff's testimony that it had not been paid, and that, after having it recorded, he had put it in his trunk, and had last seen it among Mrs. Stelts' land papers. Besides, the testimony of Mrs. Beckwith and the letters of Martin show an admission of the debt rather than a claim of payment on the part of Mrs. Stelts and the defendants. The letters of Martin show further that the mortgage was burned by Mrs. Stelts.

[6] The facts fail to support the defense that the mortgage was not given for the benefit of the separate estate of Mrs. Stelts, a married woman, and that it was therefore invalid under the statute of 1887 (19 Stat. 819), governing the validity of papers executed by married women at the time this mortgage was given. Mrs. Sassard testified: "I have heard Mrs. Stelts often talk about her affairs, and heard her say that, if it had not been for the money Mrs. Stelts left her, she would have lost her property."

And in one of his letters to Mrs. Beckwith the defendant Martin wrote: "About papa's mortgage, when Uncle John Holcombe was about to break mama up and all looked so dark for her, she was living where Aunt Janie is now. She gave papa a mortgage for \$800. The man at that time wanted \$500 for that place and the house needed repairs, and they thought \$300 would do it, and they wanted to save a home out of the ruins. So Mrs. Sassard was about to move to Charleston, and they got her to witness it, and then papa sent it to Aunt Julia, and got her to sign it. Then they recorded it." This is the only evidence on the subject, and it is affirmative proof that the mortgage was executed and the money actually paid for the benefit of the separate estate of Mrs. Stelts. It also leads to the inference that the money was borrowed and the mortgage executed to enable Mrs. Stelts to pay her creditors, rather than to an inference that the mortgage was executed to defeat creditors.

[7] The general rule is, as respondent contends, that in a suit on an obligation containing the statement of a penal sum the recovery cannot exceed that sum. *Ellis v. Sanders*, 34 S. C. 236, 13 S. E. 417. But when the terms of the paper distinctly provide otherwise, the general rule must yield to the contract of the parties.

[8] The recital of the mortgage is: "Whereas, I the said Ina H. Stelts, in and by my certain note and obligation bearing date the first day of September eighteen hundred and eighty nine, stand firmly held bound unto William E. Stelts in the penal sum of eight hundred dollars, conditioned for the payment of the full and just sum of eight hundred dollars to be paid on or by the first day of December, 1890, with interest at ten per cent per annum after maturity until the said eight hundred dollars is paid, as in and by the said note and conditions thereof, reference being made thereto had, will more fully appear." The penal sum and the principal sum to be paid are the same, but the mortgage expressly provides for the payment of more than the penal sum, namely, the penal sum \$800, and interest thereon. This being the contract, the parties must stand by it. The plaintiff is therefore entitled to a judgment of foreclosure for the sum of \$800 and interest at the rate of 10 per cent. per annum from December 1, 1890.

It is the judgment of this court that the judgment of the circuit court be reversed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(90 S. C. 61)

**WALLACE v. WALLACE et al.**

(Supreme Court of South Carolina. Nov. 15, 1911.)

**1. WILLS (§ 684\*)—DISPOSAL OF TRUST PROPERTY—ACCRUED DIVIDENDS.**

Where a testator devised property in trust to pay to his daughter the annual interest, income, or profits, undivided dividends and profits upon corporate stock held under the trust, which accrued during the life of the daughter, and were represented in part by stock dividends, and in part by the increase in book value of the shares, belonged to the life tenant, and not to the remainderman.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1616-1618; Dec. Dig. § 684.\*]

**2. LIFE ESTATES (§ 15\*)—EQUITABLE ESTOPPEL.**

Where a trust fund belonging to one for life, remainder over, was invested in corporate stock, which stock accumulated a large surplus, the failure of the life tenant to claim the accrued profits, though she knew of their existence, did not estop her from disposing of such profit by her will, for an estoppel is based upon some prejudice to the opposite party from the action or nonaction of the one sought to be estopped.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. § 15.\*]

**3. LIFE ESTATES (§ 20\*)—LOSS—APPORTIONMENT.**

Where property was bequeathed in trust, the income and interest to one for life, with remainder over, and a substituted trustee, who became such long after the creation of the trust, renewed a mortgage, adding as principal a large amount of unpaid interest, due to the life tenant, and the mortgage security failed, the loss must be apportioned between the remainderman and the life tenant, for neither should have an advantage over the other, and each must share the loss as they would have shared it, had it occurred when they first became entitled to the fund, and, furthermore, the will having specifically bequeathed the interest from the fund to the life tenant, the remainderman was not entitled to the entire proceeds of the mortgage security, to the exclusion of the life tenant.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 41; Dec. Dig. § 20.\*]

Appeal from Common Pleas Circuit Court of Richland County; George E. Prince, Judge.

"To be officially reported."

Action by H. B. Wallace, as trustee of Eliza Wallace and in his own right, against Andrew Wallace and others. There was a decree for defendants Murdoch, and plaintiff excepted and appealed, while defendants Murdoch excepted and prosecuted a cross-appeal. Affirmed, with modifications.

The opinion of the circuit judge was as follows:

"This action is brought by the plaintiff as trustee of the estate of the late Miss Eliza Wallace to obtain the construction of the will of the late Col. Andrew Wallace, and to determine the parties between whom the estate is now divisible, and for settlement of said estate and discharge of the trustee, to which action all parties who under any construction of the will might have an interest are made parties.

"The cause was referred to the master

to ascertain and report his conclusions of law and fact, but upon the reference it was agreed by counsel that the master do not report his conclusions of law or his conclusions of fact relative to the ownership of the funds derived from the sale of bank stock; it being agreed that the questions of law and the facts relative to the bank stock be left for the determination of the court. Under this agreement the master has filed his report, to which there is no exception, finding that all parties are properly before the court and the minors represented by their guardians, and that the facts stated in the complaint are true. And the cause came on to be heard before me at the first session of the spring term of the court of common pleas for Richland county.

"There is no dispute as to the facts necessary for the determination of the questions raised, and I shall content myself with briefly stating the substance of the facts necessary for an understanding of the conclusions of law reached upon the questions raised.

"In 1862 Mr. Andrew Wallace died, leaving his will, by which his estate was distributed among his 10 children. By the twenty-first clause of his will he directed that the shares devised and bequeathed to his children, whether delivered or advanced before his death, or whether the same be given specifically or generally in the distribution of the rest and residue, as well that they are to receive upon his death as that which they get after the death of their mother, also any share or shares which may return to them upon the death of any one or more of his children without leaving descendants living at the time of such child's death, as is hereinafter more particularly provided; and all and every estate or interest which his children shall take under his will is 'given to my said children for their respective lives only, and no longer, and such share or interest shall be held for my said children by the following trustees and upon the following trusts and limitations and conditions, and no others; that is to say: I give, devise and bequeath the respective shares of my children \* \* \* and Eliza Wallace to my wife, Mrs. Sarah Wallace, and to my two sons, Edward Wallace and William Wallace \* \* \* the said shares to be held by the said trustees, respectively, to and for the following uses and purposes; that is to say: The shares of my said daughters are to be held by my said trustees in trust for the sole and separate use, benefit and behoof of my said daughters, respectively, for and during the term of their respective lives, and no longer, and neither the corpus nor the income or profits of such shares is to be in any manner liable for the debts, contracts or liabilities, nor to be in any manner under the control of any of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the husbands of my said daughters, respectively, or of any husband either of them may hereafter marry; and I hereby authorize, direct and empower the said trustees to pay over to my said daughters, respectively, during their respective lives, the annual income, interest or profits of their respective shares, taking the receipt of such daughter, respectively, for the same, which receipt alone shall constitute proper acquittance and discharge for such income or profits; and I expressly stipulate and provide that the receipt or discharge of the husbands of my said daughters shall not have the effect of discharging or releasing the trustees from their liability for such income or profits.' By the twenty-second clause of his will he provides: 'Upon the death of any one of my said children, the share or portion hereinbefore given to him or her for life shall be held by such trustees, respectively, in trust for such child or children as my said son or daughter may leave living at the time of his or her death, share and share alike, the child or children of any deceased child of my said son or daughter to take among them the share which their parent would have taken if living. But in the event any of my said sons or daughters shall die without leaving a child or children, or the child or children of any deceased child living at the time of the death of such son or daughter, then the share of such son or daughter shall be equally divided amongst my surviving children and the child or children of a deceased child, these latter taking among them the share which their parent would have taken if living; and the same shall be held subject to all the trusts, limitations and conditions of this will in regard to the shares of my children hereinbefore expressed.'

"Edward Wallace, one of the life tenants and trustees of Miss Eliza Wallace, died during the War, just after his father, unmarried and without issue, Mrs. Agnes Taylor, another life tenant, died without issue on 22d November, 1884, and Mrs. Sarah Wallace, the mother, died in 1880; and the portions of the estate devised them were, under the terms of the will, distributed amongst the surviving children of testator. William Wallace, the last surviving trustee of Miss Eliza Wallace, died on 13th November, 1902, and plaintiff, upon the application of Miss Eliza Wallace, was duly substituted as trustee by this court on the 18th of December, 1902, and as such came into the possession of the estate, a schedule of which is annexed to the master's report.

"All of testator's children are now dead, Miss Eliza having last died unmarried and without issue on 12th December, 1907, leaving a will by which she devised and bequeathed to her grandnephew, A. W. Murdoch, whatever portion of her trust estate she had a right to dispose of. Upon the death of the life tenant, the trustee proceed-

ed to liquidate the estate for the purposes of division, when he was confronted with the difficulty which culminates in this action.

"The master reports the sales and contracts of sale made by the trustee full and fair, and recommends that they be confirmed, and in this I concur, and it is so ordered.

"Three questions are raised, which I proceed to dispose of:

"(1) Whether the limitation over to the trustee of the estate after the death of the life tenant without issue living at the time of her death is too remote?

"(2) If not too remote who are entitled to take thereunder?

"The limitation is to 'my surviving children and the child or children of a deceased child, these latter taking amongst them the share which the parent would have taken if living.' The limitation to surviving children prevents the interposition of the rule as to remoteness. *Selman v. Robertson*, 46 S. C. 263, 24 S. E. 187. And the rule that, where the limitation over is to a class after the happening of an event certain, only those who can bring themselves into the class at the happening of the event will take, excludes the great-grandchildren of the testator. *Clark v. Clark*, 19 S. C. 350; *Hayne v. Irvine*, 25 S. C. 289; *Shanks v. Mills*, 25 S. C. 358; *Brown v. McCall*, 44 S. C. 503, 22 S. E. 823. Therefore the limitation over is good, only the persons answering the description of children of testator's deceased child take to the exclusion of his great-grandchildren, the children of grandchildren who predeceased the life tenant.

"The third question is more difficult, and it is:

"(3) Whether the accretions of the bank stock, as shown by the difference in value of the stock at the time of its acquisition by the trust estate, and the value at the time of the death of the life tenant, due to accumulations in the interval of earnings represented in part by extra shares declared as stock dividends and in part by increase in book value of the shares from the retention of earnings undistributed, should pass to the devisee of the life tenant or to the remaindermen?

"The stock in question does not appear to have been a part of the original trust estate, but is presumably investments made by the trustee for the estate, and is stock in live, going banks now engaged in business in the cities of Columbia and Charleston, and the book value is obtained by adding the undistributed surplus and undivided profits of the respective banks to the par value of the shares. On behalf of the remaindermen, it is contended that the intention of the testator disclosed by his will above quoted is to give the life tenant only such 'annual interest, income or profits' as could be paid over annually to and receipted for by the

life tenant during her life, and all undivided and undistributed accretions or profits beyond these to the remaindermen; and, further, the life tenant is now estopped from claiming and has waived any right she may have had by conduct and acquiescence.

"I do not think that either of these contentions should prevail, and will proceed to state my conclusions as to same: To support the claim of estoppel and waiver, the plaintiff relies upon the positions that the stock dividend of the Bank of Charleston, N. B. A., was distributed in 1893; that the plaintiff was appointed trustee upon the application of the life tenant, and after his appointment furnished the life tenant statements (Exhibits C and D) in January, 1903, and in February, 1907, in which the stock is listed and its par, and in the latter statement the supposed value given; and that the evidence does not show that the life tenant made any claim for these accretions. I do not think, however, that these positions are sufficient to warrant the application of the doctrine of estoppel and waiver against the life tenant. Estoppel and waiver should ordinarily be based upon knowledge on the part of the party to be estopped and some injury or prejudice resulting to the other party from nonaction after such knowledge. The evidence fails to show these necessary elements of estoppel. On the contrary, it may be reasonably inferred from the testimony of the plaintiff and E. B. Wallace, son and administrator of the former trustee, that the life tenant did not have such knowledge; and certainly it cannot be contended that the rights of the remaindermen have been prejudiced by the life tenant's nonaction. Moreover, the will of the life tenant shows that she intended to claim for herself and her devisee everything to which she might be legally entitled. I therefore find and hold that the life tenant and her devisee are not estopped to assert their rights as to this stock.

"With regard to the further question as to whether the increment to the bank stock belonged to the life tenant or to the remaindermen, my conclusions are as follows:

"Miss Eliza Wallace died on 12th December, 1907, leaving of force her will, of which the defendant J. W. Murdoch is the executor, and by which she gave all the property which she had the right to dispose of by will to the defendant A. W. Murdoch. The estate in possession of the trustee for Miss Eliza Wallace consisted at the time of her death, among other property, of the following shares of bank stock: 13 shares of the stock of the National Loan & Exchange Bank of Columbia, of the par value of \$100 each; 9 shares of the State Bank, of the par value of \$100 each; and 19½ shares of the Bank of Charleston, N. B. A., of the par value of \$100 each. This stock was all sold by the trustee after the death of Miss Eliza Wallace, and he now holds the funds deriv-

ed from such sale for the purposes of distribution among the persons entitled thereto. The evidence shows that during the currency of the life estate it was the policy of the several banks in which this stock was held not to distribute their entire annual earnings as dividends among their stockholders, but to retain a considerable part of such earnings and allow the same to accumulate as surplus or undivided profits; and by reason of such accumulations this stock greatly enhanced in value during the time it was held by the trustee, and was sold by him at a sum correspondingly in excess of the amount of the trust fund originally invested therein. The sum realized upon the sale, which represents the enhanced price the stock sold for due to these accumulations of earnings during the currency of the life estate, is claimed by the representatives of the life tenant as earnings or profits to which the life tenant was entitled and which passed under her will; while, on the other hand, this sum is claimed by the trustee as part of the corpus of the trust estate passing to the remaindermen under the will of Andrew Wallace. The evidence shows that on October 1, 1897, 10 shares of the stock of the Central National Bank of Columbia were issued to the trustee of Miss Eliza Wallace, this stock having at that date the book value of approximately \$134.41 per share. In 1903 the Central National Bank of Columbia was consolidated with the National Loan & Exchange Bank of Columbia, and 13 shares of the latter bank were issued to the trustee in lieu of the 10 shares previously held in the Central National Bank of Columbia, the excess of the book value on the 10 shares being thus converted into three extra shares, and upon this new issue each share having a book value of approximately par. At the death of Miss Eliza Wallace, each of these 13 shares had acquired a book value of \$144.02, and the 13 shares have been sold by the trustee at \$150 per share; the aggregate increment received, which the evidence shows to be clearly due to the accumulation of undistributed earnings during the currency of the life estate, being \$528.66.

"As to the 19½ shares of stock in the Bank of Charleston, N. B. A., the evidence shows that these shares represent two blocks of stock which had been held by the trustee or trustees of Miss Eliza Wallace, one block, then represented by a certificate of 5 shares having a book value of \$120 per share, having been issued to the trustee for Miss Eliza Wallace in 1880; and the other block, then represented by a certificate for 8 shares, having a book value of \$155 per share, having become a part of the trust estate of Miss Eliza Wallace upon the death in 1884 of her sister, Mrs. Agnes Taylor. On June 24, 1893, a 50 per cent. stock dividend having been declared by this bank, these blocks of stock were increased, respectively, to 7½ shares

and 12 shares, making the aggregate of 19½ shares, which have been disposed of by the trustee. This stock, when sold by the trustee, had a book value of \$230 per share, and was sold for \$200 per share. The aggregate increment received on account of the enhancement due to the accumulated earnings on both of said blocks of stock amounts to \$2,040. The nine shares in the State Bank were purchased by the trustee in 1903 at \$111 per share, the book value per share being then \$110.72. At the death of Miss Eliza Wallace this stock had a book value of \$115.73 per share, and was subsequently sold by the trustee for \$120 per share, the aggregate increment received, which is clearly creditable to accumulated earnings, being \$42.51.

"The legal question involved is one of some difficulty. The testator by his will gave the shares of his children to trustees, who were directed 'to pay over to my said sons and daughters, respectively, during their respective lives, the annual interest, income or profits of their respective shares, taking the receipts of such daughters, respectively, for the same. \* \* \*'. I regard the direction to pay over the 'income or profits' as in effect the same as a gift of the income or profits, and I do not consider that, by the direction that the trustee shall take the receipt of the daughters for the income paid them, the testator intended to limit the generality of the gift, but only to protect the estate of the daughters from the control of their husbands. In my view, therefore, the inquiry resolves itself into whether or not the increment upon the shares in question should be regarded as income or profits, or as corpus of the trust estate. This question has been fully argued before me, and I have given the same careful consideration. While upon the subject of the distributions of dividends or earnings upon stock between life tenant and remaindermen the courts are much divided, I am of the opinion that the strongest consideration of reason and justice support the rule which apportions such dividends or earnings between life tenant and remaindermen according to the time when such earnings were made, and not according to the chance action of corporate officers in withholding or declaring dividends; and I think that upon the sale of the stock, as here, in which the funds of the life estate have been invested, the increment in value due to the undivided profits or surplus earned and to the credit of the stock, though not declared by the corporation as dividends should be awarded to the life tenant. *Simpson v. Millsaps*, 80 Miss. 239, 31 South. 912. The evidence shows with reasonable certainty the amount of the selling price of the stock in question, which represented the value of the undistributed earnings upon the conversion of the stock into money by sale, and there appears to be no difficulty in fairly apportioning proceeds of

sale between the representatives of the life tenant and the remaindermen according to the equitable rule of apportionment just stated.

"The conclusions I have reached seem to me to be also in harmony with the principles underlying the decision in *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959. I accordingly hold that the increment in question is profit from the bank stock and belongs to the life estate; and it is hereby adjudged and decreed that such increment be paid over by the trustee to the personal representative of Miss Eliza Wallace, or his attorneys herein, this increment amounting in the aggregate, according to the figures already stated, to \$2,631.17. This fund should be paid over as ordered, together with any interest which may have accumulated thereon since the sale of the stock, less the commissions of the trustee.

"As to the Chandler mortgage, when this security came into the hands of the present trustee, it was nearly barred by time and he procured a new mortgage on the same property in substitution, in which he added to the principal \$714 interest then in arrears. The mortgagor is dead and was insolvent, and the security is only worth what the land will bring at the pending foreclosure sale. Holding, as I do, that the value of the security at the time of the investment constitutes the value of the trust estate that passes to the remaindermen, it follows that the principal must be made good from the proceeds of the sale before any part thereof is applicable to the estate of the life tenant, and it is so adjudged.

"It is therefore ordered, adjudged, and decreed: That the sales and contracts of sale of the bank stock made by the trustee and reported by the master be confirmed, and that the master's report be confirmed. That the parties now entitled to participate as remaindermen in the distribution of the trust estate are testator's grandchildren, the children of his deceased children who are living at the time of the death of the life tenant, Miss Eliza Wallace, to the exclusion of his great-grandchildren, the children of his grandchildren who predeceased the said life tenant. Further ordered that from the funds in his hands the trustee, after deducting his commissions, pay the costs and expenses of this suit, including the fees fixed by the court for plaintiff's attorney and the guardians ad litem of the infant defendants; next, that he pay to J. W. Murdoch, executor of Miss Eliza Wallace, or to his attorneys herein, the sum hereinbefore adjudged to pass under her will, less his commissions in the same; and that he divide the balance into seven equal shares, and distribute one equal share thereof among testator's grandchildren, children of testator's respective children who were alive at the date of the death of the life tenant, to wit: (1) One share to the children of Dr. John Wallace, (2) one



share to the children of Wm. Wallace, (3) one share to the children of Alfred Wallace, (4) one share to the children of Mrs. Murdoch, (5) one share to the children of Mrs. Pearson, (6) one share to the children of Mrs. Evans, and (7) one share to the children of Mrs. Yates—all of whom are named in the sixth paragraph of the complaint, to the exclusion of the other defendants herein; and upon such distribution being made the trustee be discharged from any and all further trusts and liability."

Green & Green, for plaintiff. Melton & Belser and J. E. Belser, for defendants.

GARY, A. J. This action involves the construction of the late Col. Andrew Wallace's will, and was brought by the plaintiff as trustee of Miss Eliza Wallace for the purpose of determining the persons to whom her estate descended, and the manner in which it is to be distributed.

The facts are fully stated in the decree of his honor, the circuit judge, which is set out in the report of the case.

[1] The first question that will be considered is whether there was error on the part of his honor, the circuit judge, in his ruling that the accretion of the bank stock, as shown by the difference in value of the stock at the time of its acquisition by the trust estate, and the value at the time of the death of the life tenant, due to accumulations in the interval of earnings, represented in part by extra shares declared as stock dividends and in part by increase in book value of the shares from the retention of earnings undistributed passed to the devisees of the life tenant, and not to the remaindermen. Where property is given in trust, the interest, income, or profits of which is to be paid to one for life, and the principal paid to another, after the death of the life tenant, questions of difficulty frequently arise in determining whether certain receipts and profits are to be regarded as income which is to go to the life tenant, or as corpus belonging to the remainderman. As a rule, the life tenant takes the interest on a trust fund from the death of a testator, but, of course, it is subject to testamentary provisions.

In the case of *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959, a mother transferred bank stock to a trustee, "to pay the dividend, income, issues and profits thereof, as they may accrue, to me for and during the term of my natural life, and at my death to continue the collection of the same, and divide them, that is the income and profits equally between my said daughters, for and during the terms of their natural lives," with directions for sale and division of the stock among the issue of the daughters in remainder. At the time of the transfer, undivided profits had already accrued, and while dividends were declared, and received by the mother every year, other profits were made and accumulated until the bank closed its business

and distributed its assets, when the accumulated profits amounted to 400 per cent. in all. It was held that the cestui que trust for life was entitled to all the profits which accumulated after the date of the deed, but that profits already accrued at that time were a part of the corpus of the trust estate. In that case his honor, the circuit judge, decided "that the accumulated dividends are certainly profits of the stocks, and the general rule in such cases is that the profits inure to the life tenant, and to the same purport are the terms of this trust. Although there is some conflict in the authorities upon the question, it appears to me that upon principle and sound reason plaintiff is entitled to the relief demanded." In reviewing this ruling the Supreme Court said: "It is admitted that the circuit judge announced the correct rule as to all dividends declared, ordinary or extraordinary; but the trustee suggests that it does not apply to a case like this, where the extra profits have never been declared as dividends at all, so that they could not be paid over 'as they accrued,' but were retained in the bank, which, now closing out, proposes to pay these accumulated profits to the stockholders along with the original stock. He insists that in such case the rule is that the enhanced price of stock by reason of dividends earned, but not declared, will be considered as capital, and must be reinvested for the benefit of the remaindermen, and cites authorities for the doctrine. Upon general principles there may be some force in this view; but here the trust deed is the law of the case. The plaintiff had the right to make or not to make the deed as she thought best, and making it she had the right to frame the terms as she pleased; and she made them so strong that we do not feel authorized to disregard them in favor of any supposed general rule of practice upon the subject. \* \* \* We hold that all the issues and profits which accrued after the deed was executed belong to the plaintiff, the cestui que trust, for life." The words in that case which were construed to include the enhanced value of the shares of stock are similar to these in the present case, and there is no difference in principle between the two cases; but, even if this was an open question, the authorities cited in the argument of the respondent's attorneys show that this rule is just and reasonable and should be followed.

The exceptions assigning error in this respect are therefore overruled.

[2] The next assignment of error on the part of the circuit judge which will be considered is as follows: "That he erred in holding under the facts and circumstances of this case that the life tenant was not estopped, and has not waived any rights she may have had, to claim the accretions upon said bank stock; whereas he should have held that her action in placing these shares in the hands of her trustee, the plaintiff, as

part of the trust estate, her silence and the failure to claim the same during her lifetime, coupled with the facts disclosed by the letters and exhibits of the trustee to her, were sufficient to show knowledge, acquiescence, and waiver on her part, and prevents her from devising the same." For the reasons stated by the circuit judge, this exception is overruled.

[§] The last assignment of error is as follows: "That his honor erred in holding and adjudging that from the proceeds of sale under the Chandler mortgage held by H. B. Wallace, trustee, the original sum loaned to the Chandlers should be made good to the remaindermen before any part of the proceeds of such sale should go to the representatives of the estate of the life tenant; whereas it is submitted he should have found and adjudged that the Chandler bond and mortgage for \$2,000 was given to H. B. Wallace, trustee, to secure \$1,286 belonging to the trust estate, and \$714 belonging to the individual estate of Miss Eliza Wallace, and, so holding, should have adjudged that the said bond and mortgage were owned by the trust estate and the individual estate of Miss Eliza Wallace in proportion to these amounts, respectively, and that the representatives of the estate of Miss Eliza Wallace, the life tenant, were entitled to share in all proceeds of sale of the mortgaged property in proportion to the individual interest and ownership of Miss Eliza Wallace in said bond and mortgage."

In the case of *Hagan v. Platt*, 48 N. J. Eq. 206, 21 Atl. 860, the rule is thus correctly stated in the syllabus of the case by the court: "When a fund is held in trust for the benefit of one person for life, and to go to another in remainder, and a loss of a part of the fund occurs arising out of insufficient security of a particular investment, such loss is to be apportioned between the tenant for life and remainderman, in the proportion which the principal sum involved in the insufficient security bears to the interest due upon it at the time when the security is realized upon, and the amount of the loss determined." In the case of *In re Tuttle*, 49 N. J. Eq. 259, 24 Atl. 1, the principle is thus stated: "The remaindermen claim that, as it is less than the principal invested, it all belongs to them, that the responsibility for all loss to the fund must be charged to the life tenant. This insistence throws the responsibility, for the management of the trust, upon the life tenant, and that is not right. If the trustee can be charged with negligence or bad faith, he should be held responsible, but, if he be not so chargeable, and a loss happens from causes over which neither he nor the life tenant nor the remaindermen had control, it should not fall upon the life tenant alone. The trust does not exempt the remaindermen

from possible perils through failure of investments, and throw these perils entirely upon the life tenant. The trust is instituted so that a person impartial between the life tenant and remaindermen may put the fund in a situation where it will not only yield income, but also be safe. If that situation fails, the loss should be equally apportioned between the innocent life tenant and remaindermen, according to their respective rights, at the time the loss is ascertained, and the apportionment of it is made."

This rule was also followed in the case of *Parker v. Seeley*, 56 N. J. Eq. 110, 38 Atl. 280. In *Cox v. Cox*, L. R. 8 Eq. 343, where a similar question was involved, Sir William M. James, V. C., said: "The true principle in all these cases is that neither the tenant for life nor the remainderman is to gain an advantage over the other, neither is to suffer more damage in proportion to his estate and interest than the other suffers from the default of the obligor. The two must share the loss in the same way as they would have shared it, had it occurred when they first became entitled in possession to the fund."

Furthermore, in considering the first question presented by the exceptions, we announced the conclusion that the life tenant was entitled to the income, interest, and profits on the shares of stock, even when they arose from the enhanced value of the corpus, for the reason that such was the intention of the testator, as shown by the language of the will. Therefore, the income, interest, and profits cannot be taken from the estate of the life tenant, and used for the benefit of the remaindermen, without violating the provisions of the will.

This exception is sustained.

It is the judgment of this court that the judgment of the circuit court be modified in accordance with the principles herein announced, and that in all other respects it be affirmed.

JONES, C. J., and WOODS and HYDRICK, JJ., concur.

(30 S. C. 25)

LUNDY v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO. et al.

(Supreme Court of South Carolina. Nov. 13, 1911.)

1. APPEAL AND ERROR (§ 1078\*)—EXCEPTIONS—WAIVER.

Exceptions not argued on appeal are deemed withdrawn.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

2. APPEAL AND ERROR (§ 1057\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action for negligent death of an employé, any error in excluding from evidence written notice given decedent to show that he

knew of the danger was harmless, where other evidence established his knowledge of the facts which the notice was intended to prove.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.\*]

### 3. APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR—INSTRUCTIONS.

In an action against a telephone company for death of a lineman, any error in instructing as to the duties of a city along whose streets electric and telephone lines are maintained was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

### 4. TRIAL (§ 296\*)—INSTRUCTIONS—CONSTRUCTION AS WHOLE.

In an action against a telephone company for death of a city electrician while working on the company's pole, omission of an instruction to state that to render the company liable its negligence must have proximately caused the injury was not error, where another instruction required such finding.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.\*]

### 5. ELECTRICITY (§ 14\*)—WIRES—CARE REQUIRED TO PREVENT INJURY.

One operating electric wires in streets must use a very high degree of care in their construction, repair, inspection, and maintenance to prevent injury to others.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.\*]

### 6. ELECTRICITY (§ 19\*)—ELECTROCUTION OF LINEMAN—INSTRUCTIONS—NEGLIGENCE.

In an action against a telephone company for death of a city electrician, who was electrocuted while at work on the company's pole through breaking of a telephone wire, which became charged with a dangerous current from electric light wires beneath, an instruction ignoring an issue whether the telephone company was negligent in suspending the wires was error.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.\*]

### 7. NEGLIGENCE (§ 136\*)—PROVINCE OF COURT AND JURY.

Negligence is a mixed question of law and of fact; it being for the court to define negligence, but for the jury to determine whether it existed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

### 8. ELECTRICITY (§ 14\*)—ELECTROCUTION OF LINEMAN—CARE REQUIRED.

In an action against a telephone company for the death of a city electrician while working on the company's pole, caused by contact between a breaking telephone wire and an electric light wire beneath, it was not error to instruct that failure to adopt all usual appliances and methods to prevent contact and hurtful passage of current through another wire is a breach of duty to the public.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.\*]

### 9. TRIAL (§ 191\*)—INSTRUCTIONS ON FACTS—REFUSAL.

In an action against a telephone company for death of a city electrician, caused through contact between a broken telephone wire and a light wire beneath, an instruction that if one of ordinary prudence, in such circumstances as surrounded decedent, would have tested the telephone wires to ascertain if they were safe before bringing himself in contact with the wires while standing upon or in contact with a tele-

phone cable, etc., plaintiff could not recover, was properly refused as embodying a charge on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431; Dec. Dig. § 191.\*]

### 10. TRIAL (§ 250\*)—INSTRUCTIONS—APPLICABILITY TO CASE.

In an action against a telephone company for the death of a city lineman while at work on the company's pole, an instruction that where an employé chooses a dangerous way of performing his work, instead of a safe way, which was equally open to him, he is guilty of negligence which will preclude recovery, was properly refused, being applicable only to the relation of master and servant, which was not involved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. § 250.\*]

### 11. DEATH (§ 93\*)—PUNITIVE DAMAGES.

In an action for negligent death, to sustain recovery of punitive damages, it is unnecessary that plaintiff's right thereto be established by any particular fact, if all the facts considered together show such right.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 98; Dec. Dig. § 93.\*]

### 12. ELECTRICITY (§ 13\*)—INJURY THROUGH CONTACT WITH WIRES—LIABILITY.

A telegraph or telephone company is not liable for injury to persons coming in contact with its wires unless it was negligent.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 6; Dec. Dig. § 13.\*]

### 13. NEGLIGENCE (§ 1\*)—DEFINITION.

"Negligence" is failure to use that degree of care which one of ordinary intelligence and prudence might reasonably be expected to use in the particular circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

### 14. ELECTRICITY (§ 14\*)—TRIAL (§ 194\*)—ELECTROCUTION OF LINEMAN—INSTRUCTIONS.

In an action against a telephone company for death of a city electrician while working on the company's pole, caused through contact between wires, an instruction, that the company must keep its wires "perfectly" insulated and must use the "utmost care" to keep them in that condition, was erroneous as invading the jury's province and as requiring a greater degree of care than the law imposes.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14; Trial, Dec. Dig. § 194.\*]

Hydrick, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Richland County; J. W. De Vore, Judge.

Action by Minnie C. Lundy, Charles Lundy's administratrix, against the Southern Bell Telephone & Telegraph Company and another. Judgment for plaintiff, and the named defendant appeals. Reversed and remanded.

The following are appellant's exceptions:

"(1) That his honor erred in allowing the plaintiff, Mrs. Minnie C. Lundy, to testify, over the objection of defendant's counsel, that since the death of her husband she had been working in a hosiery mill for the support of herself and child; that prior to her

marriage she had not been accustomed to do that kind of work, but that since her husband's death she had been compelled to do that kind of work for support. The error being that said testimony was irrelevant, in that it was not responsive to any allegation of the complaint and did not tend to prove any element of damage for which the defendants were responsible, and was prejudicial to the defendants, in that it tended to inflame the minds of the jury by showing that by reason of the alleged negligence of the defendants the plaintiff had been subjected to unusual and unaccustomed hardships.

"(2) That his honor erred in permitting the witness Talley Harth to testify, over objection of defendant's counsel, as follows: 'Q. What practice or rule or regulation did you adopt with reference to your linemen going upon this pole, with regard to the use of gloves? Did you have any or none? A. I did not require them to use gloves in working on telephone wires. Q. In your opinion, as representing the city and in control of that, did you consider it necessary or proper to make any such regulation? Mr. Belser: We object. His opinion is not competent, and speculative. The Court: I think he can express his opinion. A. I saw no reason why he should wear rubber gloves to handle telephone wires any more than to handle a telephone.' The error being that it was solely for the jury to say, under the facts of the case, whether or not the failure of the deceased to wear rubber gloves was negligent, and it appearing that the deceased was in the employ of the witness at the time of the accident, and the witness being a stranger to both defendants, any regulations which he may or may not have adopted, or his opinion as to whether or not such regulation was proper or necessary, was entirely incompetent, and the jury may have concluded that the deceased, having obeyed the regulations and used all precautions required by the witness, as his employer, was not negligent in the failure to use rubber gloves, as charged in this defendant's answer.

"(3) That his honor erred in not admitting in evidence the 'Notice to Employees,' signed by the deceased, and reading as follows: 'Southern Bell Telephone and Telegraph Company. Notice to All Employees. The attention of linemen, inspectors, repairmen, and all employees of this company, having occasion to climb poles or work upon the same, or in or upon the underground conduits of this company, or upon the central office apparatus, or any other part of the property of this company, is hereby called to the hazardous conditions surrounding such work. Every such employee is hereby notified to carefully inspect each pole before climbing same, and to thoroughly test each and every pole, both above and below the surface of the ground, to avoid accidents.

Cross-arms, platforms, steps, and other attachments placed upon poles, should be carefully inspected before depending upon same for support. All employees of this company, who have occasion to work on the pole lines, and other parts of the property or plant of this company, where there are high current wires, owned either by this company or other companies, or persons or firms, are specially warned of the extra hazardous conditions surrounding such work, and notified to observe such extra caution as the conditions require, and in each and every instance to be provided with rubber gloves, and all other available means of protection. Each and every employee of this company is required to provide themselves with such tools as may be necessary for them to perform the labor for which they are employed by this company. Southern Bell Telephone and Telegraph Co., W. T. Gentry, Vice President and Gen'l Manager. I, the undersigned, hereby acknowledge receipt of the above rule and notice, and acknowledge that I have carefully read the same, am acquainted with its provisions, and recognize its utility. [Signed] Charlie Lundy, Employee. Dated this third day of August, 1904.' The error being that said paper was competent, in that the signature of the deceased thereto had been identified and proven by the witness R. F. Walker, and said paper was relevant, in that it tended to show knowledge on the part of the deceased of the dangers and perils of the place in which he was working at the time of his death, and of the precautions which should and could be used to obviate and escape such dangers.

"(4) That his honor erred in not admitting in evidence the 'Notice to Employees,' signed by deceased, marked 'Exhibit 1' for identification, and reading as follows: 'Southern Bell Telephone and Telegraph Company. Notice to All Employees. The attention of linemen, inspectors, repairmen, and all employees of this company, having occasion to climb poles or work upon the same, or in or upon the underground conduits of this company, or upon the central office apparatus, or any other part of the property of this company, is hereby called to the hazardous conditions surrounding such work. Every such employee is hereby notified to carefully inspect each pole before climbing same, and to thoroughly test each and every pole, both above and below the surface of the ground, to avoid accidents. Cross-arms, platforms, steps, and other attachments placed upon poles, should be carefully inspected before depending upon same for support. All employees of this company, who have occasion to work on the pole lines, and other parts of the property or plant of this company, where there are high current wires, owned either by this company or other companies, or persons or firms, are specially warned of the extra haz-

ardous conditions surrounding such work, and notified to observe such extra caution as the conditions require, and in each and every instance to be provided with rubber gloves, and all other available means of protection. Each and every employé of this company is required to provide themselves with such tools as may be necessary for them to perform the labor for which they are employed by this company. Southern Bell Telephone and Telegraph Co., W. T. Gentry, Vice President and Gen'l Manager. I, the undersigned, hereby acknowledge receipt of the above rule and notice, and acknowledge that I have carefully read the same, am acquainted with its provisions, and recognize its utility. [Signed] Charles Lundy, Employé. Dated this ——— day of ———.

The error being that said paper was competent, in that the signature of the deceased thereto had been identified and proven by the plaintiff, Mrs. Minnie C. Lundy, and said paper was relevant, in that it tended to show knowledge on the part of the deceased of the dangers and perils of the place in which he was working at the time of his death, and of the precautions which should and could be used to obviate and escape such dangers.

"(5) That his honor erred in charging plaintiff's first request to charge, as follows: 'Where a city has authorized a telephone and electric light and power company to use its streets and public places to erect the necessary poles and string its wires thereupon, and to otherwise permit and allow them to conduct and operate their business in the usual manner of telephone and electric light and power companies, such city does not thereby assume or become chargeable with the duty of inspecting such poles and lines, nor maintaining them in safe condition for the protection of persons using the streets or using such poles in the performance of their duties, but its duty extends only to the general supervision over such companies, and it is only liable for injuries caused by defects when it itself has been negligent, after actual or constructive notice of any defect. The duty of properly maintaining, operating, and inspecting their poles and wires, and taking the proper care to protect all persons who have a right to use such poles or to come in proximity to the wires strung thereon, rests upon the telephone or electric companies so operating and maintaining such poles and wires, and if any person is injured by the negligence of such companies on account of a failure to erect the poles and string the wires properly, and to keep the same in safe and proper condition by reasonable and proper inspection, such company or companies are liable therefor.' The error being: (a) That said request does not state a correct proposition of law in regard to the duties of a city along whose streets electric and telephone lines are constructed and maintained, when applied to

the case at bar, in that it is alleged in the complaint, and appears by the testimony, that the city of Columbia and deceased bore to each other the relation of master and servant, and the fact that deceased, at the time of his death, was at work for his master, the city of Columbia, on the poles of this defendant, does not absolve said city from the duties which it owed to the deceased as master. (b) That he failed to instruct the jury, in connection therewith, that, in order to render such electric or telephone company liable, its or their negligence must be the proximate cause of the injury sustained.

"(6) That his honor erred in charging the plaintiff's second request to charge, as follows: 'Where wires charged with a deadly current of electricity are strung along the streets of a city, the degree of care required to prevent injury to property or persons on the streets, or who have the right and duty to go about or in proximity to such wires, is governed by the amount of danger attending such use of the highways by the owner of the wires, and it is a general proposition that electricity is an invisible and impalpable force, highly dangerous to life and property, and those who make, sell, distribute, use, or handle it are bound to exercise care in proportion to the danger involved, and that those using the public streets for electric wires carrying a dangerous current are bound to use a very high degree of care in the construction, repair, inspection, and maintenance of such lines to prevent injury to those lawfully going upon such ways, or who may come in contact with such wires.' The error being: (a) That it was a charge upon the facts, in that it was for the jury to say what degree of care should be exercised by this defendant under the circumstances of the case. (b) That this defendant was only bound to use ordinary care, and not a very high degree of care, under the circumstances of the case. (c) That said charge was erroneous and misleading, in that it failed to distinguish between the duty owed an electric lineman in the position of plaintiff's intestate, at work upon defendant's pole, and the general public, passing along the public streets and highways, and held this defendant to the same degree of care to prevent injury to persons lawfully at work upon its poles, where the public have no right to go, as to prevent injury to persons using the public streets.

"(7) That his honor erred in charging the jury the following portion of the plaintiff's fifth request to charge: 'And it is held, as a matter of law, to be negligence on the part of the company to suspend wires in such a position that, in the event of their breaking or falling, they will become charged with a dangerous current of electricity from wires underneath.' The error being: (a) That he charged the jury as to matters of fact, when

he stated that the particular act therein mentioned constituted negligence, and under the testimony in this case said charge in effect was that this defendant was guilty of actionable negligence. (b) That said request does not state a correct proposition of law, in that it is not negligence, as a matter of law, on the part of a company to 'suspend wires in such a position that, in the event of their breaking or falling, they will become charged with a dangerous current of electricity from wires underneath,' but in every such case it is a question of fact to be determined by the jury whether or not the stringing or suspension of wires in such position constitutes negligence.

"(8) That his honor erred in charging the jury the following portion of the plaintiff's sixth request to charge: 'Failure to adopt all usual appliances and methods to prevent contact and hurtful passage of the current through another wire is a breach of duty to the public.' The error being that since, at the time of his death, Charles Lundy was upon one of the poles of this defendant, where the general public has no right to go, said charge was erroneous, in that it held this defendant to a higher degree of care than the law requires under such circumstances.

"(9) That his honor erred in refusing this defendant's fourth request to charge, which was as follows: 'If the jury believe from the evidence that a man of ordinary prudence, exercising ordinary care for his own safety under such circumstances as surrounded Charles Lundy at the time of the accident, would have tested the telephone wires to ascertain if they were safe before bringing himself in contact with said wires while standing upon or in contact with the telephone cable, and without such prior test should, in the exercise of ordinary care, have kept clear of the said cable and its supports, and that Lundy, at the time of this accident, failed to do so, and that such failure was a proximate cause of the accident, without which the same would not have occurred, then the plaintiff cannot recover, and the jury must find for the defendants.' The error being that said request stated a correct principle of law applicable to the facts of the case and the issues raised by the pleadings, and was not covered by his honor in his general charge.

"(10) That his honor erred in refusing this defendant's sixth request to charge, which was as follows: 'Where an employé, in discharging the duty required of him, has the choice of two ways in performing it, one entirely safe and the other obviously and greatly dangerous, adopts the dangerous way, and is in consequence injured, he is, as a rule, guilty of negligence which will bar a recovery based on the defendant's negligence, and he cannot relieve himself of the consequences of such contributory negligence by showing that it was customary to perform the duty in the dangerous way.' The error

being that said request stated a correct proposition of law applicable to the facts of the case and the issues raised by the pleadings, and was not covered by his honor in his general charge.

"(11) That his honor erred in refusing this defendant's eighth request to charge, which was as follows: 'The jury are instructed that in this case there is no evidence to support a verdict of punitive or vindictive damages, and that such damages cannot be awarded against the defendants.' And in charging the jury that they could award punitive or exemplary damages 'in case the wrongful act, neglect, or default of the defendants was the result of recklessness, willfulness, or malice.' The error being that there was no evidence of recklessness, willfulness, or malice on the part of this defendant, and no evidence of any willful, wanton, reckless, or intentional misconduct or breach of duty by the defendants, and his honor should not have submitted the issue of punitive damages to the jury.

"(12) That his honor erred in charging the jury the following portion of plaintiff's ninth request to charge: 'A company maintaining electric wires over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go, either for work, business, or pleasure, to prevent injury. It is the duty of the company under such conditions to keep the wire perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places.' The error being: (a) That said charge does not state a sound proposition of law, in that this defendant was bound under the law to use only reasonable care under the circumstances of the case, and not the 'utmost care,' as charged by his honor. (b) That it was a charge on the facts, in that he thereby stated what acts were necessary to constitute due care in the maintenance of such wires."

Nelson, Nelson & Gettys and Melton & Belser, for appellant. B. L. Abney and John J. Earle, for respondent.

GARY, A. J. This is an action, by the administratrix of the estate of Charles Lundy, deceased, for damages on account of the death of her husband, Charles Lundy, alleged to have been caused by the joint and concurrent negligence, recklessness, willfulness, and wantonness of the defendants. The complaint alleges: That the defendants at the time hereinafter mentioned were corporations doing business in the city of Columbia and respectively owning and maintaining plants, poles, and wires, suspended on poles therein. That on or about the 11th day of June, 1906, the defendants carelessly, negligently, willfully, and wantonly had failed to properly and safely insulate their respective wires, and to inspect the same, and

to keep the same in a proper and safe condition, and carelessly, negligently, recklessly, willfully, and wantonly had suffered their respective wires to cross and come in contact with each other, and, by rubbing against each other, to wear away the insulation thereon, whereby, on or about the 11th day of June, 1908, and while the said Charles Lundy in the performance of his duties was on one of the poles of the said Southern Bell Telephone & Telegraph Company on Main street in said city, and when he came in contact with a wire or wires, of the said Southern Bell Telephone & Telegraph Company, a powerful, dangerous and deadly current of electricity passed, and was conducted from the wire or wires of the said the Columbia Electric Street Railway Light & Power Company, along, through and over the said wire or wires of the said Southern Bell Telephone & Telegraph Company, with which the said Charles Lundy was in contact, and into the body of the said Charles Lundy, whereby he received a fatal shock. That the duties the said Charles Lundy was then performing were the arrangement and the working with or on certain lines or wires of the city of Columbia, connected, or to be connected, with the said poles of the said defendant Southern Bell Telephone & Telegraph Company, and that said duties were being performed for the city of Columbia. The defendants denied the allegations of negligence and intentional wrong, and set up the defenses of contributory negligence and assumption of risk. The jury rendered a verdict in favor of the plaintiff, against the defendant Southern Bell Telephone & Telegraph Company, for \$20,000, and the said defendant appealed upon exceptions which will be reported.

We proceed to consider the exceptions.

First and second exceptions:

[1] These exceptions were not argued by the appellant's attorneys, and must be considered as being withdrawn.

Third and fourth exceptions:

[2] These exceptions assign error on the part of his honor, the presiding judge, in refusing to allow the defendant telephone company to introduce in evidence certain papers, entitled "Notice to all Employees" which the signature of Charles Lundy showed had been received by him several years previously, while he was in the employment of the telephone company. The papers were offered for the purpose of showing that Charles Lundy had knowledge that it was dangerous to handle electric wires. Even conceding that the ruling was erroneous, it was not prejudicial, as the testimony showed that Lundy was an experienced lineman, and there was other testimony to the effect that Lundy had knowledge of the facts which the papers were intended to prove.

Fifth exception:

[3] Assignment of error "a" cannot be sustained, for the reason that the charge in

this respect, even if erroneous, was not prejudicial to the rights of the appellant.

[4] Nor can assignment of error "b" be sustained, as the charge in this respect must be considered in connection with the entire charge, when it will be seen that the presiding judge instructed the jury that the telephone company was not liable unless its negligence was the proximate cause of the injury sustained.

Sixth exception:

[5] It is axiomatic that the caution which an ordinarily prudent man is bound to exercise, in the operation of dangerous instrumentalities, must be greater than in those cases not attended with danger. And, as electric wires in streets are liable to become exceedingly dangerous, unless properly guarded, it necessarily follows that those operating such appliances are required to exercise a very high degree of care in their construction, repair, inspection, and maintenance, in order to prevent injury to others. *Parsons v. Electric Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800.

Seventh exception:

[6] This charge eliminated from the consideration of the jury the question whether there was negligence on the part of the telephone company in suspending the wires.

If the wires were properly suspended, then their breaking or falling, whereby they became charged with a dangerous current of electricity, from wires underneath, would not render the telephone company liable for an injury resulting therefrom, in the absence of negligence on its part.

[7] "Negligence" is a mixed question of law and fact. It is the duty of the court to define negligence, but it is the province of the jury to determine whether it exists in a particular case.

The charge of the presiding judge was at variance with the rule thus stated in the case of *Parsons v. Electric Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800: "The extent to which wires conveying deadly electric currents should be insulated or otherwise guarded *must be decided by the jury, under the facts of each case. No rule of law can be laid down on the subject.*"

Under the said charge, it is hardly conceivable how the jury could have rendered any verdict, except for the plaintiff, as they were not permitted to consider the question of negligence. This exception is sustained.

Eighth exception:

[8] So much of the request as is set out in the exception is an exact reproduction of the language of the court in the case of *Parsons v. Electric Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800, and this exception is overruled.

Ninth exception:

[9] The presiding judge properly refused the request on the ground that it embodied a charge on the facts. *Weaver v. Railway*, 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep.

934; *Martin v. Railway*, 84 S. C. 568, 86 S. E. 993; *Turbyfill v. Railway*, 86 S. C. 395, 88 S. E. 687; *Finch v. Railway*, 87 S. C. 190, 69 S. E. 208.

Tenth exception:

[10] In refusing the request mentioned in this exception, the presiding judge assigned the following reasons: "Now the sixth request I refuse to charge you, because that request distinctly sets forth the relation of employé, which is the law that governs master and servant. The first request which I charge you did not have any reference to employé or master and servant; the sixth does. I do not think the sixth is applicable to this case." These reasons show that the request was properly refused.

Eleventh exception:

[11] As this case must be remanded for a new trial, we deem it advisable not to comment upon the testimony, but merely to state that there was testimony tending to show that the plaintiff was entitled to punitive damages. Besides, even though no particular fact may be sufficient, alone, to show that the plaintiff was entitled to punitive damages, nevertheless, when considered together, they may have that effect. *Railroad v. Partlow*, 14 Rich. 237; *Dantzler v. Cox*, 75 S. C. 334, 55 S. E. 774; *Wertz v. Ry.*, 76 S. C. 388, 57 S. E. 194; *Rhodes v. Cotton Mills*, 87 S. C. 18, 68 S. E. 824.

Twelfth exception:

In the case of *Parsons v. Electric Co.*, 69 S. C. 305, 48 S. E. 284, 104 Am. St. Rep. 800, the court uses this language: "The rule as to the degree of care, in the use of electricity, is the same as in the use of steam and other agencies—the care must be proportionate to the danger. In determining the danger, it is the duty of those in control to have in view all the surroundings, including the contiguity of other wires, and their liability to fall and come in contact with the dangerously charged wires. As said by the Supreme Court of New Jersey in *Anderson v. Jersey City Electric Light Co.* [63 N. J. Law, 390] 43 Atl. 655: 'Care in this sense means more than mere mechanical skill; it includes circumspection and foresight with regard to reasonably probable contingencies.' The failure to adopt all usual appliances and methods to prevent contact and hurtful discharge of the current through another wire is a breach of duty to the public. This view is supported by the almost unbroken current of authority"—citing numerous cases.

[12, 13] A telegraph or telephone company is not liable in damages for injuries sustained by persons coming in contact with its wires, unless it was guilty of "negligence," which may be defined as the failure to exercise that degree of care which a person of ordinary intelligence and prudence might reasonably be expected to exercise, under the circumstances of the particular case.

While it is true that a telegraph or telephone company is only bound to exercise ordinary care, nevertheless a person of ordinary intelligence and prudence is expected to use greater caution in dealing with very dangerous instrumentalities than in those cases where there is less danger.

Questions of negligence arising in cases where injuries have been sustained through contact with electric wires in the streets are to be determined, like all other questions of negligence, by the jury, upon the facts in the particular case, unless they are only susceptible of one inference.

[14] Therefore, when the presiding judge charged that it was the duty of a telegraph or telephone company to keep its wires perfectly insulated, and that it must exercise the utmost care to keep them in that condition, he not only invaded the province of the jury, but required of the telegraph or telephone company a greater degree of care than the law imposes in such cases.

This exception is therefore sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

JONES, C. J., and WOODS, J., concur.

HYDRICK, J. I concur in the opinion of Mr. Justice GARY, except as to the disposition of the ninth exception. I am unable to see wherein the defendant's fourth request embodies a charge upon the facts. But there was no prejudicial or reversible error in refusing the request, because substantially the same instruction as is therein requested was given to the jury in other parts of the charge.

(90 S. C. 138)

STATE v. GARLINGTON et al.†  
(Supreme Court of South Carolina. Nov. 13, 1911.)

1. CRIMINAL LAW (§ 1167\*)—APPEAL—HARMLESS ERROR—INDICTMENT.

Where accused were found guilty upon the fourth count only, the question of whether the other counts sufficiently charged an offense is immaterial on appeal, in absence of prejudicial error in admitting evidence under such other count.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101-3106; Dec. Dig. § 1167.\*]

2. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of immaterial evidence is not reversible in absence of a showing of prejudice to accused therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

3. CRIMINAL LAW (§ 1168\*)—APPEAL—HARMLESS ERROR.

Any error in refusing to entertain a motion by accused at the close of the state's evidence for the direction of a verdict, because of the trial court's practice of hearing such mo-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied December 1, 1911.



tions only after all the evidence was in, was cured where, after accused's refusal to put in any evidence, the motion was renewed and refused after argument when the court offered to permit accused to put in evidence; accused not having been prejudiced by the ruling on the original motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3136; Dec. Dig. § 1168.\*]

**4. CRIMINAL LAW (§ 699\*)—DISCRETION OF TRIAL COURT—ORDER OF ARGUMENT.**

Matters of detail as to the order in which the arguments of the state and accused shall be made is ordinarily for the trial judge's sound discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1655, 1656; Dec. Dig. § 699.\*]

**5. CRIMINAL LAW (§ 645\*)—TRIAL—ARGUMENT—RIGHT TO OPEN AND CLOSE—WAIVER.**

An accused who has the right to open and reply may waive either or both of such rights.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1507-1509; Dec. Dig. § 645.\*]

**6. CRIMINAL LAW (§§ 763, 764\*)—TRIAL—INSTRUCTIONS—PROVINCE OF JURY.**

A requested charge that on a prosecution for larceny a strong presumption arises that there was no felonious intent if the taking was open, and that, if there was no subsequent attempt to conceal the property and an avowal of its taking, such presumption must be rebutted by clear and convincing evidence, was properly refused as invading the jury's province and violating the constitutional inhibition against the court's expressing an opinion as to the weight of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764.\*]

Appeal from General Sessions Circuit Court of Richland County; George E. Prince, Judge.

"To be officially reported."

John W. Garlington and another were convicted of fraudulent breach of trust, and they appeal. Affirmed.

Dial & Todd, Christie Benet, R. E. Carwile, and B. L. Abney, for appellants. Solicitor W. Hampton Cobb and J. W. Thurmond, for the State.

JONES, C. J. The appellants, having been brought to trial upon an indictment containing five counts, were found guilty upon the fourth count only, and now appeal to this court from the judgment and sentence.

The fourth count, upon which the conviction was had, charges a breach of trust by the said defendants by the conversion to their own use of the sum of \$55,596 in money, of the property of the Seminole Securities Company, intrusted to the defendants and converted to their own use with fraudulent intention. It is alleged in the first ground of appeal that there was error in the refusal of a motion made by the defendants at the trial to quash the first, second, and third counts of the indictment upon certain grounds

then stated. In the view taken by this court, however, it is not necessary here to set out the grounds of this motion in detail; but it is sufficient to say that the motions involved no charge of duplicity or improper joinder of counts, but were merely demurrers to the legal sufficiency of the averments contained in the said three counts.

As the defendants were acquitted by the verdict upon each of the counts so sought to be quashed, it is somewhat difficult to perceive how they could have been prejudiced by any alleged error in refusing to quash these counts. It is true that it is charged by the appellants in this exception that, by reason of the refusal to quash these counts, certain evidence was admitted as relevant and competent which could not otherwise have been introduced, and that thereby the defendants suffered prejudice. While, however, it is so charged in general terms that irrelevant and incompetent evidence was so admitted, it has not been made to appear that either of the defendants has thereby been prejudiced.

[1] The defendants having been found guilty upon the fourth count only, the question as to whether any crime was sufficiently charged in the other counts of the indictment becomes purely speculative, and it need not be considered in the absence of any showing of prejudicial error in the admission of evidence in support thereof. *State v. Dalby*, 86 S. C. 367, 68 S. E. 633.

The second and third exceptions assign error in the admission of testimony as to the value of the stock of the Carolina Agency Company at a time subsequent to the transfer of such stock by the defendant Garlington to the Seminole Securities Company; it being contended that only the value of the stock at the time of the transfer was relevant or material. Assuming that the evidence in question was immaterial and irrelevant, no showing has been made that any prejudice has resulted to either of the defendants in consequence of its admission.

[2] Even if it be true, as claimed in argument by appellants here, that "the subsequent value could not throw any light on the issue," it does not follow that prejudicial error was committed in receiving this evidence. If a circuit judgment is to be reversed in every instance in which any evidence is admitted which does not throw light upon the issue, there would be few cases in which the granting of a new trial would not be rendered necessary by the intrusion of some particle of testimony. The contention in these exceptions being merely that the evidence in question was irrelevant, and there being no allegation nor showing of prejudice to the defendants by reason of its admission, it is not necessary to consider the question of its materiality

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

to the issue under the count of the indictment upon which the appellants were convicted.

[3] The fourth, fifth, sixth, and sixteenth exceptions seek to present the question as to whether there was error in refusing to entertain a motion made by the defendants at the conclusion of the evidence in behalf of the state for the direction of a verdict of acquittal. Upon this point the record shows that, at the close of the evidence in chief, upon a motion by the counsel for defendants for the direction of a verdict of not guilty, the presiding judge would not then entertain the motion, announcing it to be his practice not to consider such motions until the entire evidence in the case was concluded. It further appears, however, that after said ruling has been made, the defendants announced that they would introduce no evidence, whereupon the motion for a direction of a verdict of not guilty was renewed, and, after full argument, was refused by the presiding judge. Thereafter the presiding judge ruled that the defendants would be permitted to introduce evidence in their own behalf, if they so desired stating that he would allow such evidence as matter of right on part of the defendants.

If there was any error, therefore, in the original ruling of the circuit judge upon this point, it was clearly cured by the subsequent decision allowing the defendants to offer evidence in their own behalf. Practically the action of the presiding judge in this particular was tantamount to acceding to the request of the defendants that their motion for the direction of a verdict might be heard, and, if refused, they should then be permitted to offer evidence in their defense. This motion for direction of verdict having thus been heard at the conclusion of the evidence on behalf of the state, and the defendants having thereafter been given full opportunity to introduce evidence in their own behalf, they cannot be permitted to decline to take advantage of such opportunity, and thereafter be heard to complain of a ruling alleged to be erroneous, which did not in any way deprive them of any substantial right, and which is not shown to have in any degree affected the result of the trial.

The seventh exception alleged error in refusing to grant the said motion for the direction of a verdict of acquittal upon each of the counts of the indictment. As, however, the defendants were in fact acquitted upon all the counts except the fourth, it will only be necessary to consider this exception in so far as it relates to that particular count. With reference to this count the averment is in general terms that there was no evidence of any conversion by defendants to their own use of any moneys as alleged nor any testimony or evidence tending to show any breach of trust with fraudulent intent committed by said defendants. Without undertaking to rehearse the evidence upon this

point, it is sufficient to say that there was competent testimony for the consideration of the jury, tending to show that the defendant J. Y. Garlington, as president and director of the Seminole Securities Company, and the defendant James Stobo Young, as secretary and director of the said company, acting in concert, misappropriated and converted to their own use moneys belonging to the said company and then held by them in trust, to the amount of several thousand dollars, and that the defendants so made use of the said moneys with the fraudulent intention of depriving the said company and the stockholders thereof of their property thereon. Such being the evidence tending to establish the breach of trust as charged, there was no error by the presiding judge in refusing the motion to direct a verdict of acquittal as to either of the defendants upon this count of the indictment.

The substantial question sought to be presented by the eighth, ninth, and tenth grounds of appeal relates to the right to the opening and reply in argument before the jury. It appears that the presiding judge ruled that the defendants had the right to such opening and reply, and the only question of any moment which can be considered as raised by these exceptions is as to whether the state is required to make the opening argument to the jury in a case where the defendant has the right to open and reply.

[4] As to this question, it is to be noted that the matters of detail as to the order in which a number of arguments on behalf of the state and of the defendant shall be made is ordinarily to be left to the sound discretion of the presiding judge, and there is no complaint here of any abuse of discretion in this particular.

[5] No doubt the defendant in a criminal case, where he has a right to open and reply in argument, may waive either or both of those rights. It may be true, furthermore, that the defendant in a criminal case, having the right to reply in argument by reason of not introducing evidence, may decline to open in argument and still retain the right to make the closing argument to the jury, either upon the case in general or by way of reply to any contention on the part of the state. But no such question is presented here, as the defendants were not required to open in argument to the jury in any such sense as would limit their reply to the points made in the opening address to the jury. These exceptions, therefore, cannot be sustained, since there is no ground for contending that any substantial right of defendants in the matter of argument was either abridged or denied to them. When the charge of the trial judge is considered as a whole, it will be found free from error in any of the particulars to which reference is made in the remaining exceptions.

[6] The weight to be given to any evidence in the case being entirely a matter for de-

termination by the jury, the presiding judge committed no error in refusing to charge the jury, as requested by the defendants, that, on a prosecution for larceny, "a strong presumption arises that there was no felonious intent, if the taking was open and notorious; and that, if there was no subsequent attempt to conceal the property and no denial but avowal of the taking, this presumption must be repelled by clear and convincing evidence." A charge in the language of the request just quoted would have been an invasion of the province of the jury and a violation of the constitutional inhibition against the expression of an opinion as to the weight to be given to the testimony in the case. All that the defendants had the right to ask upon this point was granted by the trial judge when he charged that any evidence as to the taking being open and notorious, as to the absence of any attempt to conceal the property, and as to there being no denial but an avowal of the taking should be considered by the jury in determining the issue as to felonious intent. The charge was free from error in any of the particulars as to which complaint is made by these exceptions.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(156 N. C. 642)

#### STATE v. LEAK.

(Supreme Court of North Carolina. Nov. 1, 1911.)

#### 1. CRIMINAL LAW (§ 1036\*)—APPEAL—OBJECTIONS—INSUFFICIENCY OF EVIDENCE.

The objection that there was not sufficient evidence to sustain a conviction cannot be first raised in the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2639-2641; Dec. Dig. § 1036.\*]

#### 2. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS—REQUESTS.

It was not error to refuse instructions requested by accused, where the court gave instructions identical in meaning and almost identical in language to those requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

#### 3. RAPE (§ 35\*)—PROSECUTION—ADMISSION OF EVIDENCE.

Evidence was admissible, in a prosecution for assault with intent to rape, that on the same day, as prosecutrix passed the accused, he caught her by the ankle, and said, "You are as fat as a pig, ain't you," being evidence of another assault, of which accused could have been convicted under the indictment.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 42-45; Dec. Dig. § 35.\*]

#### 4. CRIMINAL LAW (§ 371\*)—EVIDENCE—OTHER OFFENSES.

The evidence was also admissible as tending to prove the animus and intent of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.\*]

#### 5. CRIMINAL LAW (§ 1170½\*)—APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where it does not appear what answer would have been given to a question, asked in a prosecution for assault with intent to commit rape, as to whether accused was considered bright, or had the reputation of not having a strong mind, and it appears that witness would have probably answered both questions in the negative, it cannot be said that accused was prejudiced by excluding the answer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.\*]

#### 6. CRIMINAL LAW (§ 448\*)—EVIDENCE—OPINION EVIDENCE.

Evidence, in a prosecution for assault with intent to commit rape, that the defendant would sort of "listen" while committing the assault was not objectionable as being an opinion; the instantaneous conclusions of the mind as to the condition of mental or physical state of persons, animals, etc., derived from observations of a variety of facts presented to the senses at one time, being really facts, and not opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1051; Dec. Dig. § 448.\*]

Appeal from Superior Court, Richmond County; Ferguson, Judge.

Jim Leak was convicted of assault with intent to rape, and he appeals. Affirmed.

The defendant is charged in the indictment with the crime of assaulting Maggie Hasty, who was about 12 years of age, with the intent to commit rape, and upon conviction was sentenced to a term of five years in the state's prison.

The assault is alleged to have been committed at the home of the prosecuting witness, where the defendant, who is an old negro man, was working, and the only person on the premises, except the defendant and the witness, was a little sister of the witness. Neighbors lived within a short distance, but, if the evidence of the state is believed, the place of the assault was at the back of the house, on the stairs leading into the basement, which was at least practically concealed.

Maggie Hasty was examined as a witness for the state, and testified to the assault and the circumstances surrounding her at the time. Among other things, she said that the defendant had his hand on her person under her clothes, when a neighbor called her, and that he then desisted. The witness was permitted to say that the defendant had put his hands on her before on the day of the assault, and the defendant excepted; also on what part of her person the defendant had his hands when the neighbor called her, and defendant excepted; also that, when committing the assault, the defendant "would kind of listen," and defendant excepted.

She was asked on cross-examination if the defendant was "considered bright," and if he did not have the reputation "of not being strong-minded." Upon objection, the witness was not permitted to answer either question, and the defendant excepted.

The defendant tendered the following prayers for instructions:

"(1) That the evidence must show, beyond a reasonable doubt, not only an assault, but that the defendant intended to gratify his passion on the person of Maggie Mae Hasty, and that he intended to do so at all events, notwithstanding any resistance made on her part. If they are not so satisfied, they cannot convict the defendant of an assault with intent to commit rape upon the said Maggie Mae Hasty.

"(2) That the defendant can be convicted of the lesser offense of assault and battery, or a simple assault.

"(3) That the jury must find, beyond a reasonable doubt, from the evidence that the defendant placed his hand upon the person of Maggie Mae Hasty with the intent and purpose at the time, notwithstanding any resistance she might make, and at all events, to gratify his passion on her person, before he can be convicted of an assault to commit rape."

There was no request to charge the jury that there was not sufficient evidence to sustain the indictment, but upon the rendition of the verdict the defendant moved the court to set aside the verdict: (1) As being against the weight of the evidence; (2) for errors in the admission and rejection of testimony; for errors in his honor's charge to the jury; (3) for failure to give the special instructions asked by the defendant.

The Attorney General and Geo. L. Jones, Asst. Atty. Gen., for the State.

ALLEN, J. Upon an examination of the record, we find no error which entitles the defendant to a new trial.

[1] The objection that there was not sufficient evidence to sustain a conviction cannot be entertained after verdict (*State v. Harris*, 120 N. C. 578, 26 S. E. 774; *State v. Huggins*, 126 N. C. 1055, 35 S. E. 606; *State v. Williams*, 129 N. C. 582, 40 S. E. 84); but, if it had been made in apt time, it could not avail the defendant, as the evidence is as conclusive as in *State v. Page*, 127 N. C. 512, 37 S. E. 66, and stronger than in *State v. Garner*, 129 N. C. 536, 40 S. E. 6, in which judgments upon verdicts of guilty were approved.

[2] His honor gave the defendant the benefit of all the instructions requested, as appears from the following excerpt from his charge: "The evidence must show, beyond a reasonable doubt, not only an assault, but that the defendant intended to gratify his passion on the person of Maggie Mae Hasty, and that he intended to do so at all events, notwithstanding any resistance made on her part; and, if the evidence does not so satisfy your mind, you cannot convict the defendant of the assault with intent to commit rape upon the said Maggie Mae Hasty. The defendant can be convicted of the lesser offense of assault and battery, or simple as-

sault. The jury must find, beyond a reasonable doubt, that he placed his hands upon the person of Maggie Mae Hasty, with the intent and purpose at the time, notwithstanding any resistance she might make, and at all events, to gratify his passion on her person, before he can be convicted of an assault to commit rape."

[3, 4] It was competent for the state to prove that the defendant placed his hands on the prosecutrix at another time on the day of the assault, as evidence of another assault, of which the defendant could have been convicted under the indictment, and as tending to prove the animus and intent of the defendant. *State v. Murphy*, 84 N. C. 742; *State v. Parish*, 104 N. C. 692, 10 S. E. 457; *State v. Adams*, 138 N. C. 693, 50 S. E. 765. The evidence objected to was that a short time before it is alleged the defendant committed the assault with the felonious intent that the prosecutrix passed the defendant as he was sitting on the steps, and that he caught her by the ankle, and said, "You are as fat as a pig, ain't you?"

[5] The exception to the refusal to permit the witness to say whether or not the defendant was considered bright, or had the reputation of not having a strong mind, is without merit. There is nothing to indicate what was expected to be proved, or what answer would have been given to the questions, and, so far as we can see, the witness would have answered both questions in the negative. It does not therefore appear that the defendant has been prejudiced by the ruling.

[6] The evidence of the prosecutrix that the defendant was listening was objected to, upon the ground that it was an expression of an opinion. We do not think so. The rule applicable to evidence of this character is clearly and accurately stated in *McKelvey on Evidence*, p. 220 et seq., as follows: "The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence. A witness may say that a man appeared intoxicated, or angry, or pleased. In one sense, the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature. This class of evi-

dence is treated in many of the cases as opinion admitted under exception to the general rule, and in others as matter of fact—'shorthand statement of fact,' as it is called. It seems more accurate to treat it as fact, as it embraces only those impressions which are practically instantaneous, and require no conscious act of judgment in their formation. The evidence is almost universally admitted, and very properly, as it is helpful to the jury in aiding to a clearer comprehension of the facts." This principle has been approved in *Britt v. Railroad*, 148 N. C. 37, 61 S. E. 801; *Wilkinson v. Dunbar*, 149 N. C. 28, 62 S. E. 748, and in other cases in our reports.

We find no error.

No error.

(156 N. C. 455)

ACME CEMENT PLASTER CO. v. GREENSBORO WOOD FIBRE PLASTER CO.

(Supreme Court of North Carolina. Nov. 1, 1911.)

1. FRAUDS, STATUTE OF (§ 143\*)—PERSONS ENTITLED TO ASSERT.

Since strangers to a transaction cannot take advantage of the statute of frauds, one seeking to charge a lessor of a business for goods actually furnished the lessee cannot assert the invalidity of the lease under the statute of frauds; the provision of the statute requiring registration not applying in determining whether such person was a creditor of the lessor.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 344-350; Dec. Dig. § 143.\*]

2. CORPORATIONS (§ 425\*)—AGENCY—EQUITABLE ESTOPPEL—CLOTHING WITH APPARENT AUTHORITY.

Defendant, a manufacturing corporation, which had had business relations with plaintiff, leased its plant to C., and went out of business. Subsequently the lessee ordered goods from plaintiff, writing on paper which bore the name of the plaintiff on the top, but which omitted the names of defendant's officers, and bore the name of a different product as the thing manufactured, and was signed by defendant's corporate name, "W. E. C., Lessee." Held, that defendant's failure to notify plaintiff of the lease of its plant and its retirement from business did not estop it to deny its liability for the goods sold to the lessee, since such liability could only be based on conduct which would induce or mislead plaintiff to believe the lessee was acting on its behalf or by its authority, in spite of his signature as lessee.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1697-1705; Dec. Dig. § 425.\*]

3. CORPORATIONS (§ 429\*)—AGENCY—ESTOPPEL—SALE—NOTICE.

One furnishing goods to the lessee of defendant corporation's business upon orders from the lessee, signed by defendant's name, followed by "W. E. C., Lessee," was sufficiently notified that the goods were ordered by the lessee and not by defendant, so that defendant was not liable therefor.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1720-1725; Dec. Dig. § 429.\*]

Appeal from Superior Court, Guilford County; Daniels, Judge.

Action by the Acme Cement Plaster Company against the Greensboro Wood Fibre Plaster Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Taylor & Scales, for appellant. Stern & Stern, for appellee.

CLARK, C. J. In 1906, the plaintiff sold the defendant two car loads of cement, for which the latter paid. On January 1, 1907, the defendant leased its property to one W. E. Cochran, and went out of business. Thereafter said Cochran ordered four car loads of cement from the plaintiff. The correspondence on Cochran's part was on letter heads bearing at the top the words "Greensboro Wood Fibre Plaster Co." And at the bottom the letters were signed, "Greensboro Wood Fibre Plaster Co., W. E. Cochran, Lessee." This signature was stamped with a rubber stamp, except the words "W. E. Cochran," which was written in pen and ink. The correspondence which the defendant company had had with the plaintiff was on letter heads which bore the words "Greensboro Wood Fibre Plaster Co.," and in addition bore at the head the words "W. C. Bain, President, J. R. McClamroch, Vice President, E. G. West, Sec., Treas. & Gen. Mgr.," and was signed "Greensboro Wood Fibre Plaster Co. per E. G. West, Sec. & Treas." The letter heads of the defendant also described its business as "Manufacturers of wall plaster," while that used by Cochran used the words "Manufacturers of Blue Bell Wood Fibre Plaster." This action is brought to recover of the defendant company the price of the four car loads of cement shipped on the order of W. E. Cochran, lessee, in 1907.

The plaintiff excepted because the defendant was allowed to show by the witness West that it had leased its plant to Cochran on January 1, 1907, and for this purpose offered in evidence the written lease. The plaintiff objected, on the ground that it was a lease of the defendant's entire plant for a period of five years, consisting, among other things, of real estate, and, not having been recorded, it was void under the statute of frauds. The exception is not well taken. The statute of frauds is not available as to third parties, and strangers to the transaction cannot avail themselves of the statute. *Cowell v. Insurance Co.*, 126 N. C. 684, 36 S. E. 184; *Davis v. Inscoe*, 84 N. C. 396; *Green v. Railroad*, 77 N. C. 95. As to the plaintiff, the lease was a substantive fact, which could be proven by the witness West. Besides, the lease was in writing. Rev. 1905, § 976. The registration required by Rev. 1905, § 980, has no application when, as here, the issue to be determined is whether the plaintiff is a creditor or not.

There are numerous other exceptions, but they practically depend upon the one propo-

sition that the defendant company should have granted the plaintiff's prayer for instruction that it was incumbent upon the defendant company to notify the plaintiff that it had leased its plant to Cochran, and that, not having done so, the defendant is liable for the goods bought by said Cochran. The plaintiff contended that, when a partner retires from a partnership, in order to relieve himself from liability on account of debts created thereafter by the firm, he must give actual notice of such retirement to such persons as have been accustomed to deal with the firm, or must show that they had knowledge of such facts as would put the creditor on notice. And as to those not theretofore dealing with the firm he must show public notice given of his retirement, and that the same is true when the purchaser of a partnership business conducts it in the same name and style.

[2] The defendant does not contest these propositions of law. It offered evidence that it did not authorize the lessee to use its name in the business, and had no knowledge of the fact, and contended that the change in the former letter head, by omitting the names of the officers, and the change in the description of the business, and the signature, "W. E. Cochran, Lessee," instead of "per E. G. West, Sec. & Treas.," were sufficient and full notice to the plaintiff that it was dealing with Cochran, and not with the defendant company. The case is not analogous to that of a partnership, where the business goes on in the same name. Here there was a lease of the entire business, and the defendant had no control or knowledge of the conduct of the lessee. It was not called upon to notify the plaintiff that it had gone out of business. It would only be responsible to the plaintiff if its conduct had been such as to induce the plaintiff to believe that Cochran was acting on its behalf or by its authority, notwithstanding he described himself as lessee, or had misled the plaintiff to so believe.

[3] The court properly charged the jury that the burden was upon the plaintiff to show that defendant by its conduct induced plaintiff to believe that the person making the order for the four car loads of cement had authority to make this contract, or by its conduct misled the plaintiff, so that it believed that the defendant was responsible for the order. The court could not instruct the jury, as requested by the plaintiff, to find the issue in favor of the plaintiff. The signature of the orders, "W. E. Cochran, Lessee," was sufficient notice to the plaintiff that it was not dealing with his lessor, the defendant company. It was certainly sufficient to put the plaintiff on inquiry, and it, and not the defendant company, must suffer for the plaintiff's negligence. It would be otherwise, if the defendant had by its conduct induced

or misled the plaintiff into believing that it was liable for purchases made by its lessee, or had authorized him to make such purchases. This view of the evidence was submitted to the jury by the court. The lessor of a business does not stand in the same situation as a retiring partner, or the seller of a partnership business, who permits the business to be carried on in the same name and style as before. There former dealers with the firm must be shown to have actual notice. But when a business is carried on by a lessee, who describes himself as lessee, there is notice to all dealing with him that they are not dealing with the lessor.

The charge of his honor is very full and explicit; the evidence is voluminous, and was doubtless fully argued to the jury. There seems to be very slight contradiction as to the facts. We find no error.

(156 N. C. 588)

### ROSEMOND v. McPHERSON.

(Supreme Court of North Carolina. Oct. 9, 1911.)

#### APPEAL AND ERROR (§ 773\*)—DISMISSAL—GROUNDS.

Where appellant failed to file his brief within the time prescribed, and the case on appeal contains no assignments of error or grouped exceptions, as required by the rules of the Supreme Court, a motion by appellee to dismiss under rule 17 (39 S. E. vi) will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3108-3110; Dec. Dig. § 773.\*]

Appeal from Superior Court, Orange County; Daniels, Judge.

Action by Charles E. Rosemond against John McPherson. Judgment for plaintiff, and defendant appeals. Dismissed.

O. D. Turner, for appellant. J. W. Graham, for appellee.

PER CURIAM. This appeal is dismissed. The motion to docket and dismiss under rule 17 (39 S. E. vi) was made before the appellant applied for writ of certiorari to bring up case on appeal. The appellant did not file his brief within the time prescribed, and the case on appeal contains no assignments of error or grouped exceptions, as required by the rules of this court.

Appeal dismissed.

(156 N. C. 444)

### RUSS v. HARPER.

(Supreme Court of North Carolina. Nov. 1, 1911.)

#### 1. MASTER AND SERVANT (§ 226\*)—APPLIANCE—LATENT DEFECTS.

In an action for an injury to a laundry employé, caused by the alleged breaking of a device used for hoisting clothes to an upper story, evidence held to show that the appliance was not such an ordinary and common device as to re-

quire no special care or preparation of it by the master, so that the question of his negligence was properly left to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.\*]

**2. APPEAL AND ERROR (§ 1062\*)—HARMLESS ERROR—INSTRUCTIONS.**

In an employe's action for personal injuries, there was no evidence of plaintiff's contributory negligence, except such as might arise from the fact of her continuing to work with the defective appliance which finally caused the injury. *Held*, the doctrine of assumption of risk being, in its proper acceptance, not applicable to conditions caused by the master's negligence, or, if it exists, being determined on the principles applicable to contributory negligence, that the court committed no error to defendant's prejudice in submitting the question of plaintiff's contributory negligence, under an issue of assumption of risk.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1062.\*]

**3. RELEASE (§ 9\*)—REQUISITES AND VALIDITY—SEAL.**

A writing, to be valid as a technical release, must be under seal.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 13; Dec. Dig. § 9.\*]

**4. COMPROMISE AND SETTLEMENT (§ 20\*)—BREACH OF CONDITION—RIGHT OF OPPOSITE PARTY.**

On a breach by a master of the conditions of a writing which purports to be a settlement on mutually dependent conditions for an injury to a servant, the servant is remitted to his original rights.

[Ed. Note.—For other cases, see Compromise and Settlement, Dec. Dig. § 20.\*]

**5. MASTER AND SERVANT (§ 270\*)—RELEVANCY—SIMILAR ACCIDENT.**

In an action for an injury to a servant by the breaking of a defective appliance, testimony of a former servant that the same device broke in the same way while she was operating it a year or two before the injury of plaintiff was properly admitted as tending to show the dangerous character of the appliance, where, from the testimony of the witness, it is apparent that conditions in both instances are the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 919; Dec. Dig. § 270.\*]

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, New Hanover County; Peebles, Judge.

Action by Lula Russ against J. T. Harper. From a judgment for plaintiff, defendant appeals. Affirmed.

There was evidence on the part of plaintiff tending to show that on the 2d of February, 1909, plaintiff, an employe of defendant, doing business as the Wilmington Steam Laundry, was injured by the negligence of defendant in failing to provide a safe place or appliance for doing her work, and in failing to give same proper supervision. There was also testimony for plaintiff tending to show that the conditions contained in the paper writing set up by defendant in lieu of her recovery had not been complied with, etc.

The defendant offered evidence tending to show there had been no negligence of de-

fendant causing the injury, and resisted recovery further on the grounds that plaintiff had assumed the risk, was guilty of contributory negligence, and that any and all recovery was barred in the case by reason of an adjustment had between the parties, evidenced and contained in a paper writing executed by plaintiff in terms as follows: "Wilmington, N. C. In consideration of the fact that the Wilmington Steam Laundry will pay my doctor's and medicine bills and keep me on the pay roll at my regular salary until I am pronounced able to resume work by the doctor, I do hereby forever release and discharge said Wilmington Steam Laundry from any and all claims, demands, actions, which I now have or may hereafter have claim against for any injuries that I received on February 2d, 1900. [Signed] Lula Russ, Lizzie Russ, Charles T. Harper, Witnesses." Defendant claimed that said paper writing was and should have the effect of a release of plaintiff's demand, and offered evidence tending to show that all conditions and stipulations appearing in the agreement had been fully complied with.

The jury rendered the following verdict:

"(1) Was the plaintiff injured by the negligence of the defendant in his [defendant's] failure to furnish safe elevator arrangement? Answer: Yes.

"(2) Was the plaintiff guilty of contributory negligence as alleged? Answer: No.

"(3) Did the plaintiff assume the risk of the injury by her accepting employment and using the arrangement furnished her as alleged by defendant? Answer: No.

"(4) Did the plaintiff execute the agreement or paper writing offered in evidence by defendant, and did she receive her weekly pay and doctor's services under said agreement until the doctor determined her well and ready to return to work, in satisfaction of her claim for damages? Answer: No.

"(5) What damages, if any, is the plaintiff entitled to recover? Answer: Six hundred dollars in addition to anything paid on account."

Judgment on the verdict, and defendant excepted and appealed.

E. K. Bryan, for appellant. W. P. M. Turner, Rountree & Carr, and Herbert McClammy, for appellee.

HOKK, J. (after stating the facts as above). There was evidence tending to show that defendant was proprietor of a steam laundry, and in the ordinary progress of the work the wet clothes were placed in a large heavy basket, "large enough to lay a man's shirt in full," and raised by a hoisting rope and pulley to the third floor, where it became plaintiff's duty, as an employe, to pull the basket from the elevator shaft to the floor, remove the clothes, and give them to another employe to be placed in the dryer. That the

handle of the basket was a short rope, with iron hooks at the ends. These hooks were caught in loops at either side of the basket, and this short rope, at or about the middle, was hitched to a large hook at the end of the hoisting rope, where it was or should have been held in place by some kind of proper and secure fastening, so placed as to hold the basket steady and in its proper position. That on this occasion the basket was very heavy, having from 50 to 75 wet shirts in it, and as plaintiff in the usual way was endeavoring to pull the same to its landing place, from the absence of the fastening, or because same was insufficient or insecure, the short rope slipped, tilting the basket, with the effect that one of the hooks at the side of the basket slipped from its hold, causing the basket to drop, and as it went down the shaft the hook at the loose end of the short rope caught in plaintiff's "right arm, between the elbow and wrist, cutting through the flesh for a distance of about three inches, and lodged in the bone and muscles of the wrist. That when the basket jerked forward and the hook fastened in plaintiff's arm she fell with one shoulder against a post at the side of the shaft, and in this way was kept from being jerked into the shaft; the basket filled with wet clothes, hanging down the shaft, suspended by the rope; one large iron hook being caught in plaintiff's wrist, and the other fastened to one end of the basket." That plaintiff remained in this position for a time, till relieved by the superintendent and another employé standing near. The negligence alleged against defendant on the facts in evidence was in not having any proper fastening to hold the short rope in or on the large hook at the end of the hoisting rope, that the hook did not have sufficient curvature, and in having an insufficient and insecure fastening to keep the short rope from slipping, rendering the basket liable to tilt as it did in this instance, and thereby making plaintiff's work less secure. Speaking to this question, the plaintiff, on being shown the appliance as at present operated, stated that it was not like it was at the time plaintiff received her injury. At that time "the hook on the rope from the drum did not have any wire wrapped across the top of the hook when I worked at the laundry, and, in fact, had nothing on the hook to prevent the rope from flying off. Where the rope came together and wound upon the top hook, there was wrapped around it a small cotton string, which kept the rope from slipping, and therefore held the basket in place. The rope you have here has a large twine string wrapped just under the hook, and this is interwoven in the two small ropes. This is entirely different from the way it was arranged when I was injured. When I was injured, the two large hooks which caught in the handles of the basket were sharp at the points, but since then they have been cut off. When the accident happened, I had caught hold of

the basket by the side of it, as I had always done, to pull it from the shaft to the floor, and when I pulled it in, the small cotton cord, the center hook that held the rope in position broke, which caused one end of the basket to fly up, and in doing so one hook was released, and that end of the rope jerked loose from the top hook."

[1] There was evidence on part of defendant contradicting the portion of this above statement which tends to establish negligence on defendant's part, but on the testimony as quoted the question of defendant's negligence, under a proper charge, was for the jury. It was not a case presenting ordinary conditions requiring no special care, preparation, or prevision, where the element of proximate cause is not infrequently lacking," as in *House v. Railroad*, 152 N. C. 397, 67 S. E. 981, and *Dunn v. Railroad*, 151 N. C. 313, 66 S. E. 134, but comes under that class of cases illustrated in *Hipp v. Fiber Co.*, 152 N. C. 753, 68 S. E. 215, and *Wade v. Contracting Co.*, 149 N. C. 177, 62 S. E. 919, etc. The court was right, therefore, in submitting to the jury the issue as to defendant's negligence.

[2] We find no testimony tending to show contributory negligence by plaintiff, other than that which might arise by reason of her working on under the circumstances as they existed, and this was not improperly submitted to the jury, under an issue as to assumption of risk. Whatever may be the ruling in other jurisdictions, it is now very well established in this state that this doctrine of assumption of risk, in its proper acceptance, does not apply to conditions caused or created by the employer's negligence, or in such case, if it exists in name, it is to be determined on the principles applicable to contributory negligence. On this question, in *Bissell v. Lumber Co.*, 152 N. C. 124, 67 S. E. 259, the court quotes with approval from *Shearman & Redfield on Negligence* (section 211) as follows: "The true rule, as nearly as it can be stated, is that a servant can recover for an injury suffered from defects due to the master's fault, of which he had notice, if under all the circumstances a servant of ordinary prudence, if acting with such prudence, would, under similar conditions, have continued the same work under the same risk." And this statement has been approved in numerous decisions of the court, as in *Norris v. Holt*, *Morgan Mills*, 154 N. C. 474, 70 S. E. 912; *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69; *Tanner v. Lumber Co.*, 140 N. C. 475, 53 S. E. 287. In the *Tanner Case*, Associate Justice Brown states the doctrine we are considering as follows: "His honor instructed the jury that when the plaintiff went on the log car for the purpose of riding he assumed the risk of all the dangers incident to riding on a log train. As a general statement of the law, this proposition is correct; but it does not



go far enough, and was liable to mislead the jury. The judge should have further stated that the plaintiff assumed no risk which was incurred by reason of a defective car. There was evidence tending to prove that one of the standards used to hold the logs securely in place was gone, and there was no evidence that the plaintiff was apprised of the danger liable to result when he mounted the loaded car. Inasmuch as it was the master's duty (he having undertaken it according to the plaintiff's contention) to furnish his laborers transportation on his log train to and from the 'quarters,' it was his further duty to see that such transportation was rendered as reasonably safe as the character of it would admit. While the plaintiff assumed the risks incident to riding on loaded log cars, he did not assume any risk resulting from a defective car. *Hicks v. Manufacturing Co.*, 138 N. C. 319 [50 S. E. 703]; *Pressly v. Yarn Mills* [138 N. C. 410, 51 S. E. 69]. If the plaintiff knew that the standard was gone when he mounted the loaded log car, and if in consequence thereof the danger to himself was so obvious that no man of ordinary prudence would have ridden on it, then the plaintiff did assume the risk, and would be guilty of such contributory negligence as would bar a recovery." This being the doctrine as it obtains with us, on the facts in evidence, the court committed no error to defendant's prejudice in submitting the question of assumption of risk to the jury. See *Hamilton v. Lumber Co.*, 72 S. E. 538, at the present term.

[3, 4] On the fourth issue, the paper writing relied on by defendant could not be treated as a technical release for lack of a seal. *Redmond v. Coffin*, 17 N. C. 441; *Smithwick v. Ward*, 52 N. C. 64, 75 Am. Dec. 453; *Clark on Contracts*, p. 491; but, whether termed a release, a compromise, or an accord and satisfaction, it purports on its face to be an adjustment on mutually dependent conditions, and a breach on the part of defendant having been established by the verdict the plaintiff is remitted to his original rights. *Wacksmuth v. Atlantic Coast Line R. Co.*, 72 S. E. 813, present term; *Wildes v. Nelson*, 154 N. C. 590, 70 S. E. 940; *City of Memphis v. Brown*, 20 Wall. 289, 22 L. Ed. 264; *Noe v. Christie*, 51 N. Y. 270; 1 Am. & Eng. Enc. (2d Ed.) p. 422 et seq.

[5] There was also objection that Minnie Pickett, a witness for plaintiff, was allowed to testify that when she worked at this same place a year or two before the basket fell with her on two occasions; that the small string wrapped around the short rope just where the same was fastened to the hook on the long rope broke, causing the basket to drop to the bottom floor. The conditions appear to be the same, and the evidence tending, as it did, to show that this was a dangerous contrivance would seem to be a relevant circumstance, under *Blevins v. Cotton*

*Mills*, 150 N. C. 493, 64 S. E. 428, and cases of like kind.

There is no reversible error, and the judgment in plaintiff's favor is affirmed.

No error.

BROWN, J. (dissenting). I am of opinion that upon all the evidence the giving way of the fastening which held one side of the basket was an accident which no reasonable care or human foresight can guard against, and that the defendant should not justly be held liable for the consequences.

WALKER, J., concurs in this opinion.

(156 N. C. 529)

#### REA v. REA.†

(Supreme Court of North Carolina. Oct. 9, 1911.)

#### 1. HUSBAND AND WIFE (§ 48\*)—CONTRACTS—CONVEYANCES.

Revisal 1905, § 2107, providing that no contract between a husband and wife during coverture shall be valid, unless executed in the prescribed manner, applies only to contracts, and has no application to a conveyance of real or personal property by a wife to her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Dec. Dig. § 48.\*]

#### 2. HUSBAND AND WIFE (§ 49%\*)—PERSONAL PROPERTY—TRANSFER—REQUISITES.

The Constitution confers on a married woman full power to dispose of her personal property without restriction; and Pub. Laws 1911, c. 109, declares that, subject to the provisions of Revisal 1905, § 2107, relating to contracts only, every married woman may contract and deal, so as to affect her personal property, in the same manner and to the same effect as if she were unmarried, but that no conveyance of real estate shall be valid, unless made with the written consent of her husband, required by Const. art. 10, § 6, and a privy examination as to the execution of the same, taken and certified as required by law. *Held*, that a married woman has unlimited power to convey her personal property without restriction; and hence was entitled to make a gift thereof to her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 256-260; Dec. Dig. § 49%.\*]

Hoke and Allen, JJ., dissenting.

Appeal from Superior Court, Chowan County; Justice, Judge.

Action by Martha C. Rea against J. K. Rea, as administrator of C. W. Rea, deceased. Judgment for plaintiff, and defendant appeals. Reversed.

W. M. Bond and Pruden & Pruden, for appellant. C. S. Vann, for appellee.

CLARK, C. J. On April 6, 1908, the plaintiff, who owned 46 shares of stock in the Edenton Cotton Mills, delivered same to C. W. Rea, her husband, having indorsed on the certificate as follows: "For value received, I hereby sell, assign and transfer unto C. W. Rea, the shares of stock represent-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†For concurring opinions, see 72 S. E. 872.

ed by the within certificate, and do hereby irrevocably constitute and appoint W. O. Elliott, secretary, attorney to transfer the said stock on the books of the within corporation with full power of substitution in the premises. Martha C. Rea. April 6, 1908. In presence of C. W. Rea." On April 8, 1908, said C. W. Rea surrendered said certificate to said cotton mill, and the same number of shares were issued to him. C. W. Rea died in 1909, and the certificate of stock which had been issued to him went into the hands of his administrator. The plaintiff contends in this action that said assignment, delivery, and transfer of said stock by her was a nullity, because of noncompliance with Revisal, § 2107.

[1] There is a broad distinction between conveyances and contracts. Revisal, § 2107, applies only to contracts. Laws of 1911, c. 109, known as "Martin's Act," provides: "Subject to the provisions of section 2107, Revisal 1905, every married woman shall be authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband, provided by section 6, art. 10, of the Constitution and a privy examination as to the execution of the same taken and certified as required by law." This recognizes that section 2107 applies to contracts, and that the only restriction upon conveyances by her is that constitutional one requiring the "written assent" of her husband as to conveyances of realty, and her privy examination in such case.

Revisal, § 2107, is equally explicit. It comes under subhead 3, entitled "Contracts between Husband and Wife," and provides: "No contract between a husband and wife during coverture shall be valid to affect or change any part of the real estate of the wife or the accruing income thereof, for longer time than 3 years next ensuing the making of such contracts, or to impair or change the body or capital of the personal estate of the wife, or of the accruing income thereof, for longer time than 3 years next ensuing the making of such contracts unless such contract shall be in writing, and be duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deed of femmes covert, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be."

An examination of section 2107 shows

that it applies solely to contracts, and not to conveyances; indeed the word "contract" is used five times in that section. The object of the Legislature was clearly to prevent the wife making any contract with her husband, whereby she should incur a liability against her estate, which in future might prove a burden or charge upon it, or cause a change or impairment of her income or personality. To that end, not only a privy examination was required, but the certificate of a magistrate that the contract is not unreasonable or injurious to her. This provision does not attempt to apply to conveyances by her, as to which the act of 1911 retains the constitutional restriction in regard to realty that there must be the written assent of the husband, and privy examination. Had the act attempted to impose a further restriction upon the conveyance of married women of realty, such as the approval of a third person, it would be in conflict with the Constitution, which gives her the power to convey her realty, if she has "the written assent of her husband." The majority of this court has sustained the statutory requirement of a privy examination in conveyances of realty by married women, but solely upon the ground that it is not an additional restriction, but merely a regulation to ascertain whether the wife really executed the deed.

[2] As to conveyances by the wife of her personality, the Constitution gives her full power of *jus disponendi* without any restriction whatever. Nor is there any statute whatever that in any way has attempted to restrict it. This matter has been fully considered and settled by this court in a remarkably well-considered and able opinion by Mr. Justice Walker, in *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461, which leaves nothing to be added. That case overruled *Walton v. Bristol*, 125 N. C. 419, 34 S. E. 544, so far as it could be construed to intimate a different conclusion. In *Sydnor v. Boyd*, 119 N. C. 481, 26 S. E. 92, 37 L. R. A. 734, the wife attempted to assign her life insurance policy to her husband, so as to make it payable to him at her death, and guaranteed "the validity and sufficiency of the foregoing assignment." This was an executory contract, which would have changed or diminished the corpus of her estate at her death, and she would have incurred liability upon her guaranty. The court held that this was a contract, and invalid, because not made in compliance with the Code 1835 (now Revisal, § 2107).

If Revisal, § 2107, had included conveyances, it would have been invalid as to the transfers by a married woman of her personality, because the Constitution gives her as to them the absolute *jus disponendi*, as if *femme sole*, without any restriction whatever. It would have been invalid as to conveyances of realty, because requiring the assent of a third person over and above the "written assent" of her husband, which is

the only requirement of the Constitution, and an addition to the privy examination required by statute, which has been held a mere regulation, and not a restriction, upon the right of the woman to convey. In this case, the husband actually witnessed the transfer in writing, which, under the authority of *Jennings v. Hinton*, 128 N. C. 51, 35 S. E. 187, is a sufficient compliance with the requirement of the written assent of the husband to conveyance of realty.

In this case, there does not appear to have been any consideration, and the assignment was not only a conveyance, but a gift. No magistrate could certify that a gift by a woman to her husband is for her benefit, or does not diminish her estate. It would be a startling proposition that a married woman, who by our Constitution has full control of her property, as if unmarried, cannot make a present to her husband, if she sees fit. It is a matter of everyday occurrence. Whether she make her husband a gift of money, a dressing gown, or a pair of slippers, it would be astonishing if she could recover it from his administrator, or from him, if there should be a divorce. Of course, if the conveyance or gift by her has been procured by fraud or duress, it can be impeached, just as if made to any one else.

Summing up, the rights of married women in North Carolina as to conveyances and contracts are:

As to conveyances of personalty. There is no restriction whatever upon her right to dispose of her personalty as fully and freely as if she had remained unmarried, either in the Constitution or by any statute. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461, cited with approval by Justice Connor in *Ball v. Paquin*, 140 N. C. 91, 52 S. E. 410, 3 L. R. A. (N. S.) 307.

As to conveyances of realty. The Constitution requires only "the written assent" of the husband. The statute superadds only a regulation providing for a privy examination, which has been upheld on the ground that it is not an additional requirement, but merely a method of ascertaining if the deed is really her voluntary act.

As to contracts. Laws 1911, c. 109, provides that a married woman is authorized to contract and to affect her real and personal property thereby in the same manner and to the same effect as if she were unmarried, excepting only contracts whereby she may incur liability to her husband, as to which the provisions of Revisal, § 2107, are retained.

The conveyance of the stock by the wife was not restricted by the Constitution or any statute. If, reversing *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461, it were now held otherwise, the cotton mills could be held liable, and every bank, railroad company, and other corporation which has transferred stock in like cases to this. *Wooten v. Railroad*, 128 N. C. 119, 38 S. E. 298,

56 L. R. A. 615. While the Legislature has seen fit to guard contracts, whereby a wife may incur liability to her husband, it has not attempted to restrict her right of conveyance, still less to forbid gifts by her to her husband, without the approval of a justice of the peace.

Upon the case agreed, judgment should have been entered in favor of the defendant.

Reversed.

HOKE, J. (dissenting). I do not think that article 10, § 6, of our Constitution, had or was intended to have effect upon conveyances or contracts between husband and wife, but that such transactions have been and should continue to be proper subjects of legislative regulation, unaffected by that instrument. This, in my judgment, being a correct position, I am of opinion that section 2107 of our Revisal (the section controlling on the subject referred to) should be upheld in its integrity and construed as it is plainly written. It has been sustained and applied in numerous and repeated cases before this court ever since its enactment, 40 years ago; was recognized as the law of the land in a decision at the last term, in *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747; and was expressly retained and approved by our Legislature at its last session. Public Laws N. C. 1911, c. 109. Further, I am utterly unable to perceive how a decision, setting aside the safeguards provided by this statute, and affording facilities for a married woman to deprive herself of her property, and, in many instances, of a home for herself and children, in favor of an improvident husband, can be properly regarded as part of an enlightened and progressive policy, or in any way having a tendency to *liberate* married women from the shackles of tyrannous precedent, and, in my opinion, the statute should be upheld in its entirety. Holding the view, however, as stated, I think it a matter of supreme importance that this question should be considered as settled, and shall therefore make no further protest.

I am authorized to say that ALLEN, J., concurs in this view.

(156 N. C. 537)

#### OVERMAN v. LANIER et al.

(Supreme Court of North Carolina. Oct. 9, 1911.)

#### 1. APPEAL AND ERROR (§ 132\*)—DECISIONS REVIEWABLE—PRO FORMA JUDGMENT.

Under Const. 1868, art. 4, § 8, authorizing the Supreme Court to review any "decision" of the courts below, a pro forma judgment, entered on the coming in of a referee's report, without any consideration of the exceptions to the report, was not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 896; Dec. Dig. § 132.\*]

## 2. APPEAL AND ERROR (§ 125\*)—DECISIONS REVIEWABLE—CONSENT JUDGMENT.

No appeal lies from a consent judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 883; Dec. Dig. § 125.\*]

## 3. COSTS (§ 241\*)—COSTS ON APPEAL.

Where a pro forma judgment, entered on a referee's report with the assent of the parties, was not reviewable, on remand each party should pay half the costs of the appeal.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 241.\*]

Appeal from Superior Court, Rowan County; Lyon, Judge.

Action by L. S. Overman, as administrator, against Mattie Lanier and others. From the judgment all parties appeal. Cause remanded.

T. F. Klutz, E. C. Gregory, T. J. Jerome, E. J. Justice, L. H. Clement, and Chas. W. Tillett, for plaintiff. Walser & Walser, G. W. Garland, Burwell & Cansler, and Manly, Hendren & Womble, for defendants.

CLARK, C. J. This case was referred by consent, and on the coming in of the report there were many exceptions, both to the findings of facts and to the conclusions of law. The record states that all exceptions were overruled and that the court confirmed the report in all respects. Both sides appealed. When the case was called in this court, it was stated by counsel on both sides that the judge below, owing to the rush of business and the anxiety of both parties to get the case sent up for review, had entered a pro forma judgment without having really considered any of the exceptions.

[1] Under the former system, before the Constitution of 1868, this court was the creation of the Legislature, and under the construction of the creating act causes in equity were usually transmitted to this court upon a pro forma judgment because this court passed upon the findings of fact. But under the Constitution of 1868, art. 4, § 8, this court reviews upon appeal any "decision" of the courts below. When a pro forma judgment is rendered, there has been no decision, and hence no appeal can be entertained. In *State v. Locust*, 63 N. C. 575, which was a civil judgment upon a peace bond, this court said: "We take occasion to remind the judges of the superior courts that we will not hereafter consider cases sent to this court upon pro forma judgments, as this court is entitled to the benefit of their well-considered opinions upon questions of law, which may arise in such cases." In *Hines v. Hines*, 84 N. C. 125, the court cites with approval the above quotation from *State v. Locust*. In *Miller v. Groome*, 109 N. C. 149, 13 S. E. 840, the court said: "It was perfectly competent for the judge, upon review, if he thought so, to adopt the findings of fact and conclusions of law of the referee, and then they would become the findings and conclusions of the court; but it was error in

his honor to summarily dispose of the exceptions by overruling them and confirming the report without reviewing and passing upon them judicially." At this term, in *Thompson v. Smith*, 72 S. E. 379, Mr. Justice Walker reviews the subject, and says: "When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusions both upon the facts and upon the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties and ascertain the truth, and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because we cannot review the referee's findings in any other way. The point was presented clearly and directly in *Miller v. Groome*, 109 N. C. 148 [13 S. E. 840], and controls this case." And thereupon it was further said: "The cause is remanded, with directions that the judge of the superior court will review the referee's findings of fact and his rulings as to law upon the exceptions thereto." There are other decisions to the same effect. But the above are sufficient, if indeed any authority were needed under the terms of our Constitution. The litigants are entitled to, and should have, the opinion of the learned lawyer who presides in the superior court, who should carefully review the entire evidence and make his own findings of fact and enter his own conclusions as to the law. If this is done in a perfunctory way as by a pro forma judgment, there is no method in which the findings of fact by the referee can be reviewed when there is any evidence whatever upon the findings excepted to. This court also, as well as the parties, are entitled to the aid of the judgment of the court below after the full consideration of the cause by him. The presumption is that the judgment below is correct, and the burden is upon the appellant to overcome that presumption. It is not fair to him nor to this court to throw the burden of that presumption against either party, unless the judge has fully and carefully considered the cause before rendering the judgment, as it is his duty to do in every case.

[2] If this were a consent judgment, no appeal would lie. Besides, "consent judgments are in effect merely contracts of the parties" and have no validity as precedents. *Bank v. Commrs.*, 119 N. C. 226, 25 S. E. 966, and cases there cited.

Even if this court had power to recognize such a course as was here taken, it would not do so because the result would be to transfer into this court, without review or consideration by the judge below, all cases where there is a report by a referee. It would result that this court would necessarily be compelled to review the findings

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of fact by the referee, a duty which devolves upon the trial judge. The cause must therefore be remanded, as in *Thompson v. Smith*, ante, to the judge holding the courts of the district, with directions that he carefully review the findings of fact and conclusions of law of the referee wherever excepted to and enter his deliberate judgment as to each exception.

[3] As the pro forma judgment was entered with the assent of both parties, each will pay half the costs of this appeal.

It may be that the judgment entered by the judge below, upon consideration of the case in accordance with law, and as herein directed, may prove satisfactory to one or to both parties. But, if there should be an appeal from his judgment, the appellant may use so much of the printed matter sent up in this case as may be useful and appropriate in that appeal. To that end all the printed matter sent up in this case may be withdrawn by the parties.

Remanded.

(156 N. C. 504)

#### TOWN OF TARBORO v. STATON.

(Supreme Court of North Carolina. Oct. 9, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§ 469\*) — STREETS — IMPROVEMENT — ASSESSMENT — FRONT-FOOT RULE.

A municipal corporation may impose assessments on adjoining property by the front-foot rule for the improvement of streets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1113-1117; Dec. Dig. § 469.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 495\*) — STREET IMPROVEMENTS—ASSESSMENTS—DISCRETION.

Authority of a municipal corporation to levy assessments on abutting property for benefits conferred by street improvements being derived solely from the Legislature, the courts will not interfere with the exercise of the city's discretion in determining the extent of the benefit conferred, unless there is a want of power, or the method of assessment is so clearly inequitable as to offend a constitutional principle.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 495.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 469\*) — STREET ASSESSMENTS — BENEFITS—FRONT-FOOT RULE.

Where an ordinance directed the construction of a curb and gutter along a street, one half of the cost to be borne by the town and the other half by the abutting property owners according to frontage, an assessment of \$63.12 against complainant's frontage of 252½ feet was not so unreasonable as to justify the interference by a court.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 469.\*]

Walker, J., dissenting.

Appeal from Superior Court, Edgecombe County; Whedbee, Judge.

Action by the Town of Tarboro against one Staton. Judgment for plaintiff, and defendant appeals. Affirmed.

It appeared that the municipal authorities of Tarboro, acting under power expressly conferred by the Legislature, had passed an ordinance requiring the owners of property abutting on that part of Main street from Church street to Howard avenue to curb and gutter the portion of the street in front of their property according to certain stated specifications, the one half of the cost to be borne by the town and the other half by the owners of abutting property according to frontage, and providing, further, if any abutting owners should fail to make said improvement within 30 days after due notice given, the proper officers of the town should have same done, and that one-half costs thereof should be assessed against said property owners at so much per front foot, etc.; that defendant, after notice duly given, had failed and refused to comply with the terms of the ordinance. The work was done by the authorities, the cost thereof requiring an assessment of 50 cents per front foot, and showing defendant's portion to be \$63.12. The act in question declares the amounts properly assessed to be a lien on respective lots enforceable by action in the superior courts, and contains the provision: "And in his answer to the action so instituted, the owner shall have the right to deny the whole or any part of the amount claimed to be due by the town, and to plead any irregularity in reference to the assessment, and the issue raised shall be tried and the cause in other respects disposed of according to law and the practice of the court." Defendant resists recovery chiefly on the grounds (1) that the property of defendant in fact received no special benefit by reason of the alleged improvement; (2) that such special benefits were in no wise considered by the authorities when the assessment was ordered or made, and, having made answer to this effect, tendered issues presenting his position, and same were declined.

On issues submitted by the court the jury rendered the following verdict:

"(1) Did the commissioners of Tarboro in making the assessment take in consideration the special benefits the property assessed received in addition to the benefits received by the community at large? Answer: No.

"(2) Was the work done according to the requirement of the notice served on the property owner? Answer: Yes.

"(3) Is the defendant's lot so situated and located that any assessment charged against it should not be measured by the frontage rule? Answer: No.

"(4) What amount, if any, is the plaintiff entitled to have charged and assessed as a lien against the property of the defendant described in the complaint? Answer: \$63.12, which is admitted to be one-half of the ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tual reasonable cost of the curbing and gutter."

Judgment on the verdict, and defendant excepted and appealed, assigning for error the refusal to present or consider the questions embodied in his issues.

G. M. T. Fountain and Marshall C. Staton, for appellant. W. O. Howard, for appellee.

HOKE, J. (after stating the facts as above). [1] The right to impose burdens of this kind and the method of assessment by the front-foot rule in cases like the present have been upheld in several decisions of our court, as in *Kinston v. Wooten*, 150 N. C. 295, 63 S. E. 1081, *Kinston v. Loftin*, 149 N. C. 255, 62 S. E. 1069, *Asheville v. Trust Co.*, 143 N. C. 360, 55 S. E. 800, *Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738, and *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330. While it is said in these and other cases that assessments of this character can only be upheld on the "theory of special benefit conferred and which bear some reasonable relation to the burdens imposed," the right to make them as a general proposition is referred to the sovereign power of taxation which is primarily, and as a rule exclusively, a legislative power. And it is held with us, and the ruling is, we think, in accord with the great weight of authority, that in reference to a local improvement, governmental in its nature, the action of the Legislature or of local authorities exercising legislative power expressly conferred for the purpose is conclusive as to the necessity for a given improvement and in establishing general rules by any of the recognized methods, imposing special assessments for its construction and maintenance. And in applying these rules or methods to the property of an individual owner and on the question of amount the legislative declaration shall so far prevail that it is only in rare and extreme cases that the courts are allowed to interfere.

[2] Speaking to this question in *Peace v. City of Raleigh*, supra, the court held: "The power to levy such assessments is derived solely from the Legislature, acting either directly or through its local instrumentalities, and the courts will not interfere with the exercise of the discretion vested in the Legislature as to the necessity for, or the manner of making such assessments, unless there is a want of power or the method adopted for the assessment of the benefits is so clearly inequitable as to offend some constitutional principle." And in *Asheville v. Trust Co.*, 143 N. C. 370, 55 S. E. 804, it was said: "It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court

that no special and peculiar benefits are received. If the Legislature has fixed the district and laid the tax for the reason that in the opinion of the legislative body such district is peculiarly benefited, its action must in general be deemed conclusive." Again in *Kinston v. Wooten*, supra, it was held: "As a general rule, the assessment of adjoining property by a city for the paving of its streets and sidewalks by the front-foot rule will be upheld; but in instances where it is made to appear that in applying this rule to the property of an individual owner there is a marked disproportion between the burden imposed and any possible benefit, so that it is manifest that the principle of equality had been entirely ignored and gross injustice done, the court may interfere and afford proper relief." In this case the court further said: "It will thus be seen that, while the right of the court to interfere for the protection of the individual owner of property is recognized, its exercise can only be justified and upheld in rare and extreme cases, when it is manifest that otherwise palpable injustice will be done and the owner's rights clearly violated. This limitation arises of necessity in this scheme of taxation, for in its practical application it would well nigh arrest all imposition of these burdens if each individual owner of property were allowed to interfere and stay the action of the officials on any other principle." The opinion then refers with approval to the case of *Atlanta v. Hamlein*, 96 Ga. 383, 23 S. E. 409, and in which Atkinson, Judge, said: "As a general proposition, upon the question of benefit, whether general or special, the owner is concluded by an expression of the legislative will. Where power is conferred upon the municipal authorities in their discretion to inaugurate a system of street improvements, with the power likewise conferred of imposing upon the abutting lot owners a proportionate share of the cost of such improvements, such power may be well exercised by the city authorities without giving notice of any character to the lot owner; and it is inconsistent with the proper exercise of the taxing power, and would tend to a manifest embarrassment of the public in the prosecution of these public improvements, if, upon every assessment, the lot owner were entitled to have the question judicially determined whether or not he would be benefited by the proposed improvement. As to whether he was benefited or not is a question which should address itself to the discretion of the municipal authorities. Their judgment upon this subject is ordinarily, except in the most extreme cases, conclusive; but, as we have before stated, it is not allowable that the municipal authorities under the guise of a public improvement should arbitrarily deprive the citizen of

his estate. If, therefore, in the levy of such assessments, the cost of the improvement be so disproportionated to the value of the estate sought to be improved, as that the levy of the assessment amounts to a virtual confiscation of the lot owner's property, such assessment cannot be upheld as a legal or valid exercise of the power to tax for such improvements." These decisions are sustained, we think, as stated by the weight of well-considered authority. The case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, as interpreted and applied by subsequent decisions of the same high court not being in direct or necessary antagonism to the view presented, see *French v. Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Wright v. Davidson*, 181 U. S. 371, 21 Sup. Ct. 618, 45 L. Ed. 900; *Tonawanda v. Lyon*, 181 U. S. 391, 21 Sup. Ct. 609, 45 L. Ed. 908; *Atlanta v. Hamlein*, supra; *Preston v. Rudd*, 84 Ky. 150; *State ex rel. Wheeler v. District Court*, 80 Minn. 293, 83 N. W. 183; *Elliott on Roads and Streets* (3d Ed.) § 685; *Hamilton on Law of Special Assessments*, § 181; *Judson on Taxation*, § 359. This, then, being the correct principle, the position contended for by defendant can in no wise be sustained. The statute confers ample authority.

[3] The front-foot rule has been adopted and declared a correct and proper method, and the amount assessed against defendant, \$63.12, for a frontage of 252½ feet, would seem to be reasonable, just, and moderate. Certainly there is nothing in the record or in the evidence which shows, or tends to show, facts which would authorize the court to interfere or stay collection of the amount charged.

On the question of notice, the provision of the law affording defendants an opportunity to appear and question the amount or validity of an assessment has been approved and held sufficient in a statute of similar import in *Kinston v. Wooten* and *Kinston v. Loftin*, supra; the doctrine being stated in *Loftin's Case* as follows: "A statute authorizing such an assessment which provides for a notice that will enable the property owner to appear before some authorized tribunal and contest the validity and fairness of the assessment before it becomes a fixed charge on his property is not open to the objection that it deprives the owner of his property without due process of law."

There is no error, and the judgment below must be affirmed.

No error.

WALKER, J. (dissenting). This is a very important case, and the principle, which is said in the opinion of the court to control it, is far-reaching in its necessary consequences. It is held substantially that the state, either directly by legislative enactment, or indi-

rectly by acting through some local municipal body, may practically take the citizen's property for a public use without just compensation, if that use consists in improving the streets and sidewalks of a village, town, or city. I do not for a moment controvert the position that abutting property in a town may be assessed to pay the expenses of improvements when it is especially benefited thereby, but there is no more power or right to make the owner of abutting property pay for improvements of streets or sidewalks where there is no benefit to him than there is to tax him for the general public benefit when there is no return to him in the way of protection to himself or his property, or to take his property by condemnation or otherwise without just compensation. One is as much confiscation as the other. The Legislature may provide for the determination of the question of benefit to any particular property, and, perhaps, under the authorities, the decision of the tribunal, so authorized to consider and decide whether there is a special benefit and how much it is, and to provide whether it shall be paid for by the front-foot rule or by establishing districts for the assessments of such benefits, may not be reviewed, but that is a very different question from the one presented in this case, where the defendant's property is made to pay tribute to the public, regardless of benefit to his property and without even providing any method for deciding whether his property has received a special benefit or not. Under the charter of the plaintiff, the owner is required to pave, curb, or otherwise improve the sidewalk in front of his lot, and to pave or improve one-fourth of the street without reference to benefits of any kind, and upon his failure to do so the town commissioners are authorized to have the work done, and "the cost thereof shall be borne by the owner or owners of such lot and shall constitute a lien to the same extent that municipal taxes assessed against the same are a lien thereon."

This is not in accordance with our Constitution, the Constitution of the United States, or the principles of natural justice and right, as declared by one of our greatest jurists, Chief Justice Ruffin, in *Railroad v. Davis*, 19 N. C. (Battle's Ed.) marg. p. 451, where it is said: "The principle (of compensation) is, however, so salutary to the citizen, and concerns so nearly the character of the state, that it may well be urged that it must be consecrated by its adoption in some part of the free Constitution of this state. We should be reluctant to pronounce judicially our inability to find it in that instrument. If it be not incorporated therein, the omission must be attributed to the belief of the founders of the government that the Legislature would never perpetrate so flagrant an act of gross oppression, or that it would not be tolerated by the people, but be redressed by the next representatives chosen. There is no doubt that, while the Legislature and people

of this state expressly restricted the action of the general government on this subject, it must have been supposed by the people that their own local government was in like manner restrained, or would never act in a manner to make such a restraint necessary. There is, however, no clause in that instrument which seems to bear on the point, unless it be that which is relied on in the argument for the defendant. It is the seventeenth section of the Bill of Rights which declares 'that no freeman shall be dispossessed of his freehold, or deprived of his life, liberty or property, but by the law of the land.' Under the guaranty of this article, it has been held, and in our opinion properly held, that private property is protected from the power of despotic resumption upon a legislative declaration of forfeiture, or merely to deprive the owner of it, or to enrich the treasury, unless as a pecuniary contribution by way of tax. Such acts have no foundation in any of the reasons on which depends the power in virtue of the right of eminent domain to take private property for the public use, and they could not be sustained by the offer of the fullest compensation. Though not so obvious, it may also be true that the clause under consideration is restrictive of the right of the public to the use of private property, and impliedly forbids it without compensation." This fair and equitable principle has been so uniformly adopted in subsequent decisions of this court, following the precedent thus established by *Railroad v. Davis*, that no one now attempts to gainsay that under our system of state government a man's property cannot be taken directly or indirectly, nor can he be deprived of the use of the emoluments thereof without just compensation for the loss to him. Where is the difference between compelling him to pay the amount of an assessment levied upon his lot and which constitutes a lien thereon until paid, and to pay which it may be sold and thereby deprive him of it, and taking directly by condemnation for a public use? None at all, except in form. In the one case you make him give up his money to save his land, and money is itself property, and in the other you take the land itself without the right of redemption by paying the money. With all due deference to my Brethren, who have overruled my opinion, I take leave to say that there is no decision to be found in the books and no authority elsewhere that holds the arbitrary provision of this charter and the proceedings taken in pursuance thereof to be valid. It is far better that ambitious villages, towns, and cities should not grow so rapidly than that the sacred rights of the citizen should be destroyed or even impaired.

A similar idea was advanced by Judge Bynum in *French v. Commissioners*, 74 N. C. 692, in speaking of our dealing with the property and rights of others, with special reference to the power of taxation: "The other and better way, however," he said, "is to re-

duce the expenditures. The old proverb, 'Cut the garment according to the cloth,' has in it much practical wisdom. It is illustrated every day in private life, and is the foundation of individual integrity, contentment, and success. In every relation of wholesome life men adapt their wants and expenditures to their income. No good reason can exist why the same obligation does not rest upon corporations, and is not equally as practicable. Instead of which, as things now go, those who are intrusted with other people's money and property, whether states or counties, instead of practicing prudence and economy in the discharge of their trust, seem emulous of each other in extravagance. The end of such a course is easily seen, and must be one of disaster." It is much better not to progress so rapidly than to make the citizen pay tribute to the public for which he receives no corresponding benefit apart from that enjoyed by other members of the community. Judge Dillon said: "Special benefits to the property assessed—that is, benefits received by it in addition to those received by the community at large—is the true and only just foundation upon which local assessments can rest; and to the extent of special benefits it is everywhere admitted that the Legislature may authorize local taxes or assessments to be made." 2 Dillon on Mun. Corp. 933 (3).

I will refer to one case decided by this court, and then pass to a general consideration of the other authorities cited in the opinion, and to what is said upon the subject by the text-writers. In *Kinston v. Wooten*, 150 N. C. 300, 63 S. E. 1061, referring to *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, and *French v. Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, which is erroneously supposed to have modified it, it is said that "the system provided in the different states will usually be recognized by the federal courts as conclusive in so far as they establish general rules for making assessments, yet if, in applying these rules, or any given method, to the property of an individual, it should appear that there is a marked disproportion between the burden imposed upon the lot owner and any possible benefit his property may derive from the improvement, so that it will manifestly appear that the presumption of equality had been entirely ignored and gross injustice done, the court will interfere and grant relief." What greater inequality can there be between a burden imposed and no benefit at all in return? If, as said in that case, the courts will intervene and enjoin the assessment if the burden is great and the benefit small, what will the court do, when there is all burden and no benefit, as in this case, for, as the jury have found that benefits were not considered at all, we must assume there are none, for there are none shown to exist by the decision of a judicial tribunal or even of an



arbitrary one, and then, again, the charter gives to the commissioners, who may be a municipal oligarchy, the unlimited and arbitrary power to assess a citizen out of his property without the slightest regard to his benefits or the right of compensation for property forcibly taken from him for the benefit of the public. This despotic power resides in the board of commissioners, to be exercised at their will, and they may simply declare in the exercise of it that the abutting owner shall pay all the costs of the improvement. Remember that I have fully conceded the right of the Legislature by itself or through a local municipal body to prescribe the manner in which the benefit may be ascertained, and to levy or apportion the assessment according to some rule, by district, front foot, superficial area, or value, or otherwise, so that there is not such manifest disproportion between burden and benefit as to work oppression or shock our sense of justice. But how can we adjudicate that there is such a disproportion unless we have at least some tangible idea of what the benefit is, so that we may compare it with the burden? Proportion must exist between two or more well-known things, something that can be seen or understood. It cannot be predicated of something that is not known as between it and something that is known. All burden and no benefit does not suggest the idea of proportion, and that is the nonproportion which this charter and the ordinance adopted in pursuance of it have established.

Recent text-writers on this subject, who have reviewed all the decisions rendered up to the time their treatises were published, have thus stated the conclusion reached by them, after examining all the authorities, many of which are cited in the notes to the section we quote, which is as follows: "In order to justify a local assessment, the improvement must not only be public in its nature, but it must confer an especial and local benefit upon the property which is so assessed therefor. If the improvement confers an especial local benefit, it is no objection to an assessment therefor that it is constructed so as to benefit the public as much as possible and to injure it as little as possible. Improvements of this sort must 'have a double aspect of general public benefit and also of peculiar local benefit.' The attempt to state in general terms what constitutes a local special benefit has often been made. 'Benefits are special when they increase the value of the land, relieve it from a burden, or make it especially adapted to a purpose which enhances its value.' 'Whatever gives an additional value to the particular parcel of land is a special, and not a general, benefit, and it may be a special benefit, though not an immediate one.' Without such local benefit, the improvement may be public in character, so that the expense thereof may be borne by general tax-

ation, but a local assessment, based upon the theory of benefits, cannot be levied therefor." Jones & Page on Taxation by Assessments, § 284. *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, is directly opposed to the decision in this case. It was there held that an assessment upon abutting property by the front foot, without taking special benefits into account, for the entire cost and expense of opening a street, including not only the amount to be paid for the land, but the cost and expense of the proceedings, is a taking of private property for public use without compensation. It is said, though, that the *Norwood* Case has been reconsidered since by that court, and so qualified, modified, and explained that there is little or nothing as an authority left of it. I do not agree to this criticism of the case, or to the effect of later decisions upon it as an authority. It has been distinguished in some cases, but not overruled, and its authority, as a precedent, when more recent cases reviewing it are rightly considered, has not even been impaired, and, at least, so far as the question involved in this case is concerned.

It is supposed that the case of *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, and the other cases cited in the opinion from that volume of the reports of the same court, have so modified the decision in *Norwood's Case* as to diminish, if not destroy, its weight as an authority. I do not think so. The reasoning in those cases is devoted largely to a consideration of the manner of apportioning the assessment, whether, "in proportion to frontage, the area or the market value of the land, or in proportion to the benefits as estimated by commissioners," without any reference to the other methods. But there will be seen running through all of the discussions in these cases that there must be some determination that the property is benefited, and then the Legislature may decide in its discretion how the assessment may be apportioned. This will appear by the extract I have just taken from *Wright v. Davidson*, 181 U. S. 379, 21 Sup. Ct. 619, 45 L. Ed. 900 (cited in the opinion of the court), and this expression of the court in that case: "The class of lands to be assessed for the purpose may be either determined by the Legislature itself by defining a territorial district, or by other designation; or it may be left by the Legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited." The Legislature may decide that certain lands within a given or prescribed area will be benefited by an improvement, and form a taxing district for the purpose of apportioning the assessment. It is not the method of apportionment that I am criticizing, but the taking of a citizen's property, not only without just compensation, but

without any compensation, and you may as well take his land specifically as his money. There is no difference, as far as he is concerned. In *French v. Barber Asph. Co.*, supra, the court, in attempting to show that *Norwood's Case* does not conflict with the decision in that case, says that the decree in the *Norwood Case* did enjoin the making and collecting of the special assessment, as being equivalent to confiscation or a taking of property for a public use, without just compensation, and therefore without due process of law in violation of the fourteenth amendment, but it further says that it left the village of *Norwood* free "to make a new assessment upon the plaintiff's abutting property for so much of the expense of the opening of the street as was found, upon due and proper inquiry, to be equal to the special benefits accruing to the property"; the matter being left, with this limitation, under the control of the local authorities. In *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047, it was said by the court upon this very question: "Neither can it be doubted that, if the state Constitution does not prohibit, the Legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. But the power of the Legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the Legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country." In *Norwood v. Baker* the court thus expressed itself: "Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property, such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. *Mobile County v. Kimball*, 102 U. S. 691, 703, 704 [26 L. Ed. 238]; *Illinois Central Railroad v. Decatur*, 147 U. S. 190, 202 [13 Sup. Ct. 293, 37 L. Ed. 132]; *Bauman v. Ross*, 167 U. S. 548, 589,<sup>1</sup> and authorities there cited. And, according to the weight of ju-

dicial authority, the Legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvement." But, while this is true, it has not the power itself, nor can it be conferred upon municipal boards, to arbitrarily take the property of the citizen without any reference to benefits to be received by him from the public improvement. In *Raleigh v. Peace*, 110 N. C. 38, 14 S. E. 523, 17 L. R. A. 330, Justice Shepherd said: "It is therefore pre-eminently just, as well as the duty of the lawmaking power, to provide for an equitable adjustment of such burdens in proportion to the benefits conferred." *Ruffin, J.*, says in *Shuford v. Commissioners*, 86 N. C. 562: "[Such assessments] are committed to the unrestrained discretion of the lawmaking power of the state, only, as I take it, that the burden imposed on each citizen's property must be in proportion to the advantages it may derive therefrom." It is well not to vest too much authority in local tribunals in the matter of taking or assessing private property. It is liable to great abuse and often tends to oppression. Unlimited discretion is dangerous, and no man's property or rights should be held subject to the mere will or caprice of another. This is a government in which responsibility of the public official to the people is of the first importance. Power, it has been said, is always, though gradually, stealing from the many to the few, and recently this tendency has been somewhat increased and accelerated. This arbitrary element in government should be eliminated to the extent that such a course is consistent with the due and proper administration of public affairs and the welfare of the people. The citizen should be made to feel that he holds and enjoys his property under the protection of the law and not at the mere pleasure of one who may prove to be a petty despot, and who is not bound by any law or any restraint save his own will. This particular assessment may be just and right, and the real facts, if disclosed, might show that the defendant is only required to pay for the special benefit he will receive, which is the compensation for the loss of his money, but there is no provision of law for ascertaining the facts, and the case must be considered as if it had been found that his property will not be benefited at all. I adhere to the rule established in the *Norwood Case*, that the exaction from the owner of private property of the cost incurred in making a public improvement, or in substantial excess of the special benefits accruing to him, is in either case a taking of his property under the guise of taxation without compensation, and, when there is no provision for compensation at all, it is confiscation. All systems or schemes of taxation are based upon the idea of benefit to those who must bear

<sup>1</sup> 17 Sup. Ct. 566, 42 L. Ed. 270.

their share of the public burden, and can be justified upon no other principle, and assessments for local improvements are conceded by the authorities to be an exercise of the taxing power. My conclusion is that the assessment in this case was laid upon an arbitrary principle, there being a total failure to exercise the judgment of the Legislature or the board in determining the actual benefit, or as to whether there was any benefit, and therefore the assessment is void. The amount involved should make no difference in the application of the fundamental principle of justice and the Bill of Rights (article 1, § 17), and, if anything, we should guard most zealously against wrong to and oppression of those who are the least able to resist the encroachments and aggression of a despotic power, not that the weak and humble have any greater legal rights than those more fortunate, but for the reason that they are more exposed to the danger of a wrong use of absolute power and less able to defend themselves against it. When enforcing the claims of the public, we should be careful not to overlook the natural and constitutional rights of the citizen, which should not be sacrificed even to promote the public welfare.

(156 N. C. 541)

**MULLINAX v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of North Carolina. Nov. 9, 1911.)

**1. TELEGRAPHS AND TELEPHONES (§ 37\*)— NEGLIGENCE IN DELIVERY OF MESSAGE— EVIDENCE.**

The negligence of a telegraph company in the delivery of a message to plaintiff announcing the death of his sister at such time as prevented him from attending the funeral is established by proof that it transmitted the message incorrectly, both as to the person addressed and the names of deceased and the signer, and made no inquiry and no effort to deliver it to the plaintiff after being informed that it was probably intended for him.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 24, 29, 32; Dec. Dig. § 37.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 53\*)— NEGLIGENCE IN DELIVERY OF MESSAGE— PROXIMATE CAUSE.**

Plaintiff in an action against a telegraph company for mental anguish caused by its negligence in delaying the delivery of a telegram notifying him of the death of his sister so as to prevent him from attending her funeral must show that defendant's negligence was the proximate cause of his injury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 39-47; Dec. Dig. § 53.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 51\*)— NEGLIGENCE IN DELIVERY OF MESSAGE— CONTRIBUTORY NEGLIGENCE.**

Contributory negligence on the part of the plaintiff in an action against a telegraph company for mental anguish caused by its negligence in delaying the delivery of a death mes-

sage which prevented him from attending the funeral of his sister is fatal to a recovery, and, where plaintiff receives information of his sister's death from some other source in time to attend the funeral, and under such circumstances that he could have gone, and failed to go, he is guilty of contributory negligence; the negligence of defendant then not being the proximate cause of injury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 35; Dec. Dig. § 51.\*]

**4. TELEGRAPHS AND TELEPHONES (§ 73\*)— ACTION—QUESTIONS FOR JURY.**

On the evidence in an action against a telegraph company for mental anguish caused by its negligence in delaying the delivery of a death message, so as to prevent plaintiff from attending his sister's funeral, held, that the questions of proximate cause and contributory negligence were for the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 76; Dec. Dig. § 73.\*]

**5. TRIAL (§ 139\*)—TAKING QUESTION FROM JURY—NONSUIT OR DIRECTION OF VERDICT.**

The denial of a motion for a nonsuit and the refusal to direct a verdict for the defendant on issues of fact are proper if there was any aspect of the evidence on which a verdict can be returned in favor of plaintiff.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 332; Dec. Dig. § 139.\*]

**6. TELEGRAPHS AND TELEPHONES (§ 51\*)— DELAY—MISTAKE IN TRANSMISSION OF MESSAGE—CONTRIBUTORY NEGLIGENCE.**

Where a telegraph company receives a message for transmission to plaintiff announcing the death of his sister, and the time of her funeral, and it is incorrectly transmitted and no inquiry or effort is made to find the plaintiff, it is the plaintiff's duty to exercise the care of a man of ordinary prudence as to the information contained in the telegram, received from other sources and reasonably calculated to put him on inquiry as to whether deceased was his sister, and to make inquiries and exercise ordinary care in ascertaining and attending her funeral, and to supply himself with necessary funds to make arrangements to leave in time for the funeral, and a failure to exercise such care is contributory negligence which will defeat a recovery for mental anguish caused by the company's negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 35; Dec. Dig. § 51.\*]

**7. TELEGRAPHS AND TELEPHONES (§ 61\*)— ACTION FOR DELAY IN DELIVERY OF DEATH MESSAGE—DAMAGES.**

Where a telegraph company has been negligent in the delivery of a message addressed to plaintiff, announcing the death of his sister and the time for the funeral, it is not a defense to an action for such negligence that the husband of the deceased declined to reasonably postpone the funeral until the arrival of the plaintiff.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 61.\*]

**8. TELEGRAPHS AND TELEPHONES (§ 66\*)— NEGLIGENCE IN DELIVERY OF MESSAGE— BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.**

In an action against a telegraph company for mental anguish caused by its negligence in delaying the delivery of a death message, so as to prevent plaintiff from attending his sister's funeral, the burden of proving plaintiff's al-

leged contributory negligence was upon the defendant.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

Appeal from Superior Court, Orange County; Daniels, Judge.

Action by J. P. Mullinax against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. No error.

This is an action to recover damages for mental anguish, caused, as the plaintiff alleges, by the negligence of the defendant in the delivery of a telegram, notifying him of the death of his sister, Jennie Rains, which prevented him from attending her funeral.

Jennie Rains lived at Franklinsville, in Randolph county. It was admitted that on February 28, 1910, about 3 o'clock p. m., the following telegram was delivered to the agent of the defendant at Franklinsville: "To J. P. Mullinax, care Eno Cotton Mills, Hillsboro, N. C.: Jennie Rains killed this morning by a cow. Funeral tomorrow evening. Answer. T. A. Slack." When received by the agent of the defendant at Hillsboro, at 3:35 p. m. of the same day, it read as follows: "To J. H. Mullins, care E. O. M. H. B.: Jennie Rains killed this morning by cow. Funeral tomorrow evening. Answer. E. A. Slack." It was also admitted that the sister of the plaintiff was buried about 2 o'clock p. m. on March 1, 1910, and that the plaintiff could have reached Franklinsville in time for the funeral on a train leaving Hillsboro at 5 o'clock p. m. of February 28th, and on one leaving the same place at 4 o'clock a. m. of March 1st. The telegram was delivered to the plaintiff in the form in which it was received at Hillsboro about 8 a. m. of March 1st, and the plaintiff immediately telegraphed that he would be at Franklinsville on the next train, which telegram was received before the funeral. It was also admitted that the plaintiff went to Franklinsville on the next train after the telegram was delivered to him, and reached there about 5 o'clock p. m. of March 1st, after his sister was buried.

The plaintiff introduced evidence tending to prove that he had been the engineer at the Eno Mills for seven years, and was well known; that he worked within 500 or 600 yards of the office of the defendant; and that, if the telegram had been promptly delivered, as it was when received by the defendant, he could, and would, have gone to Franklinsville in time for the funeral. There was evidence on the part of the defendant that the telegram was promptly sent out by its messenger boy, and that he made inquiry for J. H. Mullin, and could not find such a person.

J. M. O'Neill, a witness for the defendant,

testified: That he was the manager of the defendant at Hillsboro, and that W. E. Haynes was its operator. That on the night of February 28th he had a conversation with Mr. H. S. Cates. That Mr. Cates, Haynes, and himself were at supper, and Haynes remarked to the witness that the boy had not delivered this death message; could not find the party J. H. Mullin. That Mr. Cates spoke up and wanted to know who was dead, and Haynes then repeated the message to him. That Mr. Cates said, "Maybe that is Jess Mullinax," and said, "I am going right on back to the store, and he lives close to the store, and, if it is some of his people, I will notify him." That Mr. Cates took an envelope, as witness remembers, out of his pocket, and copied down what Mr. Haynes told him was in the message from Franklinsville, and that "Jennie Rains" had been killed by a cow and "would be buried to-morrow afternoon," was not sure whether he told him who it was signed by or not. That Mr. Cates copied that down on an envelope he took out of his pocket. That it was in the afternoon, they were at supper, and that time of the year they had supper about 6 o'clock. That they were at Miss Bettie Conklin's boarding house near the depot. That he was in the telegraph office that night. That he was in there nearly every night on an average until about 11 o'clock. That he had two lamps burning. The doors were not open, but anybody could get in that wanted to. Mr. Mullinax did not come to the office that night. Witness was present when he came there the next morning. He came in, and Mr. Haynes was at the telegraph table, and witness was at the other side of the office, and Mullinax asked if there was a message for him, and Mr. Haynes told him there was one for J. H. Mullin, which might be intended for him, and gave it to him. Mullinax read it and signed for it. The message was addressed to J. H. Mullin. That, when the message was delivered to Mullinax, he sent a message to Mr. T. A. Slack. That this message was delivered to Mr. Haynes. Mullinax left on the train at 10:25 or 10:28.

H. S. Cates, who was a merchant in Hillsboro, witness for the defendant, testified: I live just south of the Oconeechee Mountain, about a mile and a half from the depot, and am not connected in any way with the Western Union Telegraph Company, and have no interest in the result of this litigation. When I went to supper just beyond the station, when I went into the dining room at Miss Bettie Conklin's, Mr. O'Neill was sitting at the table, and he and Mr. Haynes were discussing about a message, and Mr. O'Neill asked me if I knew a party by the name of 'J. H. Mullins' on the hill, and I told him I did not, but I did know a party by the name of 'J. P. Mulli-

nax,' who lived near my store, and I asked him about the message, and he told me about it, and I said I rather expected it was for Mr. Mullinax, and I said: 'If you will give me a copy of it, or give me the message, I will carry it there.' And Mr. Haynes gave me a copy. I took a right copy, don't know that I copied it exactly, but I took the outline. I don't know that I got a statement that the funeral would be the next evening, but I got a statement that Jennie Rans was dead. I got the statement that it was from Franklinsville, sent by some Mr. Slack. After I ate supper, I went back to the store, and I sent some party, I don't remember who, to see Mr. Mullinax. He lived off the path a distance and I sent a party by to tell Mr. Mullinax to come to the store, I wanted to see him, and in a few minutes Mr. Mullinax and his wife came in the store, and I was out, and, when I came in, he told me he had been waiting about five or ten minutes and he asked me what I wanted to see him about, and I told him I had a message, and had a copy of it in my pocket, and I began to look for it and could not find it at once, but afterwards I did find it and read the message to him. I read that a Mrs. Jennie Rans from Franklinsville was dead. I don't believe I stated when she would be buried. I told him she had been killed by a cow, and that Mr. Slack sent the message. I don't think I told him any initials. I told him that Mr. Slack had sent a message stating that Jennie Rans, of Franklinsville, had been killed by a cow. I don't think Mr. Mullinax said anything, but Mrs. Mullinax said, 'You have got some people up there, and I expect it is your sister.' And they remarked to each other one thing and another about it, and I think they finally decided it was his sister, but I told him the message was for J. H. Mullins. His wife said in a few minutes, 'You will have to go, won't you,' and he said, 'Yes,' and she said, 'You had better get ready and go.' This was about 8 o'clock on the night of the 28th."

There was other evidence on the part of the defendant tending to corroborate this evidence.

The plaintiff was examined as a witness, and among other things said: That he was fond of his sister, as much so as any brother could be of a sister. That it had been something like a year and a half or two years prior to her death that he had seen her. She lived at the same place she did when she died, when he last saw her. That he has suffered mental anguish and regretted the failure to see her before she was put away. That it had given him a lot of trouble. That he has been running an engine at the Eno Cotton Mills. He has had the same job ever since he has been there. That his reason for going to the telegraph office on the morning of March 1st and making inquiry about a telegram was that the night before Mr. Scott Cates sent for

him to come up to his store about 8 o'clock. He went there, and it was some time after he got there before he saw Mr. Cates, some 20 or 25 minutes. Finally Mr. Cates came in, and said Mr. O'Neill, the agent, told him there came a telegram for somebody saying his sister was killed. It sounded like "Jennie Rans" or "Jennie Renn," or something like that. Mr. Cates had written it down, but he had lost the paper. Mr. Cates said "Jennie Rans" or "Jennie Renn," or something like that, and a name something like "J. H. Mullin." It was not his name, but sounded something like him, and it might be for him. That he did not think much about it at the time, and went on home. The next morning he got to thinking about it, and went to the depot. That he went to the depot after he had gone to work. That he went to the office as soon as it was opened. The mill opens at 6 o'clock, which was before the opening of the telegraph office. The telegraph office was not open at the time Mr. Cates spoke to him. That they did not have any night train and had closed up. That he did not know where Mr. O'Neill lived. That, if the telegram had been delivered on the evening of the 28th of February, he would have gone right away to Franklinsville to his sister's funeral on the first train he could have got, if he had been sure about it. That he is pretty sure he could have arranged with the mill between 3:25 and 5:28 to have gotten off. That in a case of that kind he certainly could have gone.

Cross-examination: That on the night of February 28th he went to Mr. Cates' store in response to a message from Mr. Cates sending for him. He did not know what Mr. Cates wanted. That his wife went with him. That they went into the store together. "Q. When you went in there, didn't Mr. Cates tell you that he had had a talk with Mr. Haynes and Mr. O'Neill? A. No, sir. Q. Didn't he tell you that the telegraph company had gotten a message saying that Jennie Rains, who lived in Franklinsville, had gotten killed, and it was addressed to some one named 'J. H. Mullin,' and he thought it might be for you? A. No, sir; he didn't tell me that way. Q. Didn't he say there was a message for J. H. Mullins, saying Jennie Rans or Jennie Rains had been killed, and sent from Franklinsville? A. He told me Mr. O'Neill had asked him to see if there was anybody there by that name, and he thought it was so much like my name it might be for me. He didn't say anything about Franklinsville. Q. He told you the message stated Jennie Rains had been killed by a cow? A. 'Jennie Rans,' he said. Q. Had been killed by a cow, and the funeral would be to-morrow? A. Yes, sir. Q. Didn't he tell you that the message was from Franklinsville? A. If he did, I don't remember it. If he had said anything

about Franklinsville, I would have been more sure of it. Q. Didn't your wife turn to you and say, 'Jim, that is your sister, and you had better get ready to go'? A. No, sir; not that I know of. Q. After you had this conversation with Mr. Cates, you never went down to the telegraph office? A. No, sir; not that night. Q. You went home? A. Yes, sir." That the next morning about 8 o'clock he went to the telegraph office and got the message, and at 8:10 he sent a telegram. "Q. You went down and asked them to see this message addressed to J. H. Mullin? A. Yes, sir; and I saw it was from Franklinsville, and I was pretty sure it was my sister. Q. Then you telegraphed to T. A. Slack that you would be there on the next train? A. Yes, sir. Q. If you had left there at 4 o'clock in the morning, you would have got to Franklinsville exactly the same time as if you had left at 5:38 in the afternoon? A. Yes, sir; and I would have left if I had been sure it was my sister." That after he telegraphed Mr. Slack he went to Franklinsville. That after his talk with Mr. Cates he did not go to Miss Conklin's, where Mr. Haynes was boarding, to find out anything about the message. That he knew Mr. Haynes was working at the telegraph office. That he never went to where he was boarding, and he never went to the station until the next morning.

Redirect examination: He went to the mill after he got the message, and saw Mr. Webb, who was secretary and treasurer, and arranged with him to get off. The mill closed at 6 o'clock. That he did not go to the depot on the night of February 28th. That he did not go to the depot that night because the depot was shut up, and there was no use to go down there, and he was not sure it interested him anyhow to go. That he did not know the depot was shut up; knew it was customary for it to be shut up. He did not go down to see whether it was shut up or not. That on the morning of March 1st he got the money to go to Franklinsville on. That he got it from Mr. Webb at the office. That he could not have gone without first getting money and did not have the ready money that night. That the mill was not open that night, and that he did get the money without any trouble at the mill in the daytime when he asked for it.

The wife of the plaintiff corroborated his evidence.

Exceptions were taken by the defendant to the refusal of its motion to nonsuit, the failure to give certain prayers for instructions, and to parts of his honor's charge, all of which are embraced in five propositions:

(1) That the information given to the plaintiff by the witness Cates was as full as that he acted on the next morning, and that he received it in time to leave Hillsboro at 4 o'clock a. m. of March 1st. and in time

to reach Franklinsville before the funeral, and that, therefore, his failure to act on this information was negligence and the proximate cause of the injury.

(2) That this information, if not as full as that he received next morning, was sufficient to put the plaintiff on inquiry, and that he failed to make the inquiry, and was therefore negligent, and that this was the proximate cause of his injury.

(3) That, predicated on the two preceding propositions, the plaintiff was guilty of contributory negligence on his own evidence.

(4) That if the funeral of the sister could have been reasonably postponed until the arrival of the plaintiff, and her husband declined to postpone it, the answer to the third issue should be, "Nothing."

(5) That his honor erred in charging that the burden of the second issue was on the defendant.

The jury returned the following verdict:

"(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) If so, did the plaintiff by negligence on his part contribute to said injury? Answer: No.

"(3) What damages, if any, is the plaintiff entitled to recover? Answer: \$1,000."

From a judgment in accordance with the verdict, the defendant appealed.

King & Kimball, Geo. H. Fearons, and A. S. Barnard, for appellant. S. M. Gattis and Bryant & Brogden, for appellee.

ALLEN, J. [1] The negligence of the defendant cannot be disputed. It failed in its duty in that it transmitted the message incorrectly, and also in making no inquiry and no effort to deliver to the plaintiff, after being informed that it was probably intended for him.

[2] It is, however, true, as the defendant contends, that negligence alone will not entitle the plaintiff to recover, and that he must go further, and show that this negligence was the proximate cause of his injury.

[3] It is also true that contributory negligence on the part of the plaintiff is fatal to his action, and that if he received information of the death of his sister from some other source in time to attend the funeral, and under such circumstances that he could have gone and failed to go, that he would be guilty of contributory negligence, and the negligence of the defendant would not be proximate. There is practically no dispute as to the law. The controversy is as to the facts, and as to the meaning and effect to be given to the evidence.

[4] If we construed the evidence of the plaintiff as the defendant does, or if we were permitted to dispose of the case on the evidence of the defendant alone, we might be justified in denying a recovery, but in our opinion his honor held correctly that on the

whole evidence the question of proximate cause and contributory negligence was for the jury, and this he submitted to them under proper instructions. The plaintiff does not say that the witness Cates told him that there was a telegram for him saying his sister was dead, but that a telegram had come for some one with a name like "J. H. Mullin" that "Jennie Rans," or "Jennie Renn" was dead. He denies that he was told that the telegram came from Franklinsville. The conversation with Cates was at 8 or 9 o'clock at night, when the telegraph office was closed. He had no money, and the mills were closed, where he could have gotten money. According to the plaintiff, he received the additional information the next morning that the telegram was from Franklinsville, and then concluded it was his sister. If the telegram had been transmitted correctly and had been promptly delivered, the plaintiff would have received it before 4 o'clock p. m. of February 28th, when the mills were open, and he says he could have gotten the money for his expenses, and would have left Hillsboro on the 5 o'clock train, and, if so, would have reached Franklinsville in time for the funeral. The defendant cannot, under these circumstances, escape liability by imposing upon one who owed no duty to the plaintiff the obligation of conveying information, which the plaintiff says was imperfect, and at night, when the plaintiff had no money and could not get it, and when the office of the defendant was closed.

[5] We have considered the first three propositions, insisted on by the defendant, largely on the evidence of the plaintiff, because they are presented under a motion to nonsuit, and under prayers for instructions directing a verdict in favor of the defendant on the first and second issues, all of which should have been denied, if there was any aspect of the evidence upon which a verdict could have been returned in favor of the plaintiff. His honor imposed upon the plaintiff all that is required by law. He charged the jury that the burden was on the plaintiff to prove negligence, and that this negligence was the proximate cause of his injury; that is, that it prevented him from attending the funeral.

[6] He also said as to the duty of the plaintiff: "It was his duty to exercise the care of a man of ordinary prudence, notwithstanding the fact, if the defendant had been negligent in getting the address wrong and the name wrong and the signature wrong, still he owed the duty not to be negligent himself, but to exercise the care of a man of ordinary prudence under all the circumstances. If he did that, you would answer this issue, 'No.' If the defendant has satisfied you from all this evidence, evidence of the plaintiff and the defendant all taken together, that he failed to act as an ordinarily prudent man would have acted under all the circumstances, you will answer it,

'Yes.' It was his duty, if information came to him that was reasonably calculated to put him on inquiry as to whether or not the dead woman was his sister. It was his duty to exercise ordinary care to find out whether or not it was his sister, and if he failed to exercise such ordinary care in making inquiry and in ascertaining and in attending her funeral, that is the reason he suffered, then he is guilty of contributory negligence, and you will answer this issue, 'Yes.' Or if he knew from what was told him by Mr. Cates that it was his sister, and then he did not exercise ordinary care to supply himself with the necessary funds, and to make his arrangements to get off and go in time for the funeral, then he would be guilty of negligence, and if that negligence caused him to fail to get to the funeral, and brought about his suffering, then you should answer that issue, 'Yes.' So, at last, the whole question upon this issue comes down to whether or not he exercised the care of an ordinarily prudent man under all the circumstances, taking into consideration what had been said to him and what he knew, and what he did, the time of night, the fact that he had no money at the time, his character and standing in the community, as to whether or not he could have secured the necessary funds and could have gotten off, whether he should have concluded that she was his sister, whether he made inquiry about it and pursued the investigation and acted as a man of ordinary prudence would have acted under all the circumstances. If he did, your answer to this issue should be, 'No'; that is, that he was not guilty of contributory negligence. But if the defendant has satisfied you that he failed to exercise the care of a man of ordinary prudence in the particulars I have mentioned, or any of them, then you will answer the issue, 'Yes.'"

[7] We do not agree with the defendant as to its fourth contention. There is no evidence that the funeral of the sister could have been reasonably postponed, and, if this fact appeared, we fail to see how the act of her husband, over whom the plaintiff had no control, in declining to do so, could affect his right to recover.

[8] His honor correctly held that the burden of the second issue was on the defendant. The cases of Hocutt v. Tel. Co., 147 N. C. 186, 60 S. E. 980, and Hauser v. Tel. Co., 150 N. C. 557, 64 S. E. 503, relied on by the defendant, are not in conflict with this view. No issue of contributory negligence was submitted in either case, and consequently the question here raised of the burden of proof on that issue could not be involved. What is said by Justice Walker in the last case as to the burden of proof relates entirely to the question of proximate cause, as is clearly shown by the language he uses. He says: "The burden of proof was not upon the defendant to show that the plaintiff had not

exercised diligence, but upon the plaintiff to show, not only that the defendant had been guilty of negligence, but that its negligence was the proximate cause of the damage to him." This appears to us a clear case of negligence on the part of the defendant, resulting in damage to the plaintiff, and it has been presented to the jury with a just recognition of the rights of both parties.

No error.

(156 N. C. 519)

**HAMILTON v. HINES BROS. LUMBER CO.**

(Supreme Court of North Carolina. Nov. 9, 1911.)

**1. MASTER AND SERVANT (§ 286\*)—ACTIONS—EVIDENCE—SUFFICIENCY.**

In an action for the death of a servant killed in defendant's employ, held that, under the rule that plaintiff's evidence must be taken as true and interpreted most favorably for him, the question of defendant's negligence should have been submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010-1050; Dec. Dig. § 286.\*]

**2. APPEAL AND ERROR (§ 927\*)—REVIEW—NONSUIT—CONSTRUCTION OF EVIDENCE.**

To sustain an involuntary nonsuit, the court may not select and act upon that portion of plaintiff's evidence most favorable to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. § 927.\*]

**3. MASTER AND SERVANT (§ 107\*)—INJURIES—APPLIANCES—MACHINEERY—"WAYS" OR APPLIANCES—STATUTE.**

While the fellow servant law (Revisal 1905, § 2046), giving a right of action to an employé injured by reason of defective machinery, ways, or appliances, extends to logging railroads, the term "ways" refers rather to roadways and material objects, which it is the duty of the employer to provide, than to methods of work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 107.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7417-7421; vol. 8, p. 7834.]

**4. MASTER AND SERVANT (§ 130\*)—INJURIES—RULES—DIRECTIONS.**

A master is liable for injury to his servants caused by negligence in directions given or methods of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 264, 266, 276; Dec. Dig. § 130.\*]

**5. MASTER AND SERVANT (§ 217\*)—INJURIES—RISKS ASSUMED—EXTENT.**

Where a master is negligent in establishing methods of work and directing his servants, the doctrine of assumption of risk, in its technical significance, does not apply, but the effect of working on in the presence of known conditions depends upon whether the attendant dangers were so obvious that a man of ordinary prudence should quit the employment rather than incur them, and the fact that service was rendered with the knowledge and approval of the master or his representative and the employé's reasonable apprehension of discharge in case of disobedience are circumstances bearing upon that question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

**6. MASTER AND SERVANT (§ 270\*)—INJURIES—ACTIONS—NEGLECT—EVIDENCE.**

Where the fireman on a logging train was killed by uncoupling cars for flying switch, evidence that the engineer requested another employé to go out on the train and help deceased was admissible because tending to show that deceased was acting under the orders of the engineer, who had knowledge of the way deceased was doing the work.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.\*]

Appeal from Superior Court, Lenoir County; Peebles, Judge.

Action by H. K. Hamilton, as administrator of McCoy Hamilton, against Hines Brothers Lumber Company. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

G. V. Cowper and Y. T. Ormond, for appellant. Rouse & Land, Loftin & Dawson, McLean, Varser & McLean, for appellee.

HOKE, J. [1] There was evidence tending to show: That in September, 1910, the intestate, an employé, was run over and killed by a train of defendant company. That, at the time of the occurrence, the intestate, a youth between 18 and 19 years of age, was acting as fireman; he and the engineer composing the train crew, and the duties of intestate being to fire the engine, couple and uncouple the cars, and change the switches. That the train in question consisted of an engine and 12 or 13 logging trucks or cars, two of them, several cars back from the end, being loaded with a barrel of oil and feed stuff and was backing at the time with the purpose of cutting out these loaded cars and leaving the empties on a siding near at hand. That, with this end in view, and while the train was in motion, approaching the switch, the intestate left the engine and went along the skeleton cars of the train and to the forward end of the loaded cars and took a position to uncouple the empty cars, in front. About the same time, one Lonnie Emerson, a young man who was also on the engine, but without regular duties, so far as the testimony shows, was requested by the engineer to go forward and assist the intestate by uncoupling the empties, which were just behind the loaded cars; the intent being for intestate to change the switch, throw the empty cars in front and rear onto the siding and allow the loaded cars to remain upon the main line. That, when Lonnie Emerson had reached his position, he looked off for a moment, and, when he looked back, the intestate, who had been sitting, as stated, on the front part of the loaded cars, where they were to be uncoupled, had disappeared. He had fallen between the cars and two of them had run over him, causing injuries from which he died in about three-quarters of an hour. There was also evidence tend-



ing to show that this plan was what is termed a "flying switch"; that it was not a safe and proper way to pursue in cutting out the loaded cars and was forbidden by the company's rules. Speaking to this question, plaintiff, H. K. Hamilton, intestate's father, on his examination in chief testified as follows: "Q. You have heard the kind of switching that was being done on this road, will you state from your knowledge as an engineer and from your experience how that work should be done and the proper way to do it? The Court: He can state what is a safe way and an unsafe way. A. The safe way would be to back your train to the switch and stop and cut off your cars. Q. Can it be done any other way? A. Yes, there are other ways that it is frequently done. Our rule book says you can't make a switch that way. Q. From your knowledge of this kind of work as an engineer other than by the usually accepted rules of trainmen, doing this kind of work in this part of the country, is it considered a safe and proper way to uncouple cars when moving downgrade without stopping? Q. Have you had experience in running log trains? A. Yes, I have handled quite a bit. I will answer that it is not safe to make a flying switch anywhere. Q. What kind of switching is that which has been described? A. That is a flying switch when you have a car to shift without stopping the train, or the train is in action all the time."

[2] It is true the witness, in his cross-examination, qualifies this statement to some extent; but, as we have said in a recent case "we are not at liberty to select the more favorable portions of a witness' statement and act on it for defendant's benefit. We have repeatedly held that, on a motion for nonsuit, the evidence making for plaintiff's claim must be taken as true and interpreted in the light most favorable for him." *Dail v. Taylor*, 151 N. C. 289, 66 S. E. 135, 28 L. R. A. (N. S.) 949; *Deppe v. Railroad*, 152 N. C. 79, 67 S. E. 262. As the case goes back for a new trial, we do not deem it desirable to make any extended reference to the inferences permissible and arising on the testimony, but, applying the rule well recognized with us, "that if two minds could reasonably draw different conclusions from the evidence, and one of them would be favorable to plaintiff, the matter is for the jury" (*Allen, Judge, in Harvell v. Lumber Co.*, 154 N. C. 262, 70 S. E. 392), we are of opinion that the question of defendant's negligence should be submitted for the jury's decision.

[3] On the conduct of the intestate, while we have held that our statute, known as the fellow-servant law (Revisal 1905, § 2646), applies to these logging roads, we do not

think that the terms of the law, giving a right of action to an employé injured by reason of defective "machinery, ways or appliances," refer to conditions as now disclosed in the testimony; the term "ways," we think, having reference rather to roadways and objective conditions relevant to the inquiry and which it is the duty of the employer to provide. The negligence, if any, imputable to defendant on the testimony, is by reason of negligent directions given and methods established by the employer subjective in their nature and to which the statute on the facts presented was not intended to apply.

[4-6] It is well understood, however, that an employer of labor may be held responsible for directions given or methods established, of the kind indicated, by reason of which an employé is injured, as in *Noble v. Lumber Co.*, 151 N. C. 76, 65 S. E. 622, 134 Am. St. Rep. 974; *Shaw v. Manufacturing Co.*, 146 N. C. 235, 59 S. E. 676; *Jones v. Warehouse Co.*, 138 N. C. 546, 51 S. E. 106. And, where such negligence is established, it is further held, in this jurisdiction, that the doctrine of assumption of risk, in its technical acceptance, is no longer applicable. *Norris v. Cotton Mills*, 154 N. C. 475, 70 S. E. 912; *Tanner v. Lumber Co.*, 140 N. C. 475, 53 S. E. 237. But the effect of working on in the presence of conditions which are known and observed must be considered and determined on the question whether the attendant dangers were so obvious that a man of ordinary prudence and acting with such prudence should quit the employment rather than incur them. *Bissell v. Lumber Co.*, 152 N. C. 123, 67 S. E. 259. And, on the issues as to plaintiff's conduct, the fact that the particular service was rendered with the knowledge and approval of the employer or his vice principal or under his express directions, if given, also the employé's reasonable apprehensions of discharge in case of disobedience, etc., may be circumstances relevant to the inquiry. *Hicks v. Manufacturing Co.*, 138 N. C. 328, 50 S. E. 703. In this view, we think the statement of the witness Lonnie Emerson was properly received in evidence; "that the engineer requested the witness to go out on the train and help McCoy." It tended to show that the intestate was doing his work with the knowledge of the engineer, and it was also relevant on the question whether he was not acting under the engineer's orders.

Applying the rules as they obtain with us to the facts in evidence, we are of opinion that there was error in directing a nonsuit, and the order to that effect must be set aside.

Error.

(156 N. C. 648)

**STATE v. NOELL.**

(Supreme Court of North Carolina. Nov. 9, 1911.)

**1. ABDUCTION (§ 13\*)—CORROBORATION—FORMER STATEMENT CORRESPONDING WITH TESTIMONY.**

In a prosecution for the abduction of a girl under 14 years of age, evidence as to what the abducted girl afterwards told her mother is competent as corroborative of her testimony.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. § 23; Dec. Dig. § 13.\*]

**2. ABDUCTION (§ 12\*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.**

Evidence in a prosecution under Revisal 1905, § 3358, making the abduction of any child under the age of 14 years residing with parents, etc., a felony, *held* sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. § 22; Dec. Dig. § 12.\*]

**3. CRIMINAL LAW (§ 1152\*)—APPEAL—DISCRETION OF LOWER COURT—CONDUCT OF TRIAL—ARREST OF BYSTANDER.**

During the argument of counsel for defendant, a white woman charged with abduction, and while denouncing the introduction of a negro to prove defendant's bad character, there was great applause, and the court had one woman arrested and seated on the prisoner's bench in full view of the jury. *Held* that, in the absence of anything to show a gross abuse of the lower court's discretion, its conduct was not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1152.\*]

**4. HUSBAND AND WIFE (§ 108\*)—CRIMES—COERCION OF HUSBAND.**

Where the acts leading up to an abduction of a child under 14 years of age were committed in the presence of the husband of defendant, and the actual taking of the child away was done by defendant and her husband, who was always present, there is a presumption that the part taken by the defendant was under the coercion of her husband, and it is not necessary to show that the act was done literally in sight of the husband, it being sufficient if it was done near enough to be under his immediate control or influence; but, while the presence of the husband makes out a *prima facie* case of coercion, it is subject to be controlled by evidence that the wife acted voluntarily, and not by compulsion.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 389-391; Dec. Dig. § 108.\*]

Appeal from Superior Court, Rowan County; Daniels, Judge.

Janie Noell was convicted of abduction, and she appeals. No error.

Defendant's eighth exception was as follows: "This evidence as to what Clara Gibbs told her mother was not competent as substantive evidence, but was admitted for all purposes." Supreme Court rule 27 (66 S. E. vii). The court failed to restrict this evidence to the corroboration of Clara Gibbs either when admitted or in his charge.

Walser & Walser, Stewart & McRae, and R. Lee Wright, for appellant. T. W. Bickett, Atty. Gen., and Geo. L. Jones, Asst. Atty. Gen., for the State.

BROWN, J. There are 26 assignments of error, 9 of which relate to the introduction of evidence. We have examined these assignments of error with care, and considered the evidence objected to, and, while his honor may have been technically wrong in one or two instances, we do not find any substantial error committed in the rulings upon evidence which would warrant us in ordering another trial.

[1] The corroborative evidence offered by the state and received in evidence we think comes within the rule as defined by this court. *State v. Maulsby*, 130 N. C. 664, 41 S. E. 97; *State v. Freeman*, 100 N. C. 434, 5 S. E. 921. The crime of which the defendant stands convicted is defined in Revisal 1905, § 3358, as follows: "If any one shall abduct, or by any means induce any child under the age of 14 years, who shall reside with the father, mother, uncle, aunt, brother, or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be guilty of a felony, and on conviction shall be fined or imprisoned in the state's prison for a period not exceeding fifteen years." The evidence for the state tends to prove that the defendant and her husband resided in Charlotte, and that Clara Bell Gibbs, a girl under 14 years, resided in Lexington, N. C., with her parents. She testified that defendant came to her and solicited her to go to Charlotte and reside with her, stating that she should have fine clothes, plenty money, and an easy time. She refused to go. On May 9, 1911, defendant again saw her in Lexington, and solicited witness to go with her. The witness refused, saying that her mother was ill, and she could not leave her. She was seen again about 2 o'clock the same day by the defendant, and was again urged to leave home and go away with her. She again refused, but gave the matter some consideration. Again that afternoon, about 6 o'clock, she was seen by both defendant and defendant's husband, and they both insisted on her joining them and going away to a life of pleasure. She left them undecided, she said, and then, together with another girl, Virtie Kindly, joined them at the depot that night, and the four left on train No. 35 for Charlotte. The tickets for the two girls were furnished by husband of defendant. The defendant and the girls went on to Charlotte alone; the husband of the defendant leaving the train at Salisbury. Prosecuting witness testified that she was directed by defendant to change her dress on the train at Salisbury so she would not be recognized, and she did as directed. She further testified that, when they arrived at Charlotte, the defendant left the two girls in the station until she could secure a carriage; it being understood that they were to join her

when she gave the signal. On their way to the home of the defendant, the darky asked defendant if these were the girls, and she said "Yes." He asked, then, where the other one was, and she said there was nothing doing with her. Both girls testified that they neither slept nor ate any that night, and next morning both girls cried and insisted on returning home. This request was refused both girls at first, but directly defendant allowed Vertie Kindly to return, but said prosecuting witness could not go. That afternoon the officer in search of her found the prosecuting witness at the home of the defendant, and returned her to her father, and he carried her back to her home in Lexington that night.

[2] The defendant admitted in her testimony that the girl Clara Bell went with her, but testified that she went of her own volition without coercion or persuasion, and introduced evidence tending to contradict and explain the testimony of the witness for the state. The evidence for the state, if believed to be true, is ample to justify a conviction.

[3] During the argument of counsel for defendant, and while denouncing the introduction of a negro witness to prove the bad character of defendant, a white woman, there was great applause. The court had one woman arrested and seated on prisoner's bench in full view of the jury. To this the defendant excepted. This exception is untenable. The conduct of the court in reference to such matters as the preservation of order and in respect to contempts in the presence of the court must of necessity be left to the sound discretion of the court. The conduct of the judge is not reviewable, unless there is a gross abuse of discretion which does not appear in this record. *State v. Harrison*, 145 N. C. 414, 59 S. E. 867; *State v. Wilcox*, 131 N. C. 707, 42 S. E. 538.

[4] The defendant submitted a prayer for instruction in reference to the defendant acting under the coercion of her husband, and excepted to portions of the charge upon that phase of the case. Upon this subject his honor charged at some length. He substantially told the jury that, where a married woman commits a crime in the presence of her husband, it is presumed, in the absence of proof to the contrary, that she did it under his coercion. "If you find that the acts leading up to the abduction charged were committed in the presence of the husband of the defendant, and that the actual taking of Clara Bell Gibbs away from Lexington was done by the defendant and her husband, the husband always being present, then the law

presumes that the part taken by the defendant was under the coercion of her husband, and, unless the state has satisfied you that this presumption is not true, then you should find that the defendant is 'not guilty.' Should you find that the act was done under the coercion of the husband in this indictment against the wife, it is not necessary to show that the act was done literally in sight of the husband, but it is sufficient to raise the presumption it was done near enough to her husband to be under his immediate control or influence. If the jury find from the evidence that the defendant committed the act or acts for the commission of which she stands indicted, in the presence of her husband or near enough to him to be under his immediate control or influence, then the law raises the prima facie presumption that she acted under the coercion of her husband, and, if the jury further find that the state had not rebutted this prima facie presumption, the jury should find the defendant not guilty." We think this is a statement of the law of which the defendant has certainly no right to complain. *State v. Williams*, 65 N. C. 398. The court gave her the benefit of a presumption, but it is not a conclusive presumption. The presence of the husband makes out a prima facie case of coercion only, and is subject to be controlled by evidence that the wife acted voluntarily, and not by compulsion. 15 Am. & Eng. Ency. 904; 1 Russell on Crimes, 9 Am. Ed. 35.

It is not necessary to decide the question, but it may well be doubted whether the defendant could avail herself of such defense against a charge of this character, viz., the abduction of a girl by persuasion. It has been said by the early writers on criminal law that, "if the offense be of such a nature that it may be committed by wife alone without the concurrence of her husband, she may be punished for it without her husband." Archbold's Crim. Pr. & Pldg. 6; 1 Hawkins' Pleas, c. 1, § 13. Among the crimes excepted from the rule are keeping bawdyhouses and offenses of a like character. This principle would cover, we are inclined to think, abducting girls by solicitation for immoral purposes, a business in which the defendant was more likely to be acting upon her own initiative, rather than under the coercion of her husband. We have examined the charge as a whole, and find it to be a full, clear, and correct presentation of the case to the jury, and fully as favorable to the defendant as she had just right to expect.

No error.

(156 N. C. 569)

**HENDRICKS et ux. v. MOCKSVILLE FURNITURE CO.**

(Supreme Court of North Carolina. Oct. 9, 1911.)

**1. SALES (§ 201\*)—RECOVERY OF PRICE—CONDITIONS PRECEDENT.**

Where timber, sold with the agreement that it was to be stacked for six months and delivered at a certain place, was burned before the end of the six months, there could be no recovery of the purchase price, if the contract was executory, and the title had not passed to defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 529-541; Dec. Dig. § 201.\*]

**2. SALES (§ 201\*)—CONSTRUCTION OF CONTRACT—EXECUTORY CONTRACT.**

A written contract for the sale to a furniture factory of lumber from land jointly owned by a husband and wife provided that the lumber should be sawed and stacked for six months, one half of the purchase price to be advanced upon cutting, and the other half to be paid upon delivery at the purchaser's factory. It also acknowledged receipt of a sum stated to be advanced upon the above lumber. Though the contract was signed by the wife, there was no seal to her signature, and she was not privately examined. *Held* that, as the purpose of the construction of a contract is to discover and give effect to the intention of the parties as embodied in the entire instrument, the contract must be accepted as executory; the title not passing to the purchaser until the final delivery of the lumber.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 529-541; Dec. Dig. § 201.\*]

Appeal from Superior Court, Davie County; Lyon, Judge.

Action by M. J. Hendricks and wife, Emma, against the Mocksville Furniture Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

This action is to recover the purchase price of certain lumber, which the plaintiffs M. J. Hendricks and wife, Emma G. Hendricks, alleged they sold to the defendant.

On the 23d day of December, 1905, the plaintiffs and defendant entered into the following contract:

"North Carolina, Davie County. This contract made and entered into this day by and between M. J. Hendricks, of Davie county, N. C., the Mocksville Furniture Company, witnesseth: That the said M. J. Hendricks has bargained, sold to the said Mocksville Furniture Company, its successors, and does hereby bargain, sell and convey to said Mocksville Furniture Company and its successors all the oak and poplar timber—except the young trees and some for board purposes—suitable for furniture purposes on the following lands situate in Davie county, N. C., and bounded as follows, to wit: On the east by the lands of Mrs. B. C. Rich and Mrs. M. E. Tatum and Mocksville Furniture Company; on the north by the lands of Mocksville Furniture Company and Sam Eaton; on the west by the lands of Miss Mattie Eaton; on the south by the lands of J. W. Etchison and A. J. Hutchins and L. A. Furches, con-

taining 200 acres more or less. The price to be paid for said lumber by said Mocksville Furniture Company is \$15.00 per thousand feet, less the mill culls, delivered at their factory in Mocksville, N. C., after the said lumber has been sawed and stacked by the said M. J. Hendricks for six months, and he agrees to cut and saw the whole within one year from this date. The Mocksville Furniture Company agrees to advance to said M. J. Hendricks \$7.50 per thousand feet as soon as said lumber is stacked on sticks and the balance to be paid by said Mocksville Furniture Company when the same is delivered at Mocksville as aforesaid. Received of Mocksville Furniture Company \$100.00 advanced on above lumber, receipt of which is hereby acknowledged. Witness my hand and seal this the 23d day of December, 1905. M. J. Hendricks. [Seal.] Emma G. Hendricks. Witness: J. Minor."

About the last of August or the 1st of September, 1907, acting under this contract, the plaintiffs had at their mill, about eight miles from Mocksville, 30,000 feet of lumber in stacks, but which had been stacked less than six months, and 2,000 feet of lumber, which had been recently sawed, and was not stacked, all of which was about that time destroyed by fire, without negligence on the part of plaintiffs or defendant. The defendant advanced to the plaintiffs \$7.50 per thousand on the 30,000 feet, which had been stacked, and nothing on the 2,000 feet. Thereafter the plaintiffs delivered to the defendant 30,000 feet of lumber under said contract, upon which had been advanced \$7.50 per thousand, and demanded payment of the remainder of the contract price, which the defendant refused, claiming that the plaintiffs owed it the amount it had advanced on the lumber which was burned. His honor held that under said contract the title to the lumber was in the defendant, and rendered judgment in favor of the plaintiffs for \$480, being \$7.50 per thousand on the 30,000 feet and \$15 per thousand on the 2,000 feet, both of which lots were burned, and \$7.50 per thousand on the 30,000 feet delivered, and for \$32.36, which the defendant admitted it owed on other matters. The defendant excepted and appealed.

E. L. Gaffner and T. B. Bailey, for appellant. Jacob Stewart and E. E. Raper, for appellees.

ALLEN, J. (after stating the facts as above). The determination of the controversy between the plaintiffs and the defendant depends upon the interpretation of their contract.

[1] If it is executory, and under its provisions the title to the timber was not in the defendant, there could be no liability, because it is admitted that the timber had not been stacked six months, and there was no

delivery at Mocksville—material stipulations, which the plaintiffs agreed to perform. This is upon the familiar principle that one who seeks to recover upon a contract with interdependent conditions must show performance on his part. *Lawing v. Rintles*, 97 N. C. 350, 2 S. E. 252.

[2] As was said in *Hornthal v. Howcutt*, 154 N. C. 229, 70 S. E. 172: "The object of courts in the construction of a paper writing is to discover what the parties to it intended, and whether apt language has been used to give effect to that intention;" and "the intent as embraced in the entire instrument is the end to be attained, and each and every part of the contract must be given effect, if this can be done by any fair and reasonable interpretation." *Davis v. Frazier*, 150 N. C. 451, 64 S. E. 200.

In this last case, Justice Hoke quotes with approval *Lawson on Contracts*, §§ 388 and 389, as follows: "The third main rule is that that construction will be given which will best effectuate the intention of the parties, to be collected from the whole of the agreement; and, to ascertain the intention, regard must be had to the nature of the instrument, the condition of the parties executing it, and the objects which they had in view. \* \* \* Courts will examine the whole of the contract, and so construe each part with the others that all of them may, if possible, have some effect, for it is to be presumed that each part was inserted for a purpose, and has its office to perform. So, where two clauses are inconsistent, they should be construed so as to give effect to the intention of the parties, as gathered from the whole instrument. So every word will, if possible, be made to operate, if by law it may, according to the intention of the parties."

If we apply this rule of construction, and look at the entire instrument, what did the parties intend?

The plaintiffs argue with much force that there is nothing ambiguous in the language used, and that it says in express terms that the timber is conveyed to the defendant. This conclusion is reached, however, by looking at only a part of the contract, and that part, standing alone, has no consideration to support it. If the parties intended the title to the timber to pass upon the execution of the contract, it would be reasonable to expect the conveyance of the timber to be upon consideration of so many dollars, or for a certain amount per thousand feet. It nowhere appears that the defendant agreed to buy or pay for timber. It wanted lumber, and agreed to pay for it when delivered at Mocksville. The amount paid in advance is not spoken of as a payment, but an advancement.

Another circumstance which tends to show that it was not the intention of the parties that the paper writing should operate to pass the title to the timber at the time

it was signed is that a part of the land on which the timber stood belonged to Mrs. Hendricks, and there is no seal to her signature, and no probate and private examination as to her. Mr. Hendricks said on his examination: "The description of the land in the contract covers about 150 acres of the lands of myself and wife." Also there is no provision allowing the defendant to enter and cut, upon failure of the plaintiffs to do so.

As it appears to us, the situation of the parties was this: The plaintiffs had timber, which they wished to sell, and the defendant needed lumber. The plaintiffs agreed to cut and saw their timber into lumber and deliver it at Mocksville for \$15 per thousand feet; but, as the defendant could not use green lumber, it was stipulated that the lumber should be stacked six months before delivery, and that the defendant should advance \$7.50 per thousand feet to aid in payment of operating expenses. This is, in our opinion, a proper interpretation of the contract, and, if so, it is executory, and the title to the lumber was not in the defendant at the time of the fire.

A contract, in many respects similar to the one now before us, was considered at this term, in *Wiley v. Lumber Co.*, 72 S. E. 305. In that case plaintiff and another sold to the defendant "all the pine and gum timber of every description above the size of 12 inches at the base on a certain tract of land"; the written contract of conveyance and sale providing that defendant should have full time to have said timber cut and removed from said land, and extending in any event for such purpose to the full term of three years. The instrument also conveyed to defendant (the grantee) the privilege to have a right of way over the grantors' lands, and to erect thereon necessary tramroads, etc., for the purpose of carrying out the timber; and there was further provision that the grantors were to cut and deliver said timber at the logbed of defendant's tramroad, and to be paid therefor at the rate of \$4 per thousand, etc.; and Justice Hoke, speaking for the court, says: "Defendant is right in the position that when one has bought and paid for a lot of growing timber, and same has been conveyed him, with the privilege of removal within a given time, the contract as to the removal is so far unilateral that the purchaser is not obligated to cut and remove the timber. If he fails to do so within the time, his right or estate therein is forfeited, and inures, as a rule, to the owner of the land. We have so held in two cases at the last term. *Hornthal v. Howcutt*, 154 N. C. 228, 70 S. E. 171; *Bateman v. Lumber Co.*, 154 N. C. 248, 70 S. E. 474. But the contract in question here is not of that character. Applying to it the accepted rule of construction 'that the intent of the parties as embodied in the entire in-

strument is the end to be attained, and that each and every part must be given effect, if this can be done by any fair and reasonable interpretation' (Davis v. Frazier, 150 N. C. 451 [64 S. E. 200]). A perusal of this entire instrument will disclose that, while it begins by reciting \$450 as the consideration, the controlling stipulation of the contract provides that the parties plaintiff were to cut and deliver 'said timber' at the logbed, and the parties defendant were to pay for the same the sum of \$4 per thousand 'feet'; and it is also expressly provided that the \$450 first referred to as the consideration was only an advancement on the contract price, and to be accounted for, as the timber was delivered."

There was error in the ruling of the court, and a new trial is ordered.

New trial.

(112 Va. 870)

#### YOST et al. v. CRITCHER.

(Supreme Court of Appeals of Virginia. Nov. 17, 1910. On Rehearing, Nov. 16, 1911.)

##### 1. PARTNERSHIP (§§ 11, 70\*)—EXISTENCE OF RELATION.

An agreement whereby complainant and defendant purchased land, defendants furnishing the money and complainant performing service in drawing attention to the land, for resale at a profit, was in the nature of a partnership agreement, and required of each in the transactions inter se a high degree of duty.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 114; Dec. Dig. §§ 11, 70.\*]

##### 2. PARTNERSHIP (§ 95\*)—MUTUAL DUTIES—PURCHASE OF INTERESTS.

One partner must make a frank and honest disclosure to another of all knowledge from which a sound judgment may be formed as to the value of an interest to be acquired by the former from the latter.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 142; Dec. Dig. § 95.\*]

##### 3. PARTNERSHIP (§ 95\*)—FIDUCIARY RELATION—RIGHT TO SHARE IN PROFITS.

Two partners who, knowing that their associate was peculiarly embarrassed, induced him to sell his interest at a sacrifice in ignorance of matters with their knowledge, and, who subsequently acquired his interest from the person to whom he sold, will be required to account to him for his share of the net profits, though such person did not act for them in purchasing.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 142; Dec. Dig. § 95.\*]

##### 4. VENDOR AND PURCHASER (§ 238\*)—BONA FIDE PURCHASERS.

Generally a purchaser with notice from a purchaser without notice, takes a good title; but, if a purchaser with notice sells to a purchaser without notice and afterwards repurchases, he does not acquire any better title than he had in the first instance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 580-582; Dec. Dig. § 238.\*]

##### 5. TRUSTS (§ 225\*)—EXPENDITURES—INTEREST.

On an accounting by the trustees, interest should be allowed only on moneys actually paid by them from the time of payment, and on con-

tracts to pay bearing interest from the time such interest began to run.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 225.\*]

Harrison, J., dissenting.

Appeal from Corporation Court of Staunton.

Suit by John Critcher against Jacob Yost and others. From the decree, defendants appeal, and complainant files cross-errors. Modified and affirmed.

A. C. Gordon and J. M. Perry, for appellants. John Critcher, for appellee.

WHITTLE, J. In the spring of 1903 Glendy and wife conveyed to Jacob Yost, trustee, 3,249 acres of land in Bath county for \$10,000. The deed did not declare the character of the trust, but it appears that William Patrick and John Critcher were interested in the purchase along with Yost, and a written agreement was made between the parties to the effect that Yost and Patrick should advance the purchase money, and the title was to be held by Yost for the common benefit of himself and his associates in the proportion of three-eighths each to Yost and Patrick and two-eighths to Critcher; that the trustee, in conjunction with the other parties and with their advice and assistance, should sell the property, and, after returning the purchase money with interest and all reasonable expenses, divide the profit in the proportions mentioned. Critcher's contribution to the joint venture consisted in drawing the attention of his companions to the land and its possibilities—a service the ultimate outcome of which was the realization of a gross profit of \$14,000.

In June, 1903, Critcher, who was very much in need of money, wrote to Yost to inquire if there would be any objection to his selling one-half of his interest to an outside party, remarking that he would not sell unless it was agreeable to his associates. Yost in reply conceded Critcher's right to sell, but suggested that he ought in the first instance to give himself and Patrick the privilege of buying if so disposed. This correspondence was followed by an offer from Critcher of one-half of his holding for \$500, and a counter proposition from Yost of \$500 for his whole interest. Both propositions were declined, and soon after these occurrences the relations between Critcher and Yost became strained, and all direct communication between them ceased.

In September, 1904, the trustee entered into negotiations with Housel, of Bedford, Pa., for the sale of the timber on the land for \$17,000; and on September 15th Housel telegraphed his agent to close the deal. The trustee, accordingly, executed a deed conveying the timber to Housel at the agreed price, reciting a cash payment of one-third of the purchase money. In fact only \$200 were paid, and the deed with a

draft attached for the residue was forwarded to Bedford to be delivered on payment of the draft. On September 28th Housel's attorney wrote Yost that when certain minor objections to the form of the deed, to which he called attention, were corrected, his client would pay the draft and complete the purchase. To that letter both Yost and Patrick replied agreeing to some of the suggested changes in the deed; but Yost insisted that the draft must either be paid and the bonds for the deferred payments signed, or else that all the papers be returned without delay. He, moreover, declared that, "at the very time this transaction was closed, other parties were ready to buy," observing that: "Unless you gentlemen propose to close this matter up without further delay, kindly return all the papers to me and consider the deal off. We cannot afford to give longer time. In fact we have already jeopardized our interests in the effort to accommodate you." On October 8th the deed was reformed in compliance with Housel's insistence, but not until October 22d was there a definite refusal on his part to comply with the agreement. So that until the latter date Yost and Patrick had every reason to believe the sale would be consummated.

In May, 1905, the trustee sold the timber to Housel and Layman. The price is not disclosed, but it appears that Yost subsequently paid a bonus of \$3,700 to be released from the contract. That happened in this way: The Highland Development Company offered \$24,000 for the entire property, land, and timber; whereupon Yost bought back the timber from Housel and Layman at the above-named advance on the selling price, and then sold land and timber to the Highland Development Company for \$24,000. Meanwhile, on September 28, 1904, R. N. Page, through B. L. Partlow, opened negotiations with Critcher for the purchase of his interest, and the sale was made October 7th for \$1,000. Within a few months thereafter Page sold to Yost and Patrick. The record is silent both as to the date and consideration for this transfer; but it appears that, though Yost and Patrick freely advised with each other touching every material step looking to a sale of the community property, Critcher was not informed of transactions vitally affecting his rights. Thus, at the very time when they believed a sale of the timber alone had been made for \$7,000 (and other advantageous offers of purchase had been received), they not only failed to communicate to Critcher knowledge of these important facts, but he was suffered to part with his property for a grossly inadequate price, much less, indeed, than his share of the amount offered for the timber alone.

In these circumstances, upon a bill filed by Critcher for relief, the learned judge of the corporation court of the city of Staunton, in a convincing opinion, held that he was entitled to share in the net profits realized from

the sale to the Highland Development Company, and decreed accordingly. From that decree this appeal was allowed.

The bill called for answer under oath from the trustee with respect to documents and correspondence in his possession. It also demanded sworn answers from Partlow and Page, but waived answer under oath from Patrick. It is conceded that Partlow was acting for Page in negotiating the purchase of Critcher's interest, and, though the parties all deny that Page represented Yost and Patrick, the facts remain that he made the purchase at Patrick's suggestion, and shortly thereafter transferred his purchase to them for "a valuable consideration." Yost, it is true, denied that he had any communication with Partlow in reference to the purchase prior to the institution of the suit. He likewise denied the agency of Page. Yet, though alertly on guard and weighing his words, he was careful not to deny knowledge of Page's purpose to purchase, or communication between them on the subject. As a matter of fact, in view of the close touch maintained between himself and Patrick throughout the transaction, it is not believable that Yost was kept in ignorance of a scheme obviously designed for the purpose of eliminating an unwelcome associate by acquiring his interest in the trust subject. If the transaction had been ingenuous, there would have been no occasion to conceal the actual consideration paid by Yost and Patrick to Page; and, instead of suppressing important facts, the parties, if necessary, would have taken the witness stand to make plain the fairness of their conduct in connection with a questionable transaction.

The defense of the appellants is founded on a misapprehension of the law regulating the conduct of persons occupying a fiduciary relation to each other with respect to their dealings with matters pertaining to the trust. In this case the contract between the parties was in the nature of a partnership agreement, and imposed upon each in transactions inter se the high degree of duty arising out of that confidential relation.

As was said in *Tennant v. Dunlop*, 97 Va. 234, 33 S. E. 620, speaking of the duty of the surviving partner seeking to purchase the interest of the deceased partner: "He cannot simply remain passive, but must make a frank and honest disclosure of all within his possession or knowledge from which a sound judgment may be formed as to the value of the interest to be sold. He cannot hold the representative at arm's length, and seek to make a profit for himself."

So, also, in 30 Cyc. 457, it is said that a purchase by one partner of his copartner's interest may be avoided either for actual fraud, "or for the violation of that high degree of good faith and fair dealing which the law requires of the partners in their transactions with each other, or for a nonperform-

ance of a condition imposed by the contract."

In *Sexton v. Sexton*, 9 Grat. 204, the court held: "He (the selling partner) was bound not only to disclose truly any information in his possession that might be called for, but if he perceived that the purchasing partner was laboring under incorrect views in reference to the amount of the debt due by the concern, by which he might be misled into too high an offer for the interest to be sold, it was his duty to furnish all the data he might have by which such views might be corrected and the mischief prevented."

In the instant case, though we do not believe the parties were intentionally guilty of fraud, it is, nevertheless, plain that they did not exercise that "utmost good faith and fair dealing" which the law exacts in transactions between partners, or trustee and cestui que trust. Yost and Patrick knew that Critcher was laboring under great financial embarrassment, and, if they did not actually purchase his interest through Page, they, at least, induced the latter to buy and suffered Critcher to sell at a ruinous sacrifice, in ignorance of important facts in their possession materially affecting the price.

As was said in *Miller v. Ferguson*, 107 Va. 249, 255, 57 S. E. 649, 651, 122 Am. St. Rep. 840: "After availing themselves of Miller's plan and eliminating him as a possible competitor, they carried on negotiations behind his back and withheld from him information of the gravest importance, vitally affecting his interest."

It is immaterial whether Page did or did not act for Yost and Patrick in purchasing Critcher's interest. They permitted the sale to be made in circumstances which affected their consciences and involved a breach of trust, and the property which was subsequently acquired by them was impressed with the original trust in Critcher's favor.

It is true as a general proposition that a purchaser with notice from a purchaser without notice takes a good title. Otherwise, it is reasoned, a bona fide purchaser without notice might be hindered in the disposition of the property, "though entitled to have the whole world for his market." But the rule is subject to the exception that, when a purchaser with notice sells to a purchaser without notice and afterwards repurchases the property, he does not acquire any better title than he possessed in the first instance. *Aragon Coffee Co. v. Rogers*, 105 Va. 51, 52 S. E. 843. See note to principal case and authorities cited, 8 Am. & Eng. Ann. Cas. 626.

"As between cestui que trust and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its

original or altered state, continues to be subject to or affected by the trust." 28 Am. & Eng. Ency. of Law (2d Ed.) 1108g and note 10.

In considering the cross-errors assigned by the appellee, the commissioner should require proof of the alleged payment by Yost of \$3,700 to Housel and Layman. He must also allow interest only on moneys actually paid by Yost and Patrick from the time of payment, or upon any contract made by them for the payment of money bearing interest from the time such interest began to run. In these particulars the decree of the corporation court will be modified, and as thus modified will be affirmed.

Affirmed.

CARDWELL, J., absent.

HARRISON, J. (dissenting). With my view of the facts of this case, I cannot concur in the conclusion reached by the majority of the court.

On Rehearing.

PER CURIAM. This case is before us on a rehearing of a decree entered by this court at the November term, 1910, modifying and affirming a decree of the corporation court of the city of Staunton.

After careful consideration of the arguments on behalf of appellants and appellee, upon the rehearing, we are of opinion to adhere to the conclusion formerly reached, and the opinion then delivered, with some minor amendments, will be filed as the opinion of the court.

(136 Ga. 780)

BYROM v. VARNER et al.<sup>†</sup>

(Supreme Court of Georgia. Aug. 17, 1911.)

(Syllabus by the Court.)

INFANTS (§ 113\*)—CONCLUSIVENESS OF JUDGMENT—PARTIES OF RECORD.

Where minors were interested as tenants in remainder, and before determination of the life estate the life tenant, in behalf of herself and as *prochein ami* for the minors, instituted suit for recovery of the land, in which suit it was also sought to set aside a trustee's deed under which the defendant held, and the order of the court authorizing the trustee to sell, it being alleged that the minors were necessary parties, and prayed that a guardian *ad litem* be appointed for them, and the court having passed an order declaring the minors necessary parties, and appointing the *prochein ami* guardian *ad litem* for them, and the defendant by answer having set up the validity of the administrator's deed and order of the court under which the sale was made, and also prescriptive title by virtue of possession for more than seven years under color of the administrator's deed, in the absence of all fraud or bad faith in making the minors parties plaintiff, the judgment rendered in favor of the validity of the defendant's title was an adjudication of the plaintiff's title, not only as against the life tenant, but also as against the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied September 22, 1911.



minors, who had been made parties plaintiff under order of the court.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 321; Dec. Dig. § 113.\*]

Error from Superior Court, Houston County; W. H. Felton, Judge.

Proceedings by John S. Byrom, as administrator of Julia M. Gunn, for an order to sell lands. Forest Gray Varner and others interposed claims to the property sought to be sold. Judgment for claimants, and the administrator brings error. Reversed.

It appears from the record that in 1854 Benjamin H. Gray died testate. In the eighth item of his will he devised to "Patrick Gray in trust for and to the sole and separate use and benefit of [testator's] daughter, Anne Gray, \* \* \* for and during her natural life, and after her death to her children in fee simple, one half of [testator's] plantation on the Fort Valley road, and the other half to go as hereinafter devised." By the ninth item a devise of said other half was made to Patrick Gray in trust for the sole and separate use and benefit of the testator's daughter, Jane Gray, for and during her natural life, and after her death to her children in fee simple; it being further stated in this item that it was the will of the testator "that the said plantation be equally divided between my two daughters." In other items specific legacies were given to other children of the testator. The thirteenth item provided "that the whole residue of my estate, both real and personal, after the payment and satisfaction of all my just debts and the legacies or items hereinbefore given, be equally divided between all my children in the same manner and under the same conditions and trusts as I have hereinbefore followed in regard to my children and the property given to them in this my will." The fourteenth item was as follows: "It is my will, and I hereby direct, that if any of my children should die, leaving no child or representative of children, then and in that case the property which I have given to such child, so dying without a child or representative of children, shall revert to my estate and be equally divided between my other children in the same manner and under the same directions and trusts as hereinbefore followed by me in this my will in regard to my children and the property given to them." Anne Gray married Varner in 1855. Jane Gray married Walker prior to October, 1855. In 1856, after the marriage of Anne and Jane, Patrick Gray, as trustee, petitioned the superior court of Houston county to be removed as trustee, and that Varner and Walker be appointed trustees for their respective wives in his place. Upon this application, the court, in October, 1856, passed an order removing Patrick Gray as trustee, and appointed Varner and Walker trustees, as requested, in his place

and stead. In May, 1857, Varner and Walker, as trustees, petitioned the judge of the superior court of the Macon circuit, Houston county being within that circuit, for leave to sell the lands composing the plantation referred to in the eighth and ninth items of the will of Benjamin H. Gray, for the purpose of reinvestment. Their respective wives joined in the petition. Afterwards the judge at chambers, after considering the application, granted leave to Varner and Walker, as trustees, to sell the land at public or private sale, and empowered the trustees to convey the same by deed and receive what the land might sell for, and invest the same in other property upon like limitations, conditions, and trusts as those on which the land to be sold was then held by the trustees. On October 6, 1857, Walker, as trustee, conveyed, by warranty deed reciting that it was in pursuance of the aforesaid order, a one-half undivided interest in the lands described in the order to Daniel F. Gunn, for the stated consideration of \$4,000. On January 5, 1859, Varner, as trustee, conveyed, by warranty deed reciting that it was in pursuance of the aforesaid order, to Daniel F. Gunn the remaining one-half undivided interest in the same lands for the recited consideration of \$4,885. Both of these deeds purported to convey the lands described therein "to the said Daniel F. Gunn, his heirs and assigns, forever." Walker died in 1864. His wife, Jane, died in 1867, leaving no children. Daniel F. Gunn, though he took such conveyances to himself, purchased a one-third interest in the lands for Julia M. Gunn, and the remaining two-thirds interest for his wards, Ulysses Gunn and Valeria Gunn; and subsequently, in 1865, by an order of the court of ordinary, Daniel F. Gunn turned the interest of his wards over to them in a settlement with them as guardian. Subsequently Valeria Gunn sold and conveyed her undivided interest in the land to Julia M. Gunn, and afterwards, upon the petition of U. M. Gunn, the lands were partitioned between him and Julia M. Gunn. The lands have been in the adverse possession of Daniel F. Gunn and those claiming under him, as above stated, from the time of his purchase of them from Varner and Walker as trustees.

In 1874 Mrs. Anne Varner, for herself and as next friend of her minor children, A. J. Varner, Julia F. Varner, Forrest Gray Varner, Paul H. Varner, and R. L. Varner, brought a bill in the superior court of Houston county, against Daniel F. Gunn, U. M. Gunn, and Julia M. Gunn, for the recovery of the one-half interest in the lands as devised in the eighth item of the will of Benjamin H. Gray, and of one-sixth interest in the land as devised in the ninth item of the will. Attached as exhibits to the will and made a part thereof were copies of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

will of Benjamin H. Gray, the order of the court substituting Varner and Walker as trustees in the place of Patrick Gray, the order granted to Varner and Walker as trustees to sell the land for reinvestment, and the deeds made by them to Daniel H. Gunn. The bill alleged that the order for sale and reinvestment was fraudulently obtained; that Anne Varner was unduly coerced by her husband to consent to the granting of such order; that the sale to Gunn was collusive, and not for the purpose of reinvestment; that Gunn never paid any money for the lands, but settled with Varner for the same in notes held by Gunn against Varner; and that all of the defendants had knowledge that the order for sale was fraudulently obtained, and of the collusion between Varner and Walker on the one side and Daniel F. Gunn on the other, as to the latter's purchase of the lands. The prayers were for the recovery of the land and mesne profits, that the order of sale be set aside, that the deed from Varner as trustee be set aside and canceled, and that "some fit and suitable person may, it being necessary, be appointed to act as her trustee and as trustee for her said minor children." Subsequently the following order was passed: "Georgia, Houston County. It appearing to the court that H. A. Varner, Julia F. Varner, Forrest Gray Varner, Paul H. Varner and Robert L. Varner are minors, and are interested in the suit of Anne Varner v. D. F. Gunn et al., it is therefore ordered by the court that Mrs. Anne Varner be and she is hereby appointed guardian ad litem of said minors, and that said cause proceed in her name as such guardian. In open court, C. F. Crisp, J. S. C., S. W. C., Presiding." On November 26, 1877, Mrs. Anne Varner in writing accepted the appointment of guardian ad litem of her said minor children. The defendants answered, to the effect that Daniel F. Gunn purchased the lands from the trustees in good faith, and paid full value in money to the trustees for the same, believing that he was getting a valid and absolute title thereto. All knowledge or notice of the alleged coercion inducing Mrs. Varner to consent to the granting of the order to sell, and her objection to the sale, and collusion of Daniel F. Gunn with Varner, was denied. A prescriptive title under seven years' adverse possession with color was set up. Upon the trial of that bill a verdict was rendered in favor of the defendants, which by order was made the decree of the court. The plaintiffs moved for a new trial; two grounds of the motion being as follows:

"Because the court erred in charging the jury as follows: 'Under the terms of the will of old man Benjamin Gray, he created a trust estate for the benefit of his daughters and their children, a life estate in the daughters, and the remainder in their children, appointing his son, Patrick Gray, trustee. If

Patrick Gray resigned his trust, or by order of a court of chancery other trustees were appointed, then the legal title to the estate was in the trustee so appointed; and if there was such action as that, and the trustee or trustees so appointed applied to the judge of the superior court of this circuit for an order to sell the property at private sale, and the cestuis que trust, these ladies, had notice of that order and consented to it, and if the judge of the superior court granted an order that it might be sold and the proceeds reinvested for the same uses and trusts, and if bought bona fide, for a valuable consideration, without fraud between them and the trustees at such sale, they got a good title and the complainants in this action cannot recover.'

"Because the court erred in charging the jury as follows: 'The defendants say more. If that proposition is not true, if they did not get a good title at such sale, if the sale was made, yet they say that these trustees obtained an order from the judge of the proper court to sell this property, and that, bona fide and for a valuable consideration, they bought it from said trustees in pursuance of that order, that they took a deed from the trustee and went into possession under that deed, and that they and those claiming under them have remained in possession of this property more than seven years under color of title before the institution of this suit, and that therefore they have what the law calls a good prescriptive title.'

The motion was overruled. On exception to this ruling, the case was brought to the Supreme Court, where the judgment was affirmed. *Varner v. Gunn*, 61 Ga. 54. In the opinion then rendered it was said: "The controlling question in this case is whether the complainant's right to recover the amount sued for was barred by the statute of limitations, it being in the nature of an equitable action of ejectment." After stating the relevant facts and the charge of the trial judge on the subject of prescriptive title, which was excepted to in the motion for a new trial, it was held: "This charge of the court was not erroneous, especially when taken in connection with the other portions of the charge contained in the record"—citing two former decisions of this court. The decision was rendered at the August term, 1878, of this court.

After the death of Anne Varner, which occurred in September, 1809, John S. Byrom, as administrator of the estate of Julia M. Gunn, applied to the ordinary of Houston county for an order to sell the land or lands belonging to the estate of his intestate, which were the same lands that had been awarded to her in the partition proceedings between U. M. Gunn and herself. F. G. Varner and Julia Chapman (née Varner), who were surviving children of Anne Varner, and Lena B. Stembridge, who was the widow of Paul H. Varner, another of the children of Anne

Varner, interposed claims to the property sought to be sold by the administrator, basing their claim of title upon the will of Benjamin H. Gray, as fully set forth in their equitable petition filed in aid of their claim. The administrator filed answer to this petition, alleging, among other things, that the legal title passed under the sales by the trustees of Anne Varner and Jane Walker to Daniel F. Gunn, and finally vested in Julia M. Gunn, as fully set forth in the record in the case of Varner v. Gunn et al., before referred to, and that the claimants were concluded by the judgment against them in the case brought by their mother, Anne Varner, for herself and as next friend and guardian ad litem for the claimants, against Julia M. Gunn and other defendants.

Upon trial of the case now under review, wherein all of the facts above set forth appeared, the court directed a verdict in favor of the claimants. The administrator moved for a new trial, which being refused, he excepted.

Guerry, Hall & Roberts, for plaintiff in error. H. A. Mathews and Jno. P. Ross, for defendants in error.

ATKINSON, J. (after stating the facts as above). This case, we think, turns upon the question whether the claimants were concluded by the judgment rendered in the case brought by Mrs. Varner, for herself and as next friend and guardian ad litem for all of her minor children, among whom were two of the claimants, and Paul H. Varner, of whom the third claimant is the sole heir at law, against Julia M. Gunn, the intestate of the plaintiff in error, and other defendants. In that case the order granted by the superior court to the trustees of Anne Varner and Jane Walker to sell the entire interest in the lands in question was attacked and sought to be set aside on the ground that Mrs. Varner's consent thereto was obtained through coercion on the part of her husband. The deed from the trustees to Daniel F. Gunn, made in pursuance of such order of sale, was also attacked on the ground of collusion between Varner and Daniel F. Gunn, the purchaser. The deed purported to convey the fee in the land; and it is evident, from the order of sale, and the terms of the deed, and the consideration purporting to have been paid, that a sale and conveyance of the entire interest in the land could be made and the proceeds reinvested by the trustees in other property under the same trusts, conditions, and limitations. It further appears that Mrs. Varner, in bringing that action, believed that her children, all of whom were then minors, were interested in that action. In the bill there was a recital that they were necessary parties, and a request that the judge should appoint a guardian ad litem to repre-

sent their interests in the suit. The judge appointed Mrs. Varner as guardian ad litem for the minors, reciting in the order that it appeared that they were necessary parties, and whether they were such was a question to be then determined by the court. It appears, from the issues made by the answers of the defendants in that case, that the defenses set up by them were alike applicable to Mrs. Varner and her children, for whom she was guardian ad litem. The judge who presided at the trial of that case was evidently of the opinion that the minors were interested in that litigation, for the order appointing a guardian ad litem for them expressly so states; and this opinion of the judge is further indicated in the instructions he gave to the jury, upon which error was assigned in the motion made for a new trial. This court, upon the review of the trial in that case, affirmed the judgment. They deemed it necessary to discuss rulings on but one point, namely, prescription.

As the claimants in the present action were parties in the former case against the intestate of the plaintiff in error and others, and as the judgment was there rendered against them to the effect that the defendants in that action had a good prescriptive title to the identical land involved in the present suit, the plaintiffs must be held to be concluded by that judgment; it appearing that they were made parties to the former case in good faith and for the protection of what was then considered to be their interest in the suit, and there being nothing tending to show that there was any fraud, collusion, or any improper motive of any character tending to injuriously affect their interests by making them parties in that action. *Ross v. Southwestern R. Co.*, 53 Ga. 514; *Watkins v. Lawton*, 69 Ga. 371; *Freeman v. Prendergast*, 94 Ga. 385, 21 S. E. 837; *Lowe v. Equitable Mortgage Co.*, 102 Ga. 103, 29 S. E. 148; *Walden v. Walden*, 128 Ga. 126, 57 S. E. 323. It follows, from what has been said, that a verdict was demanded in favor of the administrator, and that the court erred in directing a verdict for the claimants.

Judgment reversed.

BECK, J., absent. The other Justices concur.

(10 Ga. App. 29)

BOATRIGHT v. STATE (No. 3,434.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 250\*)—HABEAS CORPUS (§ 30\*)—IRREGULARITIES IN JUSTICE'S COURT—WAIVER.

There was no error in striking the plea to the jurisdiction. The mere fact that there were irregularities in the justice's court during the

commitment trial would not deprive the city court of jurisdiction to try the case, on accusation duly made. If the commitment was irregular or illegal, the defendant might have raised such questions by habeas corpus, but could not, after having been bound over, and having given bond, plead them to the jurisdiction of the city court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 250;\* Habeas Corpus, Dec. Dig. § 30.\*]

## 2. LARCENY (§ 56\*)—EVIDENCE—SUFFICIENCY.

The evidence showed that the defendant, an employé of a railway company, was seen to leave an express car with a package and go to an old passenger car, where he left it. Investigation disclosed that a barrel of shad fish, contained in the express car, had been opened with a knife. The defendant was watched, and was seen to return to the passenger car and get the package and start toward home. The express agent overtook him, and, after defendant's denial that the package contained fish, broke it open and found two shad. The agent went to every fish dealer in town, and none of them had any such fish in stock on that day. *Held*, the corpus delicti was properly proved, and the verdict of guilty authorized.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 149; Dec. Dig. § 56.\*]

Error from City Court of Sandersville; E. W. Jordan, Judge.

Levi Boatright was convicted of larceny, and brings error. Affirmed.

Goodwin & Wood, for plaintiff in error. J. E. Hyman, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 88)

## HERRING v. STATE. (No. 3,576.)

(Court of Appeals of Georgia. Oct. 10, 1911.  
Rehearing Denied Nov. 20, 1911.)

(Syllabus by the Court.)

### 1. INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

The evidence authorizes a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

### 2. CRIMINAL LAW (§ 730\*)—TRIAL—CONDUCT OF COUNSEL—OFFER OF ILLEGAL TESTIMONY.

Ordinarily it is not cause for a mistrial in a criminal case that the Solicitor General merely tenders illegal testimony, where the court refuses to admit it, and instructs the jury not to consider it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.\*]

### 3. CHARGE OF COURT—NO ERROR.

The charge of the court was not subject to the assignments of error made against it.

Error from City Court of Macon; Robt. Hodges, Judge.

J. F. Herring was convicted of keeping intoxicating liquor on hand at his place of business, and brings error. Affirmed.

W. D. McNeill, for plaintiff in error. W. J. Grace, Sol. Gen., for the State.

POWELL, J. [1] 1. The defendant was indicted for keeping intoxicating liquor on

hand at his place of business. Liquor was found in his store, and also in an adjacent barn. His defense was that the liquor had been put there, without his knowledge or consent, by other persons. If the jury had believed the witnesses by whom the accused attempted to support this defense, they doubtless would have acquitted him; but evidently they did not believe the witnesses. We do not blame the jury for refusing to believe the testimony of these witnesses, for it carried on its face the inherent marks of falsity, and jurors are not required to believe even sworn testimony which because of its inconsistencies, improbabilities, and contradictions, does not commend itself to the reasonable mind as being true.

[2] 2. A witness for the defendant had testified that he was a clerk in the defendant's store, and that no liquor had been kept therein since the defendant had pleaded guilty (at a previous date) of the offense of selling liquor. The state cross-examined him as to the time when his employment began, and, for the purpose of showing that he had not truly stated the length of his service, offered in evidence the former indictment against the accused. Defendant's counsel objected to the solicitor's introducing this indictment, and moved the court declare a mistrial, because he had tendered it in evidence. There was nothing in this transaction which required the grant of a mistrial. The judge did all that he was required to do when he sustained the objection to the testimony, even if, as a matter of fact, the testimony was not legally admissible; but the court went further in this case and told the jury to disregard this matter entirely, and not to let it influence them in any way. Certainly the defendant will not be given a new trial for this occurrence, under the circumstances.

[3] 3. Certain criticisms are made upon the charge of the court, but, without going into details, we will simply say that here was no error, and that the defendant was fairly tried and legally convicted.

Judgment affirmed.

(10 Ga. App. 13)

## JAMES v. STATE. (No. 3,322.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

### 1. WEAPONS (§ 3\*)—CARRYING WITHOUT LICENSE—CONSTITUTIONAL PROVISION.

The act of the General Assembly approved August 12, 1910 (Acts 1910, p. 134), making it unlawful "to have or carry about the person any pistol or revolver," without first obtaining license from the ordinary, is held by the Supreme Court to be constitutional, in *Strickland v. State*, 137 Ga. 1, 72 S. E. 260.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 3.\*]

### 2. STATES (§ 12\*)—BOUNDARIES—RIVER.

The boundary line between the states of Georgia and South Carolina is that agreed on

by the commissioners of both states at the convention of Beaufort on April 28, 1787. This boundary line, as then fixed and established, was not altered by the fact that subsequently the United States government, in the course of its work to improve the navigation of the Savannah river, changed the location of the main current or channel of the river; but it remains where the main channel or current of the river flowed naturally when the boundary line was originally fixed and established.

[Ed. Note.—For other cases, see States, Dec. Dig. § 12.\*]

### 3. CRIMINAL LAW (§ 564\*)—JURISDICTION—BOUNDARY BETWEEN STATES.

The evidence shows that the offense was committed at a point on the bridge which connects Georgia with South Carolina, and on the Georgia side of the main current or channel of the river, as said current or channel was located when it was originally fixed and established as the boundary line between the two states. The venue was thus fully proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1277-1284; Dec. Dig. § 564.\*]

Error from City Court of Richmond County, W. F. Eve, Judge.

George James was convicted of carrying on his person a pistol without having procured a license, and brings error. Affirmed.

E. Foster Brigham, B. B. McCowen, and Isaac S. Peebles, Jr., for plaintiff in error. Jas. C. C. Black, Jr., Sol., for the State.

HILL, C. J. George James was convicted of a violation of the act of the General Assembly (Acts 1910, p. 134) making it a misdemeanor for one to carry on his person a pistol without having procured a license as provided by the act. The record raised two questions: (1) As to the constitutionality of the act upon which the indictment was framed; and (2) whether the jurisdictional fact of venue was proved.

[1] The first question has been settled by the Supreme Court in the case of Strickland v. State, 137 Ga. 1, 72 S. E. 260, on certificate from this court for instructions.

[2, 3] The evidence necessary to determine the question of venue, briefly stated, is as follows: James was arrested by a police officer of the city of Augusta on the bridge over the Savannah river, known as the "Center Street Bridge"; this bridge connecting the states of Georgia and South Carolina. At the time of the arrest James had a revolver on his person and had not procured a license to carry it. The arrest was made about the middle of the bridge, and at a point which would be in the state of South Carolina if the present channel of the Savannah river is to be accepted as the boundary line between these two states; but if the boundary line between the two states is the current or main thread of the channel of the river as originally fixed and determined by the treaty of Beaufort as the boundary line between them, then the offense was committed in the state of Georgia. So the question which must de-

termine the venue in the present case is dependent upon the location of the boundary line between the states of Georgia and South Carolina as above indicated. The evidence further showed that, for a distance of about a mile above and below where the Center Street bridge crosses the river, the United States government by a series of training dikes has diverted the natural channel of the river from the South Carolina side to the Georgia side, for the purpose of improving the navigation of the river on the Georgia side at the city of Augusta, and that before the building of these dikes the channel of the river was 600 or 700 feet from the Georgia side, and 200 or 300 feet from the South Carolina side, and was gradually changing to the Carolina side, but since the building of the dikes the current of the river is only 250 feet from the Georgia side. In other words, the building of the training dikes by the United States government has changed the natural current of the river, so that, instead of being 600 to 700 feet from the Georgia side, as formerly, it is now only 250 feet from the Georgia side. According to the treaty of Beaufort between the states of Georgia and South Carolina, agreed on by the commissioners of both states on the 28th of April, 1787, the current or main thread of the channel of the Savannah river fixed and established the boundary between the two states. Pol. Code 1910, § 16; Hotchkiss' Statutes, §§ 913-917; Simpson v. State, 92 Ga. 41, 17 S. E. 984, 22 L. R. A. 248, 44 Am. St. Rep. 75. The boundary line so fixed was intended to be a permanent boundary line between the two states, subject to be changed only by the subsequent joint action of the two states.

There is no Georgia decision exactly in point, but the question here involved has been before the Supreme Court of the United States in several cases, and that august tribunal has clearly laid down the rule by which the question in this case can be determined. In the case of State of Nebraska v. State of Iowa, 143 U. S. 369, 12 Sup. Ct. 396, 38 L. Ed. 186, in a very learned opinion by Justice Brewer, it is held that where the boundary between states or nations is, by prescription or treaty, found in running water, accretion, no matter to which side it adds ground, leaves the boundary still the center; that avulsion has no effect on boundaries, but leaves it in the center of the old channel. In other words, an accretion on an ordinary river would leave the boundary between two states the varying center of the channel, and an avulsion would leave the boundary the center of the abandoned channel. See, also, a very elaborate opinion by Attorney General Cushing, in which the subject is very exhaustively considered and the above distinction made; also the general subject treat-

ed in Gould on Waters, § 159, and Angell on Water Courses, § 60. In the case of *Missouri v. Nebraska*, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372, which was a case to determine the boundary line between the two states and to define what was the center of the main channel of the Missouri river, it was held that accretion is the gradual accumulation by alluvial formation, and, where a boundary river changes its course gradually in such manner, the boundary remains the varying center of the channel, but that avulsion is a rapid change in the course or channel of a river, and does not work any change in the boundary, which remains as it was in the center of the river, although no water may be flowing therein. These principles apply alike whether the river is a boundary line between private property or between states and nations. Now, the boundary line between the state of Georgia and South Carolina, as fixed by the treaty of Beaufort in 1787, was the current or main thread of the Savannah river between designated points. There is no evidence that this channel has been changed, either by the gradual process of accretion or by the sudden and violent process of avulsion.

It is insisted, however, by learned counsel for the plaintiff in error, that this current or main thread of the channel has been changed by the work of the United States government for the purpose of improving the navigability of the Savannah river near the city of Augusta, and that the channel of the river is now located much nearer the Georgia side, and that this change in the channel or current of the river changes ipso facto the boundary line between the two states. In support of this contention it is said that Const. U. S. art. 1, § 8, par. 3, gives to the federal government control of all navigable rivers between states, and that it therefore follows that any change in the channel or current of a navigable river is a lawful change, and thereafter the channel of the river is fixed, and the boundary line follows this current or channel. Unquestionably the United States government, by the provision of the Constitution above quoted, has control over navigable rivers for the purpose of improving navigation; but the exercise of this right cannot in any sense affect the boundary lines as fixed by treaties, or law, or prescription, between the states, or between riparian owners. Where grants of land border on navigable streams, no change which the United States government might make in the course of such stream could affect in any way the rights of the riparian owners as fixed and determined by deeds or prescription, and, of course, where a river is made a boundary line between two states, if the course of the river is changed or diverted by the United States government in the exercise of its authority

to improve navigation, the change in the course of the river would not affect the boundary line, but the boundary line would remain as fixed by law, treaty, or prescription. The legal effect of the act of the government in changing the main channel or current of the river is analogous to a change caused by avulsion, and not by accretion. The treaty of Beaufort, as therein stated, settled and adjusted the boundary differences between the states of Georgia and South Carolina, and established a fixed and permanent boundary line between them, and this boundary line was distinctly declared to be the current or main thread or channel of the Savannah river between the two states, between designated points on said river. This boundary line, so fixed and established by authority of the two sovereign states, could not be changed or affected by any act of the federal government in pursuance of its power over navigable rivers. Indeed, we do not think that this right to regulate and improve navigable rivers has any relation whatever to the question of boundary lines.

We conclude, therefore, that the existing boundary line between the states of Georgia and South Carolina is as fixed and established by the treaty of Beaufort; and this being true, under the evidence, the offense in this case was committed within the state of Georgia, and the venue was sufficiently shown.

Judgment affirmed.

(10 Ga. App. 30)

CARSWELL v. STATE. (No. 3,439.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 364\*)—EVIDENCE—RES GESTÆ.

Where a killing took place in front of a store and across the street from it, a statement of the accused, after he had walked away from the scene of the difficulty and into the store, in which he voluntarily stated to the bystanders, "Men, what I done, I had to do it," was not improperly rejected as not being part of the res gestæ, on the ground that it was not free from suspicion of device or afterthought.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 816; Dec. Dig. § 364.\*]

2. HOMICIDE (§ 309\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Under the evidence, there was no error in failing to charge the law of involuntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 809.\*]

3. CRIMINAL LAW (§ 715\*)—TRIAL—ARGUMENT OF COUNSEL.

The judge was justified in not permitting counsel for the defendant to use, in his argument before the jury, a gun which had not been introduced in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1666; Dec. Dig. § 715.\*]

**4. INSTRUCTIONS—CONSTRUCTION AS A WHOLE.**

When the excerpt from the charge upon which error is assigned is considered in connection with the charge as a whole and with the facts of the case, it appears that there was no error in the charge on provocation by words, threats, and contemptuous gestures.

**5. INSTRUCTIONS — APPLICABILITY TO EVIDENCE.**

The request to charge was not adjusted to the evidence.

(Additional Syllabus by Editorial Staff.)

**6. CRIMINAL LAW (§ 363\*)—EVIDENCE—"RES GESTÆ."**

The "res gestæ" of a transaction is what is done during the progress of it, or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with it. No precise point of time can be fixed a priori where the res gestæ ends. Each case turns on its own circumstances, and the inquiry is rather into events, than into the precise time which has elapsed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. § 363.\*

For other definitions, see Words and Phrases, vol. 7, pp. 6130-6136; vol. 8, p. 7787.]

Error from Superior Court, Laurens County; J. H. Martin, Judge.

Robert Carswell was convicted of voluntary manslaughter, and brings error. Affirmed.

The defendant was convicted of voluntary manslaughter, and excepts to the overruling of his motion for a new trial. The facts leading up to the homicide are, in brief, as follows: The defendant walked into the store of the deceased one night after dark, whereupon an argument took place between them (in which the deceased was the aggressor) as to whether or not the defendant had been "dodging around" the former's house after his little 12 year old daughter. The defendant denied the charge, but the deceased persisted that, unless the rumor ceased, he would kill the defendant. As the quarrel progressed, mutual cursing was indulged in. As to what happened after this the evidence is in sharp conflict. The defendant and his witnesses say that he was ordered out of the deceased's store, and went directly across the street, and was sitting on the porch of that store; that the deceased, with a breech-loading shotgun, went out of the side door of his store, and around toward the back of the other store, and slipped up on the defendant unawares, and had cocked the gun, and, with it pointed at the defendant's head, said, "Don't you move." The defendant grabbed the barrel of the gun and endeavored to wrest it from the deceased's hand, and, in the scuffle which followed, the defendant shot the deceased three times with a pistol; two of the wounds being of fatal character. After the three pistol shots, a gun was shot, and the shot from it took effect in the deceased's hip. This wound

was not necessarily of fatal character. According to the defendant, the gun was discharged either by him or the deceased in the scuffle.

A few moments before his death the deceased made a dying statement, to the effect that after the quarrel had been entered upon, and while he was standing in the door of his store with the gun under his arm, the defendant's brother grabbed it, while the defendant shot the pistol three times, after which his brother shot the gun, inflicting the wounds resulting in death. This dying statement, as thus related by the deceased's wife, is in conflict with the version of the transaction as detailed by the eyewitnesses, and is opposed to the physical fact that the deceased's body was directly in front of the store across the street, where the defendant and his witnesses said he went after leaving the deceased's store. The evidence is that the deceased was of a violent character, and that he had purchased a box of gun shells a short while before the quarrel.

Howard & Hightower, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

RUSSELL, J. [1] 1. The defendant claims that the court erred in excluding from the jury the statement of the defendant, made a short while after the fatality, under the following circumstances: After the three pistol shots and a short pause of a few seconds came the gunshot. Then the defendant's brother came into the store door with the gun in his hands and said: "Let me have some shells. I am going out there and kill that God damn Charles McCall, who is the instigation of all this row." The storekeeper said: "You get out of this store with that gun. You can't get no shells in here." Whereupon the speaker walked back to the door, looked out on the ground, then slipped back in the store, and handed the gun to a bystander, remarking: "There's nothing in it." About that time the defendant jumped right up in the door with the pistol in his hands and said: "Men, what I done, I had to do it." On motion this statement was ruled out, and the question presented is whether it was admissible as a part of the res gestæ. The witness estimated that the time elapsing after the gunshot and the making of the statement was about half a minute.

[8] Under such circumstances a witness' estimate of the exact number of seconds or minutes intervening is not very trustworthy. The important fact is that the statement was made, not during the fight, but after it was over, and after the defendant had left the scene of the homicide and appeared before the onlookers. However brief the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

time, the physical facts show that the statement was not wholly free from the suspicion of device or afterthought. As is said in *Hall v. State*, 48 Ga. 607: "The res gestæ of a transaction is what is done during the progress of it, or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with it. No precise point of time can be fixed a priori where the res gestæ ends. Each case turns on its own circumstances. Indeed, the inquiry is rather into events than into the precise time which has elapsed."

It has been held that a witness cannot testify that within a minute after the shooting another person ran into the house, a distance of 25 or 30 steps from the scene of the shooting, and whispered that the accused had shot the deceased. "The whispering indicated premeditation, rather than spontaneous exclamation; there being apparently nothing to call for the lowering of the voice, if the speaker was prompted by natural impulse only." *Futch v. State*, 90 Ga. 472, 18 S. E. 102. The line of demarcation between self-serving declarations, inadmissible under the hearsay rule, and involuntary spontaneous verbal acts, admissible as part of the res gestæ, is shadowy and hard to delineate with accuracy and generality. Circumstances alter cases, and each case must be governed by its own peculiar and individual facts. The defendant in this case, in saying that he had to kill, was not making an involuntary exclamation, but had left the scene of the killing, and reason had returned. We are of the opinion, therefore, that there was no error in excluding the testimony.

[2] 2. Complaint is made that the judge erred in failing to charge the law of involuntary manslaughter. Under the dying declaration offered by the state, the defendant was guilty of murder. According to the statement of the accused and the evidence in his behalf, the killing was justifiable. Under no theory was the killing unintentional or involuntary, and therefore the judge very properly omitted the law of involuntary manslaughter from his charge. Indeed, it would have been reversible error to have so charged under such circumstances. *Branch v. State*, 5 Ga. App. 651, 63 S. E. 714; *Clark v. State*, 117 Ga. 254 (6), 43 S. E. 853. In holding that the evidence authorized the charge on the law of involuntary manslaughter in the case of *Chapman v. State*, 120 Ga. 855, 857, 48 S. E. 350, 351, it was said: "If the brick was hastily picked up and thrown, with no intention of killing the deceased, and the evidence failed to disclose that the brick was either a deadly weapon or was thrown in such a manner as ordinarily would have produced death, the homicide would be involuntary." Here the evidence discloses both that the weapon

used was deadly and that it was used with the intention to kill. In the other case relied on by counsel for plaintiff in error, *Dorsey v. State*, 126 Ga. 633, 55 S. E. 473, the fatal blow was made with the end of a billiard cue of a kind and character from which the jury could have inferred that there was no intention to kill.

[3] 3. In arguing the case to the jury the defendant's counsel undertook to illustrate with a single-barrel shotgun how the gunshot wound could have been inflicted as the defendant had stated. On objection from the solicitor general that the gun had not been introduced in evidence, the judge refused to permit the use of the gun as aforesaid. It does not appear whether the gun which it was sought to use was the one with which the deceased was shot. Ordinarily, in illustrating to the jury an argument, counsel may use any means at hand; but it would be manifestly unfair to permit a party to get the benefit of having introduced evidence which had not been introduced. Under the circumstances, we see no reason for reversing the judgment because of this supposed error. *Nobles v. State*, 127 Ga. 213 (4), 56 S. E. 125.

[4, 5] 4, 5. When the charge as a whole is considered in connection with the excerpt upon which the assignment of error is predicated and the facts of the case, the law relating to provocation by words, threats, and contemptuous gestures was correctly given. Irrespective of whether the written request was a correct statement of the law in the abstract, it was not adjusted to the evidence, and therefore there was no error in refusing to give it in the charge. None of the assignments of error present any reason for a reversal of the judgment.

Judgment affirmed.

(10 Ga. App. 18)

TURNER v. STATE. (No. 3,330.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 255\*)—OPERATION—OFFENSES—WRECKING TRAINS.

There was no error in overruling the demurrer to the indictment.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 255.\*]

2. RAILROADS (§ 255\*)—OPERATION—OFFENSES—WRECKING TRAINS.

In an indictment, under section 513 of the Penal Code of 1910, it is unnecessary to prove ownership of the railroad track, if possession of it consistently with the allegations of the indictment be shown.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 785, 786; Dec. Dig. § 255.\*]

3. RAILROADS (§ 255\*)—OPERATION—OFFENSES—WRECKING TRAINS.

Intent and purpose to wreck a train was sufficiently shown by evidence that the defendant placed an iron bar, 3½ feet long, weighing 20 pounds, on a railroad track, laying the small



end on the iron rail and the other end against the cross-tie, a few moments before a passenger train was due, that the track at this point is on an embankment, and that the defendant then went across into a field and hid behind some bushes.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 255.\*]

Error from Superior Court, Greene County; B. F. Walker, Judge.

J. T. Turner was convicted of attempting to wreck a train, and brings error. Affirmed.

Jas. Davison and Miles W. Lewis, for plaintiff in error. Jos. E. Pottle, Sol. Gen., Jos. B. & Bryan Cumming, and Noel P. Park, for the State.

RUSSELL, J. [1] 1. The defendant was indicted for a violation of section 513 of the Penal Code of 1910. The language of the indictment conforms substantially to that used in the statute. The instrument used was alleged to be "an iron article, the exact character of which is to said grand jurors unknown." The manner of making the attempt was alleged to be by placing the iron article on the railroad of the Georgia Railroad & Banking Company. The defendant filed a special demurrer to the indictment, because the train which it was claimed the defendant attempted to wreck was not described, and because the means or manner of the attempt was not set forth with sufficient particularity. We think the indictment is sufficient. It is not necessary to describe the train with particularity; for that does not enter into the gravamen of the crime. An attempt to wreck any train is a crime; and, as the offender may not know what train he will wreck, the state is not required to show what train he intends to wreck. The defendant was informed by the indictment that he was charged with an attempt to wreck a train on the railroad track of the Georgia Railroad & Banking Company. This was sufficient to notify him of the gist of the charge against him. We likewise think both the means and the manner are sufficiently alleged; it being stated that the defendant placed an iron article on the railroad track.

[2] 2. One of the grounds of the motion for a new trial complains that a witness for the state was allowed to testify that the railroad track was owned by the Georgia Railroad & Banking Company, over the defendant's objection that the record title was the best evidence. Ownership of the tracks would not necessarily have to be evidenced by a written record title; and, it not appearing to the court that there was any such title, it would seem that no proper foundation for the objection had been laid. Furthermore, the evidence objected to was immaterial. Under section 513 of the Penal Code, the ownership of the track is imma-

terial, it being entirely sufficient that the track was in the possession of a railroad company. *Adkins v. State*, 115 Ga. 582, 41 S. E. 987.

[3] 3. It is unnecessary to elaborate the third headnote. The charge was eminently fair, and the verdict fully authorized, and the judgment is

Affirmed.

(10 Ga. App. 67)

WILSON v. STATE. (No. 3,669.)

(Court of Appeals of Georgia. Nov. 7, 1911.)

(Syllabus by the Court.)

1. DUPLICITY IN INDICTMENT—WRECKING TRAIN.

The indictment in this case was not duplicitous. It set forth the offense as defined by section 513 of the Penal Code of 1910, and did not include the offense as defined by section 522. The allegations were sufficient in form and substance, and the demurrer was properly overruled.

2. RAILROADS (§ 255\*)—OPERATION—OFFENSES AGAINST RAILROADS—INDICTMENT—EVIDENCE.

An indictment, under section 513 of the Penal Code of 1910, need not allege the ownership of the "railroad train, locomotive, car, coach, or vehicle" which was being used and run on the railroad track when it was wrecked or attempted to be wrecked, nor is it necessary to allege and prove the ownership of the railroad track. It was sufficient to allege and prove that the railroad train, locomotive, car, or coach was "passenger train No. 2 of the Georgia Railroad, which was then and there being used and was on the railroad track of the Georgia Railroad for the purpose of travel and transportation." Testimony that the Georgia Railroad was a corporation was wholly immaterial, and there was no error in excluding it. *Walker v. State*, 97 Ga. 213, 22 S. E. 528; *Turner v. State*, 10 Ga. App. —, 72 S. E. 604, this day decided.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 785; Dec. Dig. § 255.\*]

3. CRIMINAL LAW (§ 784\*)—TRIAL—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

The evidence was direct as to the commission of the offense and the identity of the accused as the offender, and the court was not required to charge on the probative value of circumstantial evidence because, in addition to the direct evidence, there were also circumstances indicating guilt. *Bivins v. State*, 5 Ga. App. 434, 63 S. E. 523, and cases there cited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888; Dec. Dig. § 784.\*]

4. SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence supports the verdict, and no error of law appears.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Charlie Wilson was convicted of wrecking or attempting to wreck a train, and brings error. Affirmed.

M. L. Felts, for plaintiff in error. Thos. J. Brown, Sol. Gen., and E. P. Davis, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 66)

**COKER v. CITY OF TIFTON.** (No. 3,641.)  
(Court of Appeals of Georgia. Nov. 7, 1911.)*(Syllabus by the Court.)***1. CRIMINAL LAW (§§ 1028, 1033\*)—CERTIORARI—OBJECTIONS WAIVED.**

Questions involving the validity of a municipal ordinance and the jurisdiction of the trial court, not made in that court, and raised for the first time on certiorari in the superior court, will not be considered by the latter court, or by this court. *Sutton v. Council of Washington*, 4 Ga. App. 30, 60 S. E. 811; *S. F. & W. Ry. Co. v. Hardin*, 110 Ga. 433, 35 S. E. 681.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619, 2629; Dec. Dig. §§ 1028, 1033.\*]

**2. REVIEW ON APPEAL.**

No error of law appears, and the verdict fully supports the finding of the trial court.

Error from Superior Court, Tift County; *W. E. Thomas, Judge.*

Jack Coker was convicted of violating a city ordinance. From an order refusing certiorari, he brings error. Affirmed.

J. B. Murrow and J. J. Murray, for plaintiff in error. Fulwood & Murray, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(10 Ga. App. 90)

**WALLACE v. SOUTHERN RY. CO.**  
(No. 3,894.)

(Court of Appeals of Georgia. Nov. 7, 1911.  
Rehearing Denied Nov. 20, 1911.)

*(Syllabus by the Court.)***1. TRIAL (§ 139\*)—NONSUIT—SUFFICIENCY OF EVIDENCE.**

Where the jury can reasonably infer, from the evidence, that an allegation of negligence which would authorize a recovery has been proved, a nonsuit should not be granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 338-341; Dec. Dig. § 139.\*]

**2. DEATH (§ 58\*)—ACTION FOR WRONGFUL DEATH—PRESUMPTION OF NEGLIGENCE.**

The presumption of negligence against the employé "in case death results from injury to the employé," created by the act of 1909 (Acts 1909, p. 160), is a part of the integral right to recover, and is not alone a rule of evidence, and is applicable only to causes of action arising subsequently to the passage of the act in question.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 58.\*]

Error from City Court of Atlanta; *H. M. Reid, Judge.*

Action by C. H. Wallace against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, 6 Ga. App. 526, 65 S. E. 299.

Burton Smith and R. W. Crenshaw, for plaintiff in error. McDaniel & Black, for defendant in error.

**HILL, C. J.** Wallace was employed by the Southern Railway Company as a switchman, and on or about October 26, 1906, in the early part of the night, and while engaged in the discharge of his duties, he was killed by the running of an engine operated by the railway company. His widow brought suit to recover damages for the homicide. At the conclusion of the plaintiff's evidence a nonsuit was granted, and to this judgment she excepts. Illustrating the question of nonsuit, there are also two special assignments of error on the admission and rejection of testimony.

This is the second appearance of the case before this court on an assignment of error to the judgment awarding a nonsuit. When first here, this court held that the plaintiff failed to show a prima facie case of liability, and consequently affirmed the judgment. *Wallace v. Southern Ry. Co.*, 6 Ga. App. 526, 65 S. E. 299. There is some substantial difference between the allegations of negligence in the first and second petitions, but very little, if any, material difference in the evidence in support of the allegations on the two trials. In a judgment awarding a nonsuit, as nothing is decided except the sufficiency of the evidence presented in support of the allegations in that particular case, it is not deemed necessary to call attention to any difference between the allegations and evidence in the present case and the first case. We shall only consider and decide the correctness of the judgment, under the allegations and the proof offered in support thereof, on the question of liability in the case sub judice. The employment by the railway company of the husband of the plaintiff as a switchman, and the fact that he was killed in the discharge of his duties by the engine of the railway company, were not controverted, and the only question for the determination of this court relates to the issue of negligence under the allegations of the petition and the evidence for the plaintiff.

The allegations on the subject of negligence are as follows: "In the course of his duties, deceased was switching cars in [Fulton] county, near Armour. \* \* \* At said time and place deceased threw a switch [in front of the engine] and gave a signal to the engineer to move forward. Immediately upon his giving the signal, and just as the engine was in the act of starting, a great volume of steam gushed out, surrounding the engine in every direction, and enveloping the deceased. The engine continued to advance, and ran over the deceased and killed him. \* \* \* It is impossible for plaintiff to give any of the details from the time the steam enveloped her husband until his mangled body was found in the rear of the engine." She alleges that "the escaping steam obscured the vision of the deceased,

and was so opaque that he could not see through it, and, furthermore, it stung and blinded his eyes, and it was impossible for him to see, or know direction, or tell in which direction the engine was, or in which direction he should go, or save himself in any way. She does not know and cannot say whether the engine struck the deceased while he was trying to escape from it, or exactly how it happened." In this connection it is further alleged that, "some time before the death of the decedent, the defendant knew the condition of this engine, had promised to repair it repeatedly, and had had it in the shop for that purpose," but, "notwithstanding this, they sent it out to be used for yard purposes, when the character of the work made it essential that the engine should start and stop properly"; that the decedent was killed on the very night of the day that the engine came from the shop, and he had no chance to know its defective condition, and, under these circumstances, it is insisted that the decedent was relieved from any assumption of risk. She charges that "the escaping steam and the action of the engineer in moving the engine while the deceased was endangered," as described, "were the real and proximate cause of his death." She charges that "the valves of said engine around the piston rods, and also the steam chest and cylinders, were leaking badly," that by proper examination and repairs this defective condition of the engine could have been discovered and repaired, and that the defendant was negligent in failing to make a proper inspection and in failing to correct these defects; and she further charges that it was negligence to operate the engine in such defective condition, and, under these circumstances, it is insisted that the decedent was relieved of any assumption of risk.

These are substantially the allegations of negligence, and they may be divided into two grounds: First, the negligence of the railway company in failing to inspect and repair the defects in the engine, and in knowingly using the engine in this defective condition; and, second, the negligence of the engineer in continuing to move forward his engine after he had received the signal to move forward by the switchman, when he discovered that the escaping steam had so enveloped the switchman as to make it impossible to observe his location on the track in front of the moving engine.

1. In support of the first allegation of negligence, the evidence is not controverted that the engine was in a defective condition as described; nor is it denied that the defendant company knew of this condition, or by proper inspection could have found it out, and an inference of negligence was reasonably deducible from the facts in evidence. We think, however, as to this the deceased switchman had assumed the risk. The evidence is clear that his opportunity for dis-

covering the defective condition of the engine was as good as that of the master, that he had been working as a front switchman on this engine in the yards of the company from 6 o'clock in the morning until the time when he was killed, and the evidence shows that this engine had been leaking badly during this whole day, up to the very time of the accident, and that everybody connected with this engine and its operation could not possibly have failed to see the escaping steam and have knowledge of the defective character of the engine. The deceased switchman therefore knew, or in the exercise of ordinary care in connection with the discharge of his duties as a switchman could have known, that the engine had not been fixed, although it had been in the shop for that purpose, that it was defective, that the steam did escape whenever the engine started, that he fully realized his danger in connection with the escaping steam, and that, notwithstanding this knowledge, he continued his work. We think it clear, therefore, that he assumed the risk resulting from the defective condition of the engine, and that as to this ground of negligence he was not entitled to recover.

[1] 2. Illustrating the second allegation of negligence, the evidence shows, or it is reasonably deducible therefrom, that the switchman, in the proper discharge of his duty and for the proper signaling for the engineer to start forward, crossed the track a few feet in front of the engine, "to the engineer's side, and gave the signal for the engineer to start forward"; that the manner in which this was done by the switchman was the customary and proper way to do it; that the engineer saw the signal and immediately started the engine forward; that the steam rushed out suddenly "in a great volume," and completely enveloped the switchman, and hid him from the engineer's view; that as the steam enveloped the switchman, the light of his lantern immediately went out; that the engineer saw that the switchman was thus enveloped, and saw that he was standing on the track when he gave the signal; that he knew that it was customary for switchmen, after giving signals of this character, to get upon the moving engine; that, seeing this perilous position of the switchman, it was the engineer's duty to stop his engine until the vapor should have been dissipated, and he, the engineer, enabled to see the exact location of the switchman, and the switchman allowed without danger to himself to get upon the moving engine; that, notwithstanding these facts, he continued to move his engine towards the place where the switchman was last seen standing on the track, and the evidence is that he could have stopped his engine "in 4 or 5 feet," but that he did not stop the engine for 80 feet from where he struck and ran over the switchman.

We do not mean to say that on these issues the evidence is altogether in favor of the contention of the plaintiff, for it is insisted by learned counsel for the railway company that the only reasonable deduction from the evidence is that the switchman was not on the track in front of the engine when he gave the signal for the engineer to start, but that he had passed over the track, and was standing off the track, in front of the engine, on the ground, in a position of safety and, himself seeing the enveloping steam, and realizing that it would be unsafe for him in that condition to attempt to step on the track, he nevertheless endeavored to do so; that instead of waiting until the steam passed away, or until the engine stopped, to get upon the engine, he, notwithstanding the dangerous situation, through his own negligence attempted to get upon the engine, and in this manner met his death, and, therefore, that his own negligence was the proximate cause of his death. Under the evidence it is not clear how the switchman was killed. It does not disclose that he attempted to get on the engine while it was moving. He may have been walking on the track in front of the engine, and his feet may have caught in the frog of the track, and he may have been thrown, and in that position may have been run over and killed. Neither is it clearly shown that he was standing on the track in front of the engine when he gave the signal, but it is fairly issuable from the evidence that he was so standing. The uncertainty as to these questions should be left to the solution of a jury. It is not so conclusive that as matter of law it can be held that the negligence of the deceased caused his death, or that by the exercise of ordinary diligence he could have avoided the negligence of the engineer in continuing to move his engine under the circumstances. It cannot be doubted that the question whether the engineer was guilty of negligence in moving forward his engine, notwithstanding he saw the perilous situation of the decedent, and whether, if the engine was so moved forward, this was the cause of the killing, are, under the evidence and inferences fairly deducible therefrom, at least issuable, and cannot certainly be determined as questions of law. On this allegation of negligence, under the evidence, our minds are in a condition of uncertainty and unrest, and we prefer to leave the question to be solved by the jury, where, if issuable at all, the law places the responsibility of solution.

[2] 3. Learned counsel for the plaintiff contends that the act of 1909 (Acts 1909, p. 160) is applicable to this case. He concedes that it could not be applicable if the question involved a right to recover, because it would be retroactive in character, as the homicide occurred in 1906; and he insists that the presumption of negligence created by this act, under certain facts, is a rule of evidence, and as such would apply to any cause of action arising after the passage of the act. The general rule of law which counsel states is undoubtedly correct, that the Legislature has power to make rules of evidence, and presumptions are ordinarily rules of evidence, applicable to causes of action which have accrued prior to the passage of the act. In this case, however, the act expressly provides that it is applicable only to causes of action arising subsequently to its passage, and the act is intended to modify the extreme hardship of the statute, which prohibited an employé from recovering damages unless he himself was absolutely faultless in connection with his injury. The act does provide that, in case death results from an injury to an employé, a presumption of negligence is thus raised which must be rebutted by the employer; but this presumption constitutes an integral part of the right to recover, and can have no retroactive effect. In *Louisville & Nashville R. Co. v. Bradford*, 135 Ga. 522, 69 S. E. 870, it is expressly held that causes of action arising prior to the act of 1909, *supra*, are unaffected by its provisions, and that an instruction which the trial judge in that case gave to the jury, to the effect that the presumption of negligence created by the act did apply to a cause of action arising prior to its passage, was erroneous. This seems to settle the question, and really renders unnecessary an opinion by the court on this point. However, under the statute as it stood at the time of the homicide, whenever the plaintiff proved the negligence of the engineer, this cast the burden on the railroad company of proving the contributory negligence of the employé.

4. The assignments of error as to the rulings on evidence are conceded by counsel for plaintiff in error not to be controlling or material, and, as they may probably not occur on a second trial, it is not now necessary to decide them. We reverse the judgment, awarding a nonsuit in this case, solely on the ground discussed in the second division of the opinion.

Judgment reversed.

(157 N. C. 1)

**MAYNARD et al. v. SEARS.**

(Supreme Court of North Carolina. Nov. 15, 1911.)

**1. WILLS (§ 602\*) — ESTATE CONVEYED — DEFEASIBLE FEE.**

A will, after making specific dispositions of certain slaves to J. C. and S., gave the balance of testator's land and negroes to be equally divided between J., C., and S., and provided that, if they all died without such heirs, the property should return to testator's brother and sister or their lawful heirs. *Held*, that J., C., and S. took a defeasible fee in the land devised.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351-1359; Dec. Dig. § 602.\*]

**2. REMAINDERS (§ 17\*) — LIMITATIONS.**

The statute of limitations does not run against remaindermen in favor of a grantee of the life tenant until the life estate falls in.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig. § 17; Limitation of Actions, Cent. Dig. § 231.]

**3. APPEAL AND ERROR (§ 927\*) — NONSUIT — EVIDENCE.**

On appeal from a nonsuit, the evidence must be considered in the light most favorable to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3743-3757; Dec. Dig. § 927.\*]

**4. EJECTMENT (§ 95\*) — ACTION — SUFFICIENCY OF EVIDENCE.**

Evidence in an action to recover land in which plaintiff claimed as heir at law to B.'s brother *held* to sustain a finding that B. had owned the land.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-295; Dec. Dig. § 95.\*]

**5. TRIAL (§ 140\*) — WEIGHT OF EVIDENCE — QUESTION FOR JURY.**

The weight of the testimony of a witness as to occurrences 60 or 70 years ago was for the jury, and not for the court, though the witness was only five or six years of age at the time of the matters as to which he testified.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.\*]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by James Maynard and others against A. S. Sears. From a judgment for defendant, plaintiffs appeals. Reversed.

Aycock & Winston and Peele & Maynard, for appellants. R. N. Simms, for appellee.

**CLARK, C. J.** This is an action to recover 100 acres of land. Berry Surls died in 1842, having executed his will as follows:

"In the name of God, Amen. I, Berry Surls, of county of Wake, being of sound and perfect mind and memory, blessed be God, do this 10th day of February, one thousand eight hundred and forty two, make and publish this my last will and testament in manner following: That I say, first I give and bequeath to John Pollard one negro girl by the name of Jane, to him and his lawful heirs, begotten of his body, dying without such to return to Caswell Pollard and Thomas Slaughter, or their lawful heirs, begotten of their body. Item the second: I give Caswell

Pollard one negro girl by the name of Hannah, to him and his lawful heirs begotten of his body, dying without such to return as above directed. Thirdly, I give to Thomas Slaughter one negro girl by the name of Pat, to him and his lawful heirs begotten of his body, dying without such to return to John and Caswell Pollard, or their lawful heirs begotten of their body, and the balance of my land and negroes to be equally divided between John Pollard, Caswell Pollard and Thomas Slaughter, after paying all my just debts, with the exception of Buck. It is my desire that he be sold to a speculator and it is my desire that all my stock of all kinds be sold and equally divided between them as above stated. Also my money and notes to be divided \* \* \* in the manner above stated equally between my three sons which are named in this will. It is my desire that if they all should die without such heirs to return to my brother and sister, or their lawful heirs. I also appoint and ordain my worthy friend, Henry Williams, my executor to this my last will and testament. In testimony whereof I have hereunto set my hand and affixed my seal, in the presence of Dempsey Sorrell and John Brown, this 10th day of February, 1842.

his  
"Berry (X) Surls."  
mark

The plaintiffs claim that they are the heirs at law of John Surls, who was a brother of Berry Surls, and offered evidence thereof. Berry Surls left no legitimate children. Soon after he died, his three devisees, John and Caswell Pollard and Thomas Slaughter, took possession of the land sued for, and cultivated the same, which they undertook to convey on October 4, 1851, to Bartlett Sears, who took possession of the land, and held it till his death. It was sold February, 10, 1878, to pay the debts of Bartlett Sears. It was purchased by W. H. Crabtree, who took possession. The deed to him recites that the land is the same as that sold by John Pollard, Caswell Pollard, and Thomas Slaughter to Bartlett Sears by aforesaid deed October 4, 1851. On November 20, 1878, Crabtree sold the land, together with adjoining land, making a tract of 282 acres to S. R. Horne, who remained in possession till April 24, 1897, when he conveyed the land to the defendant, Sears. The last one of the three devisees named in the will of Berry Surls, to wit Caswell Pollard, died in February, 1908. This action was brought the following year.

[1] The plaintiffs correctly contend that, under the will of Berry Surls, John and Caswell Pollard and Thomas Slaughter took a defeasible fee in said 100 acres, and that their deed to Bartlett Sears conveyed only such estate, and that the successive mesne conveyances down to the defendant, Sears, conveyed no more than such defeasible fee in the land. The statute of limitations did

not begin to run against the plaintiffs, if heirs at law of John Surls, till the death of Caswell Pollard in 1908. Only one of the three devisees married, and the plaintiffs offered evidence that he left no children.

[2] The statute of limitations does not run against the remainderman in favor of the grantee of the life tenant until the life estate falls in. *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756; *Cox v. Jernigan*, 154 N. C. 584, 70 S. E. 949; *Staton v. Mullis*, 92 N. C. 623. The defendant contends that the evidence does not show that the land ever belonged to Berry Surls, nor that the plaintiffs are the heirs at law of John Surls, nor that Thomas Slaughter and John Pollard are yet dead, and that they did not leave children. There was evidence upon all these propositions, but the defendant claimed that it was not sufficient to be submitted to the jury to prove these contentions of the plaintiffs.

[3] The judge having directed a nonsuit, the evidence must be taken in the light of the most favorable inferences which can be drawn from it. It is manifest from the entire will that the testator intended that each of the devisees should have a fee simple defeasible upon failure to heirs of his body. He makes this direction as to the slaves, his money and notes, and directs "the balance of the land and negroes be equally divided between the three," adding that it was his desire "that if they all should die without such heirs to return to my brother and sister or their lawful heirs." The testator applied the significant word "return" to everything.

[4] The witness Markham testified that, when he first knew the land, Berry Surls was cultivating it; that the witness was then five or six years old; that he saw the negro Buck named in the will at work on the land; and that the description of the 100 acres in the deed from the three devisees to Sears embraced the 100 acres of land which he identified and described. He says that 50 acres were in cultivation when he first knew the land; that he remembers that a man was found dead on the tract, and that Berry Surls had a grave dug on the land to bury him; that, after the death of Berry Surls, the three devisees took possession of the land, and cultivated it; that Berry Surls lived on the land; that he saw him in the house he lived in, saw him two or three times, and saw him walking in the fields where Buck and Beck mentioned in his will were working. It is true that the witness states that he was then only five or six years of age.

[5] But the weight of his testimony was a matter for the jury. A son of Bartlett G. Sears, former owner of the land, fully identified the 100 acres. The witness Markham testified that Bartlett Sears while in possession cut down the timber on the land, and stated that his title was only good for the lifetime of the three devisees named in the

will. The witness Sears also stated that he was present when the land was sold to pay his father's debts, and it was stated at the time that the title was in dispute, and the land brought only \$160 or \$170, whereas it was really worth \$500 or \$600. The witness Byrd testified that he heard Horne, the defendant's grantor, say that he told the defendant that there was a defect in the title of the 100-acre tract. The will of Berry Surls shows that he claimed to own this land in fee simple.

There is also evidence sufficient, if believed by the jury, to justify the finding that the plaintiffs were heirs at law of John Surls, and that neither John nor Caswell Pollard nor Thomas Slaughter left any children. Whether the jury would have found the facts on these points in accord with the contentions of the plaintiff or not, there was sufficient evidence to submit the case to their finding. In directing a nonsuit there was error.

(156 N. C. 463)

### SAUNDERS et ux. v. GILBERT.

(Supreme Court of North Carolina. Nov. 9, 1911.)

#### 1. EVIDENCE (§ 121\*)—RES GESTÆ.

Plaintiff was accosted on the street by defendant, accompanied by a crowd of persons, and offensive epithets were applied to him. On reaching his home, the crowd, which had followed him, remained in the street, and, in an action by plaintiff and his wife for trespass and assault, it appeared that defendant said, "Will give you 24 hours to leave town;" that some one in the crowd said, "Get him now;" and that, just as plaintiff got inside the gate, some one said, "That was all that saved you;" that plaintiff fired into the air to frighten the crowd, whereupon defendant fired; the bullet striking a post in front of plaintiff's wife, who was standing on the piazza. *Held*, that the evidence as to what was said by persons in the crowd was admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303-333; Dec. Dig. § 121.\*]

#### 2. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for assault and trespass, the plaintiff proved without contradiction her highly excited and nervous state after it was over, and that the doctor whom she sent for administered medicine hypodermically, and testified that he said it was morphine. *Held*, that, even if it was error to admit his statement in evidence, it was harmless; it being evident that the medicine given was a sedative, and wholly immaterial what its exact nature was.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4180; Dec. Dig. § 1050.\*]

#### 3. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS.

The court instructed that if defendant fired through a reasonable apprehension that he was in danger, or that a felony was about to be committed, he would not be guilty of assault or trespass; that if plaintiff fired to protect himself, and defendant fired in a reckless manner, without reasonable apprehension that any one was to suffer from plaintiff, defendant would not be guilty of an assault or trespass. *Held*, that, if defendant thought himself entitled to an instruction that one exercising self-defense

may act upon appearances, or the facts as they appear to him at the time, he should have requested it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

**4. ASSAULT AND BATTERY (§ 13\*)—TRESPASS (§ 26\*)—DEFENSES.**

Defendant's liability for trespass or assault did not depend on his right of self-defense; the trespass and assault having already been committed.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 11; Dec. Dig. § 13;\* *Trespass*, Cent. Dig. § 58; Dec. Dig. § 26.\*]

**5. ASSAULT AND BATTERY (§ 2\*)—TRESPASS (§ 10\*)—WHAT CONSTITUTES.**

Plaintiff was accosted on the street by defendant, accompanied by a crowd of persons, and offensive epithets applied to him. On reaching his home, the crowd, which had followed him, remained in the street, and, in an action by plaintiff and his wife for trespass and assault, it appeared that defendant said, "Will give you 24 hours to leave town;" that some one in the crowd said, "Get him now;" and that, just as plaintiff got inside the gate, some one said, "That was all that saved you;" that plaintiff fired into the air to frighten the crowd, whereupon defendant fired; the bullet striking a post in front of plaintiff's wife, who was standing on the piazza. *Held*, that defendant was guilty of assault and trespass.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 1; Dec. Dig. § 2;\* *Trespass*, Cent. Dig. §§ 8-12; Dec. Dig. § 10.\*]

**6. ASSAULT AND BATTERY (§ 38\*)—PUNITIVE DAMAGES.**

It was proper to instruct that the jury might award actual damages, giving consideration to mental and physical pain, and also punitive damages, if the assault was committed maliciously or wantonly.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 53; Dec. Dig. § 38.\*]

Appeal from Superior Court, Pasquotank County; Justice, Judge.

Actions by W. O. Saunders and Columbia Saunders against Oliver F. Gilbert. From judgments for plaintiffs, after consolidation of the actions, defendant appeals. Affirmed.

These are actions, one by the plaintiff W. O. Saunders, and the other by his wife, Columbia Saunders, against the defendant for trespass and assault. They were consolidated and tried together, resulting in a verdict and judgment for the plaintiffs, from which the defendant appealed. As the parties differ materially as to the nature of the evidence, it becomes necessary to state it at some length, all of it having been introduced by the plaintiffs:

The plaintiff Columbia Saunders testified: "I live on Cypress street, and have lived in this town since I was a child; am the daughter of John Ballance and wife of W. O. Saunders; have known the defendant 12 or 13 years; was once a clerk in his store about three years, and for Mitchell, his brother-in-law, in which the defendant was a clerk, for about five years. On July 31, 1910, I was at home alone in my house until about 9 p. m., and was on the porch when my husband came, a large crowd of people following him,

from church; some in front and some behind him. My husband came in the gate and closed it; heard Gilbert's voice. He said to Mr. Saunders, 'Will give you 24 hours to leave town.'" Plaintiff was then asked, "What did the crowd do?" Defendant objected. Objection overruled and defendant excepted. "A. The people leaned up against the fence, and I heard other threats. My husband told them to leave, and the first man who came in the yard he would shoot. I was in the light, and had on a white dress; saw a large crowd—two or three hundred people—and heard some one in the crowd say, 'Get him now.' My husband fired upwards from the doorstep towards treetops. I then pulled him on the porch, and some firing began on the street. A bullet struck the wall, just did miss me. I saw the flash. Another bullet struck the piazza post immediately in front of me, and between me and the person firing. If the bullet had not struck the post, it would have hit me. Q. What did any one say? A. Just as Mr. Saunders got inside the gate, some one said, 'That was all that saved you.' (To this question and answer, defendant objected. Objection overruled, and defendant excepted.) Two bullets struck the house, and one struck the fence. The crowd seemed angry; saw no arms, except flash of pistol. It made me nervous, and I was nearly wild; did not sleep that night; have not gotten over it yet; sent for Dr. McMullan, and he came. Q. What did Dr. McMullan say he gave you? (Defendant objected; objection overruled; defendant excepted.) A. He said it was morphine. Q. How did he administer it. A. He put it in my arm. It did not put me to sleep. There were several others saw me, among them Mr. and Mrs. Simons and Mr. and Mrs. White. I was screaming and crying, and could not eat or sleep any scarcely for about a week. I had a baby about five months old and two other children, three and five years old, in the house with me. I am still afraid to sleep without doors and blinds closed. On Monday I sent for Dr. Fearing."

Cross-examined, she testified: "This was on Sunday night immediately after service. Some people always passed my house going from church, but no large crowd like this. Mr. Saunders' father was with him, and went in the yard when he did. No one else came in the yard. The gate was 10 or 15 feet from the porch. Mr. Saunders came to about the bottom of the step and fired two or three times; nobody else had fired before he shot. He fired twice. I don't know whether he fired the third shot then or a little after. Then the firing was from the street. I pulled Mr. Saunders in just after he had fired. I closed the door when he went in; don't know whether it was before the third shot or not. He went upstairs, and left me on the piazza. Mr. Saunders had been to Blackwell

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Memorial Church. Nobody attempted to go into the gate, but pushed against the fence in a threatening manner. Mr. Saunders had not been in the house, since he left to go to church, until after the firing began."

Edward Brinson testified: "I have lived in Elizabeth City 17 years; know defendant. On July 31, 1910, was at Blackwell Memorial Church; saw W. O. Saunders there; did not see Gilbert at church. I came out on sidewalk, and saw it was full of people, and I got into the street in front of Saunders' house; heard some one say, 'Stop,' or 'Halt.' Some one in the yard fired. It was Saunders who shot; held the pistol and fired up above the crowd. I saw Gilbert fire towards the house. I dodged around Gilbert, and heard several shots from where Gilbert was standing near the oak. Gilbert kind of leaned forward when he fired. I ran. I heard no threats. The street and the sidewalks were full of people, some walking leisurely, some fast, and some running."

J. M. Ballance testified: "I met O. F. Gilbert on the street Monday, July 25, 1910, a week before the occurrence, and had a talk with him. He said, 'I understand you have stock in the Independent.' I said: 'No, I have not; all I have done is to sign Saunders' bond to keep him out of jail.' He said, 'I want to tell you that I want to withdraw from you, if you have any stock in it.' He said, 'Why don't you help to stop this man [referring to Saunders] from talking about your pastor?' I said, 'I have nothing to do with that.' I said something, and he said, 'Don't you think, if I am going to kill a man, it is my place to warn him beforehand of it?' Saunders was editor of the Independent. On the 31st, at night, I was at Blackwell Memorial Church. I went towards home along Cypress street. When I got about 80 feet of Saunders' house, some one fired two shots upward from Saunders' doorsteps; then there were four shots fired from the street towards Saunders' house, in quick succession, from near the oak. I went home, and then back to Saunders' house. Mrs. Saunders was very nervous. I stayed there that night with the chief of police and a guard. I am half-brother to Mrs. Saunders. I saw three bullet holes, but saw no bullets; saw the glancing dents in the wood. I was 80 feet away; no one between me and the party firing on the sidewalk. I heard Saunders say he fired three times before any one else shot. When Saunders drew his pistol, the people on the sidewalk and on the street began to run. I am on Saunders' prosecution bond."

Mr. Matthews testified: "I live six or eight hundred feet from Saunders' house. Was in front of my gate and heard two shots, and four to six more. I went to Saunders' house. The street was full of people, in groups; considerable excitement; saw Mrs. Saunders. She was greatly distressed—on the porch wringing her hands and appealing for help."

Dr. Zenas Fearing testified: "I know

plaintiffs. As mayor of Elizabeth City, I was phoned to come to Saunders' house Sunday night, and went as mayor and not as physician. Mrs. Saunders was very nervous and on the verge of collapse. This was on Sunday night. Dr. McMullan was there Sunday night. She was nervous. On the 2d of August, saw Mrs. Saunders professionally, and treated her for nervousness."

Charles Reid, sheriff of the county, testified: "Was at church, and was going home; heard the shots—three shots—then four or five; went to the house of Saunders. Mrs. Saunders was nervous, and asked me to protect her; stayed there until the crowd dispersed. I left guard around the house."

Plaintiff rests, and defendant introduced no evidence. The court, after reading the evidence to the jury, stating the contention of the parties, respectively, among other things, charged the jury as follows:

"(1) If you find that Gilbert fired the shots towards the house through a reasonable apprehension that he was in danger of serious bodily harm from Saunders, or if he fired the shots, believing that a felony was about to be committed, then Gilbert would not be guilty of committing a trespass as charged in the complaint, and it would be the duty of the jury to answer the issue as to trespass, 'No.'" Defendant excepted.

"2. If you find that Gilbert fired the shots toward the house under a reasonable apprehension that he was about to suffer serious bodily harm himself, or that a felony was about to be committed, then he would have had a right to so fire the shots, and he would not be guilty of assault or trespass, as charged in the complaint, and it would be the duty of the jury to answer the issue as to assault and trespass, 'No.'" Defendant excepted.

"3. If you find that the plaintiff W. O. Saunders fired the shots in the air above the heads of the crowd for the purpose of protecting his home and frightening the crowd away, and protecting himself from serious danger, and the said defendant fired the shots in the direction of the plaintiffs, in a reckless manner, without having any reasonable apprehension that he or anybody else was about to suffer from Saunders, then you should answer the issue as to unlawful assault, 'Yes.'" Defendant excepted.

"4. If you shall find that the plaintiff W. O. Saunders fired the shots in the air above the heads of the crowd, for the purpose of protecting his home and frightening the crowd away, and protecting himself from serious danger, and defendant fired the shots in the direction of the plaintiffs, in a reckless manner, without having any reasonable apprehension that he or anybody else was about to suffer from W. O. Saunders, then you should answer the issue as to unlawful trespass, 'Yes.'" Defendant excepted.



Upon the subject of damages, the court charged the jury: "That if they should answer the issues as to the assaults and trespasses which appear in the record, 'No,' they need go no further, for the plaintiffs would have suffered no damages. But if they answer those issues, 'Yes,' then they would go further, and consider the question of damages, and give to the plaintiffs such actual damages as they may have sustained because of the alleged wrongful conduct of the defendant, Gilbert; and in reaching their conclusion as to such actual damage they might consider any mental and physical pain which they find that the plaintiffs suffered by reason of the said alleged wrongful conduct on the part of the defendant, and in addition might add such amount as, in their judgment and discretion, they deemed right as punitive or exemplary damages, provided you find that there was an assault committed on plaintiffs, maliciously or wantonly." Defendant excepted.

J. C. B. Ehringhaus, J. B. Leigh, W. M. Bond, and E. F. Aydlett, for appellant. S. Brown Shepherd, Pruden & Pruden, and Meekins & Tillett, for appellees.

**WALKER, J.** (after stating the facts as above). [1] The testimony as to what was said in the road and in front of the plaintiffs' home was clearly competent. The *res gestæ* includes what was said, as well as what was done. The acts and the outcries of this unlawful assembly (for that is, in plain speech and in law, what it was) is held to be competent as *pars rei gestæ*, and also as tending to show their purpose, or *quo animo*. Nothing is better settled than this rule of evidence. *State v. Rawles*, 65 N. C. 334; *State v. Worthington*, 64 N. C. 594. We find it stated in 4 Elliott on Evidence, § 3128, that "what is said and done by persons during the time they are engaged in a riot (or unlawful assembly) constitutes the *res gestæ*, and it is, of course, competent, as a rule, to prove all that is said and done"—the acts and the words of the mob, or any members of it—as in *Rex v. Gordon*, 21 State Trials, 485 (563), wherein evidence of the cries of the mob, "No popery," as it was proceeding towards Parliament House, were held competent and admissible as a part of the *res gestæ*.

[2] What Dr. McMullan said to the feme plaintiff, Mrs. Saunders, when he was administering morphine hyperdermically, is not of sufficient importance to warrant the granting of a new trial, if it was incompetent as evidence. The evidence as to her highly excited and nervous condition was overwhelmingly established by the evidence, and there was none to the contrary. We are permitted to use our common sense sometimes in deciding legal questions, and every one must know that the good doctor was administering something medicinally for the

alleviations of her sufferings and to quiet her excited nerves. Whether it was morphine, or any other opiate, narcotic, anodyne or sedative, can make no essential difference. It was evidently given, whether internally or by hyperdermic, to calm and soothe her disturbed feelings. We do not mean to imply that it was not competent as a statement accompanying an act and explanatory of it, but waiving, for the present, the question of its admissibility under the strict rule of evidence, it was harmless, if incompetent.

[3] Having passed the skirmish line, we will now address ourselves to the remaining point in the case—the validity of the judge's charge upon the subject of forcible trespass and the right of self-defense. The charge was clear and sufficiently full, in the absence of requests for more specific instructions. If the defendant thought himself entitled to an instruction that "a person exercising the right of self-defense may safely act upon appearances, or the facts and circumstances as they appeared to him at the time, if he entertained an honest belief in their existence," he should have asked the judge to make his charge more definite in that respect, and, having failed to do so, he cannot, after the verdict, complain. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225. He appeared, by his silence, to be content with the instructions, and we will not hear him speak now. The judge laid down a correct rule that the defendant must have had a reasonable apprehension that his own life or limb was in jeopardy, and the jury are to judge of the reasonableness of his fear, notwithstanding the other principle asserted. *State v. Nash*, 88 N. C. 618. Would a man of ordinary firmness, and similarly situated, have reasonably acted upon the assumption that he was about to receive serious bodily harm, and defended himself, giving him the benefit of his view of the circumstances at the time? In *Nash's Case*, Judge Ashe said: "The court did not give the prisoner, in *Scott's Case*, 26 N. C. 409, [42 Am. Dec. 148], the benefit of the principle, for the reason that no such instruction had been asked in the court below; the judge concluding that the prisoner would have requested the instruction, if he had acted upon such belief." This is a sufficient answer to defendant's exception for failure to give the instruction, the omission of which in the charge is now assigned as error. A defendant must not sleep upon his rights, but be vigilant; otherwise the court may be betrayed into assuming that he had none, because he did not assert it.

[4] But, on other grounds, should the failure to insert the instruction in the charge, even if it is correct in itself, be reversible error? We think not. The defendant's liability for a trespass or an assault depended not upon his right of self-defense. He was the aggressor, and, with his asso-

dates, had pursued the plaintiff W. O. Saunders, even into his own yard—it may, with strict regard for the facts, be said, had forced him there by his fear of superior numbers, until he took refuge in his own house, and escaped from threatened violence to his person. The offense of forcible trespass or assault was complete at that very moment, and what occurred afterwards when, in the apprehension that he was about to be attacked on his own premises, Saunders fired his pistol to “scare them off,” and defendant returned the fire, has nothing to do with the unlawfulness of the defendant's acts, and does not excuse what they did. He had already committed a forcible trespass and assault, as we will see, and Saunders' conduct, defensible in law, as it is (*State v. Nash*, supra), did not excuse him or condone the offense he had already committed. Who will say that Saunders did not have reasonable ground to apprehend that they were about to attack him, and even his wife, whom he had the right to defend, in his own house?

[5] It would seem unnecessary to discuss the character of the defendant's acts, in order to show that they were unlawful and violative of the plaintiff's rights of person and property. They were, at least, sufficient to constitute a civil trespass. “If three persons commit a trespass upon property, in the presence of the person in possession, their number makes it indictable, although actual force is not used.” *State v. Fisher*, 12 N. C. 504. In that case the learned and just judge, who presided over this court at the time (*Taylor, C. J.*), said: “The inquiry therefore is whether the facts proved, according to the case sent up, amount to an indictable trespass. In *Regina v. Soley* and others, it is said by Lord Holt that, ‘as to what act will make a riot or trespass, such act as will make a trespass will also make a riot,’ by which he must be understood to mean if committed by three or more persons (11 Mod. 116). The converse of the proposition must be true that a trespass, committed by three or more persons, will make a riot. In every trespass, as well as riot, there must be some circumstances, either of an actual force or violence, or at least of an apparent tendency thereto, as are apt to strike a terror into the people; but it is not necessary that personal violence should have been committed. *Clifford v. Brandon*, 2 Campbell, 369. Any resistance on the part of the prosecutrix must have led to an actual breach of the peace; but the resistance of two women to the four persons who came to take the corn must have been unavailing.” So in *State v. Rawles*, 65 N. C. 334, it was held that when even four persons, with a gun and hoe, pursued another, who is at a place where he has a right to be, and by threatening and insulting language put him in fear, or (by what is) calculated to do so, and thereby induce him to go home sooner than he would

have gone, or in a different way or course, and compel him by their number to do what he would not otherwise have done, they were guilty of a forcible trespass, although they did not approach nearer to him than 75 yards, and did not attempt to use their weapons. It is further said: “When a number of persons meet together, and there is evidence tending to show a common design to commit an assault upon another, they may all be properly found guilty, though only one of them used threatening and insulting language to him.” And again said Judge Settle: “The prosecutor was where he had a right to be, and had just been engaged in repairing his fences, which some one had knocked down, and no one had the right, by numbers, manner, language, weapons, or otherwise, to drive him home by a different path, or at a different pace, than that which he chose to take. What was the prosecutor to do? Was he to stand still and submit to a battery? Can the defendants stand in a more favorable light before a court of justice, merely because their violence was not fully consummated in consequence of the flight of the prosecutor? Some stress seems to be laid upon the fact that the gun and other weapons were not taken from the shoulders of those carrying them. As is said in *State v. Church*, 63 N. C. 16, that makes no difference, for ‘that would have been but the work of a moment, and was not needed to put the prosecutor in fear and to interfere with his personal liberty.’” But the subject was fully discussed at this term in *State v. Davenport*, and the authorities cited, and it covers the questions now raised by the defendant. There can be no question that defendant is civilly liable for the trespass and assault.

It can make no difference that this large multitude of people did not actually enter upon the premises of the plaintiffs, or go within their curtilage. We have held that the gathering of a large number of persons on the public road in front of a man's house, or the use of violence, abusive or insulting language in a public or private road, or in the street of a city, in the presence and hearing of the owner of adjoining property, constitutes a forcible trespass. *State v. Lloyd*, 85 N. C. 573; *State v. Hinson*, 83 N. C. 640. In *State v. Widenhouse*, 71 N. C. 279, it is said that “the only privilege which the public have in a public road is that of passing over it, and those who abuse that privilege become trespassers ab initio—” citing *State v. Buckner*, 61 N. C. 558, 98 Am. Dec. 83, where Judge Reade says: “All misbehavior is aggravated by being in a public place. The only privilege which the public have in a public road is that of passing over it. If they misbehave in it, they create a nuisance. The road is for travel, and for no other purpose.” Judge Ashe said, in *State v. Davis*, 80 N. C. 351, 30 Am. Rep. 86: “He [the defendant] seemed to have rested his defense

upon the ground that he was in the public road, and had the right to do there as he pleased. In this he was mistaken. The public have only an easement in a highway; that is, the right of passing and repassing along it. The soil remains in the owner, and where one stops in the road, and conducts himself as the defendant is charged to have done, he becomes a trespasser, and the owner has the right to abate the nuisance which he is creating. The principle of *molliter manus* does not apply to a case like this, where the trespasser, armed with a pistol, is acting in such belligerent defiance. See *State v. Buckner*, 61 N. C. 558 [98 Am. Dec. 83]. The defendant used language which was calculated and intended to bring on a fight, and a fight ensued. He is guilty. *State v. Perry*, 50 N. C. 9 [69 Am. Dec. 768]; *State v. Robbins*, 78 N. C. 431." In our case it was a pistol duel, which ensued from the defendant's aggressive conduct, and the multitude with him supplied the place of the required force or violence, as it certainly tended to intimidate the plaintiffs and to put them in fear. *State v. Laney*, 87 N. C. 535. It is therefore because the acts were committed in a public place, and were just as much calculated to produce a breach of the peace as if actual entry had been made upon the premises, which could be done in a moment, that we cannot escape the conviction that this invasion of the defendant was conducted in such numbers and with such a display of force as to overawe and intimidate the plaintiffs; and it surely tended to a breach of the peace. He is contending that it did actually lead to that result, as he is charging the plaintiff W. O. Saunders with assaulting him and putting him on the defensive, so that he returned his fire, and we have an alleged duel; yet nobody is guilty, and surely not the aggressors! The cases collected in *Walser's Index Digest of the Criminal Law*, at pages 162-166, will be found, when examined, to fully sustain our view of the facts of this case, when considered in their legal aspect. "A person who merely stops on the sidewalk in front of a man's house and remains there, using abusive and insulting language towards him, commits a (civil) trespass." 28 Am. & Eng. Enc. 553, citing *Adams v. Rivers*, 11 Barb. (N. Y.) 390.

[8] It is argued, and with some plausibility, that the court erred in allowing the jury to award punitive damages, in addition to those which are actual and compensatory. It would be exceedingly strange if a civil injury, which is also a crime, does not entitle the injured party to vindictive damages, and yet it is said that the reason why the law should be so is the very fact that the defendant will be punished in the criminal indictment, if convicted. But he may not be either indicted or adequately punished. Whatever may be the law elsewhere, this court has held, according to the rule, which we think is general, that when the defend-

ant has been indicted and punished for the crime the pecuniary punishment can be considered by the jury in reduction of punitive damages. *Johnston v. Crawford*, 61 N. C. 342. Is not this the fair and equitable rule? Should the wrongdoer escape his full and proper measure of punishment in the civil suit, until he is ready to show that he has made proper amends to the public in the criminal prosecution? Even then, the payment of the fine may be considered only in reduction of the damages, as we have shown, and does not bar the claim to vindictive damages. In *Sowers v. Sowers*, 87 N. C. 303, *Smith, C. J.*, says: "Even after conviction and punishment by fine, under an indictment for an assault, it would not defeat the right of the injured party to recover exemplary damages, or, as it is sometimes called, 'smart money,' and could only be made available in reduction of damages"—citing *Smithwick v. Ward*, 52 N. C. 64, 75 Am. Dec. 453, and approving the law thus stated by Judge Manly: "This element, in the estimate of damages, is allowed to punish the defendants for violating the laws, and by making them *smart* to deter others, as well as themselves, from similar violations. The principles upon which society acts in punishing criminally is precisely the same. The public never is actuated by revenge, but solely by a motive of self-protection, and punishes to prevent a repetition of the offense by the culprit, or its perpetration by others." It is not, and should not be, his liability to be criminally indicted and punished for the same offense that entitles him to any reduction, but his actual prosecution and punishment for the same. *Sedgwick*, one of our most accurate writers upon this subject, has given this rule to guide us: "Thus far we have been speaking of the great class of cases where no question of fraud, malice, gross negligence, or oppression intervenes. Where either of these elements mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages, not only to recompense the sufferer, but to punish the offender." 1 *Sedgwick on Damages*, p. 53; 13 Cyc. 106. We had occasion to consider this question in *Jackson v. Telephone Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738, and in that case, after a review of the precedents, we arrived at this conclusion: "The doctrine is well settled that the jury, in addition to compensatory damages, may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly, or with criminal indifference to civil obligations (*Railroad v. Prentiss*, 147 U. S. 106 [13 Sup. Ct. 261, 37 L. Ed. 97]), or (the defendant) has been guilty of an intentional and

willful violation of the plaintiff's rights. *Railroad v. Arms*, 91 U. S. 489 [23 L. Ed. 374]; *Hansley v. Railroad*, 117 N. C. 565 [23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600].” *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729, sustains the doctrine in the following words: “It is settled in this court that, in an action for trespass, accompanied with malice, the plaintiff may recover exemplary damages in excess of the amount of his injuries, if the ad damnum is properly laid.” See, also, *Williams v. Railroad*, 144 N. C. 498, 57 S. E. 216, 12 L. R. A. (N. S.) 191. Even under the rule as stated in *Remington v. Kirby*, 120 N. C. 320, 26 S. E. 917, the plaintiff was entitled to punitive damages. It is the willful disregard of the rights of another, treating him with contempt or insult, or willfully or wantonly trespassing upon his lawful rights, that requires rebuke and makes the necessity for vindicatory justice, sets an example to wrongdoers, and appeases an offended society, whose members should be permitted to live in peace and without molestation, and not be subjected to disturbance in their Sunday devotions, or in their quiet and peaceful homes, by an unlawful invasion of those who strangely enough imagine that they can resent alleged grievances by themselves becoming the violators of the law. This is an aggravated case, and the verdict was none too large. A citizen, returning from church on a Sabbath evening, is accosted on the street by the defendant and his associates, and offensive epithets applied to him, and he is pressed upon so hard that he is compelled to seek protection and safety in the recesses of his home, and still the defendant contends that these acts are but a simple violation of the plaintiff's rights, without any features of aggravation, when it appears that he fired into the house and narrowly missed killing or severely injuring plaintiff's wife—a defenseless woman, whom he should have seen, as she was standing under the light. This case is the equal of any in our law books for its flagrancy, whatever the provocation may have been, and calls, if any state of facts can call, for the award of punitive damages. Chief Baron Pollock (of the Exchequer Chamber) said that vindictive damages were generally awarded in actions of trespass, if accompanied with circumstances of insult or humiliation, or if the wrong is willfully committed in reckless or contemptuous disregard of the plaintiff's rights. In such a case, he thought, and his associates, Barons Bramwell, Wilde, and Channel, agreed with him, the jury should be free to assess damages beyond those which are awarded in the ordinary case, where the wrong is unattended by any such circumstances, and he added that the courts have always recognized the distinction between damages given with a liberal and a sparing hand. *Embleu v. Myers*, 6 Harlist & Norman, 54; *Day v. Woodworth*, 13 How. 363, 371, 14 L. Ed. 181; *McNamara*

*v. King*, 7 Ill. (2 Gilman) 432. If a wrong is willful, compensatory damages are not adequate, but the defendant must pay an additional sum for the sake of society, and to discourage a repetition of his offense against its laws. In a case where the circumstances of the assault were much less aggravated than those appearing in the record, *Gibbs*, C. J., said: “I wish to know, in a case where a man disregards every principle which actuates the conduct of good citizens, what is to restrain him, except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low station of life who should behave himself in this manner? I do not know upon what principle we can grant a rule [for a new trial] in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain.” The subject of punitive damages has been considered at this term in a learned opinion by Justice Hoke, delivered in *Blow v. Joyner*, 72 S. E. 319 a case much like this in some of its features.

But the defendant's counsel contended that there were no actual damages, and, at most, the plaintiffs could recover only nominal damages, and, this being so, it follows that no exemplary damages can be awarded. We do not assent to the premises or the conclusion. In answer to a similar contention, we find the following in 1 *Sedgwick on Damages* (8th Ed.) § 361: “If the plaintiff has suffered no actual loss, he cannot maintain an action merely to recover exemplary damages. A plaintiff has no right, the courts say, to maintain an action *merely* to inflict punishment; exemplary damages are in no case a right of the plaintiff, and cannot, therefore, become a cause of action. If, however, a right of action exists, though the loss is nominal, exemplary damages may be recovered in a proper case; for the plaintiff had a right to maintain his action apart from the privilege of recovering exemplary damages. So, in case of a malicious trespass on land, though the actual damage is nominal, exemplary damages may be recovered.” *Wilson v. Vaughan* (C. C.) 23 Fed. 229; *Hefley v. Baker*, 19 Kan. 9. The same rule was applied by Wilmot, C. J., in *Tullidge v. Wade*, 3 Wils. 18. It is erroneous, though, to assume that there was no actual damage done by the defendant, which gave the plaintiff a right to substantial compensation. He deliberately shot into the house, frightened and alarmed the plaintiffs, who were rightfully and peacefully its occupants; these and some other acts are properly subjects of fair compensation, and not merely of nominal damages. In *Rogers v. Spence*, 13 M. & W. 571, *Denman*, C. J., said: “The actions of trespass on real and personal property were an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect

of such rights, though no loss or diminution in value of property may have occurred." It is held to be the law that an individual, whose rights of person or property are thus violated, is generally entitled to recover damages for pecuniary loss, physical pain, if any, inconvenience, injury to feelings, and mental suffering, pain, vexation, anxiety, the sense of wrong, shame, or humiliation in the sufferer's breast, resulting from an act dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade, or insult; the latter being sometimes called solatium—solace—or recompense for the wounded feelings, as distinguished from special or pecuniary damages. 1 Sedgwick (8th Ed.) § 37 et seq. Inconvenience, annoyance, or discomfort may also be considered. This, of course, is physical, and must not be purely imaginative, and must be produced through the medium of the senses, not flow from mere delicacy of taste, or refined fancy, or abnormal sensibility. It must be in a tangible form, and assessable at a money value. 1 Sedgwick, § 42, and cases cited: Williams v. Railroad, supra; 4 Sutherland on Damages, §§ 1010 and 1241. "The motive with which a wrong is done in some cases affects the rule by which compensation is measured or losses estimated. Where there is fraud or other intentional wrong, compensatory damages are given with a more liberal hand by juries, and their verdicts in such cases are less closely scanned by courts than in cases where that element is absent. \* \* \* But there is a more liberal allowance of damages where the tort is an aggressive one, and the entire damages, or some part of them, are not capable of measurement by some standard of value or definite rule." We again remind those who are disposed to take the law into their own hands and punish their enemies, or a supposed wrongdoer, that there is a sufficient legal remedy for every alleged grievance, and if they will not resort to the courts where it can be enforced, but prefer to act in defiance of constituted authority, the fault and the consequences will all be theirs, and they have no reason to complain if that same offended law, whose peaceful methods they have ignored, rebukes their defiance with heavy damages.

It is suggested in the evidence that W. O. Saunders had committed some gross impropriety by criticising a minister of the gospel in his newspaper. The specific offense is not pointed out, nor are we in any way informed as to the nature of his criticism. But this is all immaterial. Perhaps he may have greatly exceeded the limits of fair and proper comment, and that which he did should be reprobated. We cannot say how this is, nor need we, as the matter is not before us. There is one thing very certain, though, the defendant, and the multitude he was leading, had no right to resent what he had said by

approaching him and his home in a hostile manner, with threats and menaces, and with a deadly weapon, to execute revenge upon him, however grievous his offense against them or against society, and not even if it was a criminal libel he had published. Government could not, upon any other principle, exist or continue as it was designed to be, when organized for the peace, safety, welfare, and happiness of the people. If the plaintiff W. O. Saunders has committed any wrong, if he has willfully criticised a minister, or committed any other offense against public decency or social order, we have not the slightest word to utter in extenuation of the outrage, but he should be punished by the law, and not by the mob.

We find no error in this record, and it must be so certified.

No error.

(156 N. C. 524)

NORTH CAROLINA CHRISTIAN CONFERENCE et al. v. ALLEN et al.  
(Supreme Court of North Carolina. Nov. 9, 1911.)

1. RELIGIOUS SOCIETIES (§ 11\*)—CONGREGATIONAL SYSTEM OF CHURCH GOVERNMENT—RIGHTS OF CHURCHES.

Under the congregational system of church government, each individual congregation is governed by a majority of its members, and, though such congregations combine into associations, the associations have no supervision or governmental authority over the individual congregations.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 80-86; Dec. Dig. § 11.\*]

2. RELIGIOUS SOCIETIES (§ 9\*)—ELECTION AND REMOVAL OF TRUSTEES—STATUTORY AUTHORITY.

Under Revisal 1905, §§ 2670, 2671, providing that any religious body may, from time to time, and at any time, appoint and remove trustees, a church governed by the congregational system of church government may remove its trustees at will, without notice or cause shown; and the discipline of the denomination, which provides for 10 days' notice and trial of offenses, is applicable to moral infractions of church discipline, and does not abridge the power to remove or appoint trustees at will; and a majority of the members of such church may remove trustees, acting with a minority against the majority, and the majority may elect new trustees, and the majority of the members and the trustees may control the church property as against the minority and the trustees so removed.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 47-74; Dec. Dig. § 9.\*]

Allen, J., dissenting.

Appeal from Superior Court, Granville County; Daniels, Judge.

Action by the North Carolina Christian Conference and others against John Allen and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Graham & Devin, for appellants. B. S. Royster, T. T. Hicks, and A. A. Hicks, for appellees.

OLARK, C. J. This was an action by the North Carolina Christian Conference and several members of the Rock Spring Christian Church, Colored, for an injunction against Rev. John Allen, Thomas Grissom, John Meadows, Ben Smith, and James Bailey from interfering with the plaintiffs in their occupation and control of said Rock Spring Christian Church building and property and their conduct of public worship in said building.

It appears by the evidence, both for the plaintiffs and defendants, that said Rock Spring Christian Church, and it is so decreed by the judge, is of the Christian faith, whose government is congregational, and that the North Carolina Conference of said church is a merely voluntary association, exercising no control over the church property or the congregations; and hence the plaintiff the North Carolina Christian Conference has no right or interest in the church property, and is not a proper party to this action.

[1] In *Simmons v. Allison*, 118 N. C. 770, 24 S. E. 716, we had occasion to call attention to the distinction between those churches whose organization is connectional, such as the Protestant Episcopal, the various Methodist churches, the Presbyterian, the Roman Catholic, and others, which are governed by large bodies, such as diocese, conferences, and synods, and the like, in which the individual congregations bear the same relation to the governing body as counties bear to the state, and, on the other hand, the congregational system, which is in use among the Baptists, the Congregational, and the Christian, and other denominations. In these latter, the individual congregation is each an independent republic, governed by the majority of its members, and subject to control or supervision by no higher authority. To the latter order, the Rock Spring Christian Church belonged. The churches of the congregational system often combine into associations, conferences, and general conventions. But, unlike such organizations under the connectional system, these bodies, under the congregational system, are purely voluntary associations, for the purpose of joining their efforts for missions and similar work, but having no supervision, control, or governmental authority of any kind whatsoever over the individual congregations, which are absolutely independent of each other.

To the latter system, the Rock Springs Christian Church, Colored, belonged. It appeared in evidence that this congregation had re-elected the Reverend John Allen their pastor in the fall of 1909. He had already served as such for eight years. Soon afterwards, on Sunday, December 18, 1909, Rev. J. A. Alexander appeared at the church, claiming that he was sent by the North Carolina Christian Conference. At that time there were three trustees—Arch Preddy, Alex.

Brooks, and Thomas Grissom. The first two named, being a majority of the trustees sided with Rev. J. A. Alexander, and, they claiming control of the building, said Alexander held services therein. Rev. John Allen and the majority of the congregation objected, but Brooks and Preddy claimed to be the legal custodians of the property. The majority of the congregation, with the Reverend John Allen, with commendable forbearance, refrained from any interference. It appears from the evidence of the plaintiff that the objecting membership, headed by the Reverend John Allen were very largely in the majority. It appears in the evidence that from 7 to 12 members, including the 2 trustees, were with Alexander, and that 36 members sided with Rev. John Allen. This small minority, after holding services, were dismissed, whereupon Pastor Allen and his 36 members took possession and held services, in spite of the prohibition of Alex. Brooks and Arch Preddy. It was the regular day for church conference. The minutes show that the meeting then regularly met and re-elected John Allen pastor by 86 votes; that resolutions were also passed, removing Alex. Brooks as trustee for "forbidding the members to meet in the church," and A. R. Preddy for "forcing his way into the church and removing the lock," and thereupon the defendants John Meadows and James Bailey, named herein as defendants, were elected trustees in their place. The contest therefore turns upon the validity of the election of said trustees at a regular church meeting and the removal of the other two, for Thos. Grissom, the other trustee, had sided with the majority and the Reverend John Allen.

[2] Revisal 1905, 2670, provides that any religious body "may from time to time and at any time, appoint in such manner as such body, society, or congregation deem proper, a suitable number of persons as trustees." And Revisal 1905, 2671, provides: "The body appointing shall remove such trustees or any of them." In *Thornton v. Harris*, 140 N. C. 499, 53 S. E. 342, it was held under those sections any church has a right "to remove its trustees at will." The trustees of a church have no property interest as against the governing body of the church. They are merely agents, or, as it is expressed in one of our opinions, "A church trustee is a mere locum tenens." Speaking algebraically, church trustees are merely x, y, and z. For legal purposes, they represent the church as to the world. But, as to the cestui que trustent, they can be appointed or removed at will. The statute requires no notice or cause to be shown. The discipline of the Christian denomination, with which the Rock Springs Church is affiliated, provides for 10 days' notice and trial of "offenses." But this applies to moral delinquencies or infractions of church discipline

—in short, to trials for offenses. It could not abridge, and does not even refer to, the power given by the statutes to remove or appoint trustees at will.

The Rock Springs Church, under the congregational policy, is an independent entity, recognizing no superior in its government. Under the policy of the denomination to which it belongs, the majority of the members control its government and management. The minutes of the church show that they had cause to remove Preddy and Brooks as trustees, who had taken possession of the church, because, being a majority of the trustees, they had held the building for hours for a small minority, and in behalf of a minister not elected by the congregation, against the majority of the members and regular elected pastor. Even if the congregation had not possessed the right to remove Brooks and Preddy at will, still there was no restriction in the statute, or in the church discipline, restricting the number of trustees, and the election of the two new trustees was certainly valid. These two, with Thomas Grissom, who had remained loyal to the majority, constituted a majority of the trustees, and it was error to enjoin them from controlling the property and conducting public worship.

The minutes of the church show that after the 36 members, together with their duly chosen pastor, John Allen, obtained possession of the church, upon its vacation by Rev. Alexander and the small minority, services were regularly conducted. Such services appear to have been opened by singing, not inappropriately, the hymn, "When I can read my title clear." The text discussed by the pastor, Rev. John Allen, is given as Jeremiah, ii, 24. The nature of the sermon preached on that text and its application to the occasion is not so clear. The defendants have a majority of the trustees (three out of five), even if Preddy and Brooks were not properly removed. And they have all the trustees, if they were legally removed, as we think is the case under our statute, and the judgment below must be reversed.

ALLEN, J., dissents.

(157 N. C. 21)

CARMICHAEL v. BELL TELEPHONE CO.  
(Supreme Court of North Carolina. Nov. 15, 1911.)

1. DAMAGES (§§ 48, 87\*)—"COMPENSATORY DAMAGES"—"PUNITIVE DAMAGES."

"Compensatory damages" are not necessarily confined to actual pecuniary loss in money or time, but embrace injury to feelings and mental anguish following as a natural and proximate result of the wrong complained of; while "punitive damages" are awarded in addition to compensation, as a punishment to the wrongdoer, and as a warning to others, and they are allowed only where there are some features of

aggravation, as where the wrong is done willfully and maliciously.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 100-103, 188-192; Dec. Dig. §§ 48, 87.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1357-1358; vol. 7, pp. 5851, 5852; vol. 8, p. 7775.]

2. DAMAGES (§ 28\*)—BREACH OF CONTRACT—EXTENT OF RECOVERY.

A recovery for breach of contract is confined to such damages as were in the reasonable contemplation of the parties at the time the contract was made, and which are susceptible of ascertainment with a reasonable degree of certainty, and is ordinarily limited to pecuniary recompense for the loss sustained by the injured party, except where an agreement clearly has reference to a different standard, in which case the damages must be awarded according to such standard.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 58, 62; Dec. Dig. § 23.\*]

3. TELEGRAPHS AND TELEPHONES (§ 67\*)—WRONGFUL REMOVAL OF TELEPHONE SERVICE—LIABILITY.

Where a telephone company operating under a public franchise breaches its duty to render service it has undertaken to perform, a customer having a contractual relation with it, and suffering special injury by reason of such breach, may sue in tort and recover compensation for the annoyance and inconvenience and humiliation fairly attributable to the wrong done.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 67.\*]

4. TELEGRAPHS AND TELEPHONES (§ 67\*)—WRONGFUL REMOVAL OF TELEPHONE SERVICE—LIABILITY.

Where a telephone company operating under a public franchise disconnected the telephone of a customer, who refused to pay an unjust demand, and who, to obtain a restoration of the telephone service, paid the sum demanded, and it appeared that the telephone service was for household purposes, the customer could for the wrong recover the damages resulting from the annoyance and inconvenience, together with the special damages resulting from the fact that the customer's father-in-law was at the time in a hospital, dangerously sick; the company, at the time of the discontinuance of the service, having notice of that fact.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 67.\*]

5. TELEGRAPHS AND TELEPHONES (§ 69\*)—DISCONTINUANCE OF TELEPHONE SERVICE—PUNITIVE DAMAGES.

Where a telephone company wrongfully disconnected the telephone of a customer, who refused to pay an unlawful demand, the jury, in determining the award of punitive damages, must consider the facts of the case in determining whether the act of the company was done maliciously, in which case only could they award punitive damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 69.\*]

Appeal from Superior Court, New Hanover County; Peebles, Judge.

Action by John Carmichael against the Bell Telephone Company. From a judgment granting insufficient relief, plaintiff appeals. Reversed, and new trial granted.

Civil action to recover damages for wrongfully removing a telephone from plaintiff's

premises, tried before his honor, R. B. Peebles, judge, and a jury, at April term, 1911, of the superior court of New Hanover county. There was evidence tending to show: That the telephone charges due from plaintiff were at the rate of \$4.50 per quarter, payable in advance, beginning January 1st. That plaintiff, on 3d of June, 1908, paid defendant the \$4.50 for the quarter beginning April 1st, and took a receipt for same. That in the latter part of June plaintiff was notified there was a balance against him of \$3 for said quarter, and, unless same was paid, the telephone would be removed. Plaintiff protested, and informed the agents of defendant company that he had paid the dues, and could produce a receipt. Plaintiff failed to find the receipt readily, as he had given it to his wife, who was temporarily from home in daily attendance on her father, who had been operated on, and was in the hospital, and thereupon, in afternoon of June 27, 1908, defendant company, while plaintiff was absent, disconnected the phone, and deprived plaintiff and his family of its use from Saturday night until Monday morning, June 29th. That on Monday morning, June 29th, plaintiff went to the offices of the company, paid the \$3 claimed under protest, and the service was thereupon restored. That in July following the plaintiff found the receipt for the \$4.50, the entire price for the quarter, and on failure to adjust matters action was instituted. On the question of damages, plaintiff testified, among other things, that the telephone was used for the purpose of calling up physicians, hospitals, druggists, doing the marketing, grocery business, and other general household uses, and proposed further to show that at this particular time, plaintiff suffered special inconvenience and annoyance by reason of the fact that his father-in-law had been operated on, and was then at the hospital in a dangerous condition, and plaintiff was unable to communicate with the hospital concerning him, or with his family, which was then at the beach some distance away. This, with evidence from which knowledge of these special conditions on the part of the company might be inferred, as proposed evidence, was excluded, and plaintiff excepted. There was testimony on the part of defendant to the effect that plaintiff was not prompt in payment of his telephone dues, and that on two or three occasions before this it had been necessary to disconnect his telephone for nonpayment of dues. That while plaintiff produced a receipt for the \$4.50, the dues for the quarter ending June 30, 1908, as a matter of fact, he had only paid \$1.50, and it was so reported to the company by the collecting agent. That the receipt for \$4.50 was signed by mistake to a printed form, in which the amount was so stated; the agent failing to change this to \$1.50, the amount actually paid, and that the books of the company showed the amount due to be

\$3, and that in fact such amount was due for said quarter. That defendant had no malicious or improper motive in disconnecting the telephone, or in collecting the \$3, but acted in the honest belief it was enforcing its rights in the premises.

His honor ruled that plaintiff could not in any event recover damages in excess of \$3, the amount of overcharge as claimed by plaintiff, and under such ruling the following verdict was rendered:

"(1) Did the defendant unlawfully cut out plaintiff's telephone, as alleged in the complaint? Answer. Yes.

"(2) If so, what damage is plaintiff entitled to recover therefor? Answer: Three dollars, and interest to date from June 29, 1908."

Judgment on the verdict for \$3, with interest, and plaintiff excepted and appealed, assigning errors.

Rountree & Carr, for appellant. H. E. Palmer, B. J. Clay, and J. D. Bellamy, for appellee.

HOKE, J. (after stating the facts as above). [1] An impression not infrequently exists, and is sometimes acted on, that in the larger number of ordinary causes compensatory damages should be confined to actual pecuniary loss, and that any recovery above actual loss in money or time, having definite pecuniary value, partakes of the nature of punitive damages. Speaking to this question in a concurring opinion in *Ammons v. Railroad*, 140 N. C. 199, 52 S. E. 733, it was said: "The court below and the parties litigant seem to have considered that the seventh issue on actual damages was confined to pecuniary loss, and that any recovery over and above this must be had, if at all, on the eighth issue, above set out. But this is not at all true. 'Actual,' in the sense of compensatory damages, is not restricted necessarily to the actual loss in time or money. The claimant may be confined to this, if the jury so determine; but more than this is contained in the term, and more than this is covered by the issue. As said by Clark, C. J., in *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648: 'Where the facts and nature of the action so warrant, actual damages include pecuniary loss, physical pain, and mental suffering,' etc. And again: 'Compensatory damages include all other damages than punitive, thus embracing not only special damage as direct pecuniary loss, but injury to feelings, mental anguish,' etc.—citing 18 Am. & Eng. Enc. (2d Ed.) 1082; Hale on Damages, pp. 99, 106. And this last author says: 'It may be stated as a general rule, in actions of tort, that whenever a wrong is committed which will support an action to recover some damages compensation for mental suffering may also be recovered, if such suffering follows as a natural and proximate result.' And so here, where a passenger is wrongfully ejected



from a railroad train, the demand may be considered as one in tort, and, on an issue as to actual or compensatory damages, he may recover what the jury may decide to be a fair and just compensation for the injury, including his actual loss in time or money, physical inconvenience and mental suffering, or humiliation, endured, and which could be considered as a reasonable and probable result of the wrong done. *McNeill v. Railroad*, 135 N. C. 683, 47 S. E. 765, 67 L. R. A. 227; *Head v. Railroad*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Hale on Damages*, supra, § 261. As said by Beckley, J., in *Head's Case*: 'Wounding a man's feelings is as much actual damages as breaking his limb. The difference is that one is internal and the other external; one mental, the other physical. At common law, compensatory damages include, upon principle, and, I think, upon authority, salve for wounded feelings, and our Code had no purpose to deny such damages where the common law allowed them.' And on the subject of punitive damages it was further said: 'Exemplary or punitive damages are not given with a view to compensation, but are under certain circumstances awarded in addition to compensation, as a punishment to defendant, and as a warning to other wrongdoers. They are not allowed as a matter of course, but only where there are some features of aggravation, as when the wrong is done willfully and maliciously, or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights.' In the view of compensatory damages, suggested with approval in this citation, there was error in the ruling which limited plaintiff's recovery in any aspect of the case to the \$3, the amount of money wrongfully collected by defendant, whether the action should be considered as one for a breach of contract or for a tort.

[2] It is true that recovery for breach of contract is confined to such damages as were in the reasonable contemplation of the parties at the time same was made, and which are susceptible of ascertainment with a reasonable degree of certainty, and that ordinarily this damage is limited to pecuniary recompense for the loss sustained by the injured party; but this will be found to have its origin and basis in the fact that the vast majority of contracts concern themselves with pecuniary values, and have the pecuniary standard for adjustment alone in contemplation; but, where an agreement clearly has reference to a different standard, damages in case of breach must be awarded according to the standard which the parties have adopted. This is the principle upon which recoveries for mental anguish in a certain class of telegraph cases, and when treated simply as actions for breach of contract, are properly made to rest, as shown

in the well-considered opinion by our present Chief Justice, in *Young v. Telegraph Co.*, 107 N. C. 370, 11 S. E. 1044, 9 L. R. A. 660, 22 Am. St. Rep. 883, a decision since followed and applied by the court in numerous cases; and so in contracts for telephone service for household purposes pecuniary values are not ordinarily in contemplation, and on breach, even when the action is simply for breach of contract, a different standard of adjustment must necessarily or may properly be adopted, to wit, a fair compensation for the loss and for the inconvenience and annoyance in being wrongfully deprived of the service stipulated for. *Telephone v. Hobart*, 89 Miss. 252, 42 South. 349. *Hale on Damages*, p. 102.

[3] On the allegations of the complaint, however, and the facts in evidence, the plaintiff is not confined to a recovery for breach of contract. It appears that defendant is a public service corporation, operating under a public franchise, and for breach of duty in rendering the service it has undertaken to perform, one having contract relations with such company, and suffering special injury by reason of such breach, is entitled to sue in tort, and, in case of recovery, have his damages admeasured as in that character of action. This was held in *Peanut Co. v. Railroad*, 155 N. C. 148, 71 S. E. 71, citing several other decisions to like effect, and see in that case more especially the concurring opinion of Associate Justice Allen, as to the obligation of diligence imposed by the law upon corporations of this kind, and the character of action available in case of breach causing special damages to persons having contract relations with such companies. Plaintiff, then, having a right to sue in tort, if his cause of action is established, is entitled to recover a compensation for the annoyance and inconvenience and humiliation fairly attributable to the wrong done, and under facts as they existed at the time the same was committed. *Peanut Co. v. Railroad*, supra.

[4] And in this view the annoyance and inconvenience naturally arising from the fact that plaintiff's father-in-law was at the time in the hospital, and supposed to be in a dangerous condition, if this circumstance was known to the company or its managing officers—not, of course, the suffering and anxiety caused by the father-in-law's placing and condition, but the annoyance and anxiety occasioned by the loss of the telephone service at such time—in considering any damages imputable to this source, the obligation on plaintiff to do what he could reasonably do to lessen his anxiety is also a proper subject for consideration. *Bowen v. King*, 146 N. C. 385, 59 S. E. 1044; *Railroad v. Hardware Co.*, 143 N. C. 54, 55 S. E. 422.

[5] On the question of punitive or exemplary damages, recurring again to the doctrine as stated in the *Ammons Case*, supra

if the jury should find that the wrong complained of was committed, and that the same was done maliciously, or under such circumstance of willfulness on part of defendant as to show a wanton or reckless disregard of plaintiff's rights, they may, in addition to compensatory damages, award such additional damages by way of punishment as they may deem right and proper. In this aspect of the matter, the principles and authorities applicable are more fully discussed and referred to in the case of *Williams v. Railroad*, 144 N. C. 502, 57 S. E. 216, 12 L. R. A. (N. S.) 191.

On this question of allowing exemplary damages, as well as the amount, in case the jury should determine to award the same, the fact that plaintiff informed defendant of the payment of the amount due, and that he had a receipt showing this, and that defendant still insisted there was no such payment, and further the fact that plaintiff had several times before made default in payment of his dues, and that this collecting agent had informed the managing officers of the company there was a balance still due, and that the books of the company showed this to be correct, are circumstances relevant to the inquiry.

For the error indicated, plaintiff is entitled to a new trial of this cause, and it is so ordered.

New trial.

#### DE BRUHL v. HOOD.

(Supreme Court of North Carolina. Nov. 9, 1911.)

##### Upon Rehearing.

##### Costs (§ 42\*)—EFFECT OF TENDER.

In a suit to enjoin foreclosure, where the mortgagor alleged that only a certain amount was due and made a tender of it, which was refused by the mortgagee, who claimed a much larger sum, a verdict for an amount less than the sum tendered entitled the mortgagor to his costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 137-164; Dec. Dig. § 42.\*]

On motion for rehearing, motion denied. For former opinion, see 72 S. E. 83.

**PER CURIAM.** This is a motion to reconsider this case, as decided at this term, for the purpose of having the plaintiff taxed with the costs of the lower court, instead of the defendant, who was taxed with the costs by that court. It is based upon the ground that this court held that the tender of payment had not been kept good, and as the court below held that "a tender had been made and the verdict of the jury was far less than the amount of the tender," and costs were adjudged against the defendant, there should be a reversal as to costs. We do not think so. The motion is based on a

misapprehension as to the scope of our decision. The dispute was as to the true amount due upon the mortgage; the suit having been brought by the mortgagor, who is plaintiff herein, to enjoin a sale under the powers of sale contained in the mortgages. Plaintiff erroneously supposed the amount was \$273.68 and tendered that sum, which defendant, the mortgagor, refused to accept, contending that the amount due was \$1,180.96. An issue was made up upon those contentions and submitted to the jury, and they found upon sufficient evidence that it was neither of the amounts as claimed by the parties, but \$203, and judgment for the defendant was entered for that amount. The defendant lost upon the issue, and was therefore properly taxed with the costs. The validity of the tender had nothing to do with the judgment for costs against the defendant. That was based entirely upon the verdict by which he failed to recover the amount demanded, but much less than plaintiff had tendered. We decided that the refusal to accept the money, when tendered by the plaintiff, left the matter open as to the correct amount due upon the debt.

This will clearly appear by this extract taken from the opinion of this court: "We see from this case that, even when the tender was held to be good and continuing, by reason of what was said to be equivalent to actual payment into court, the court had the right to find the correct amount and enter judgment for it, and not for the larger amount which was tendered; and, a fortiori, this can be done when the tender was made out of court, and under the circumstances in this case." *De Bruhl v. Hood*, 72 S. E. 83. The defendant was really cast in the suit, and was therefore properly adjudged to pay the costs.

Motion denied.

(156 N. C. 578)

#### DAVIDSON v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 15, 1911.)

##### 1. RAILROADS (§ 440\*)—INJURIES TO ANIMALS AT CROSSING — ACTIONS — ISSUES — LAST CLEAR CHANCE.

The evidence for plaintiff in an action for injuries to his team at a railroad crossing tended to prove that, as his driver approached the tracks, the watchman signaled him to cross, and that, as he was crossing, the yardmaster hit the mules and tried to stop them, and that in consequence they were injured by a train. Defendant's evidence tended to prove that the watchman signaled the driver to stop before he started to cross the tracks, that he did not heed the signal, and that, when the yardmaster attempted to stop and turn the mules, the driver whipped them up, in consequence of which they were struck by a train. *Held*, that the issue as to last clear chance is not raised.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1570-1574; Dec. Dig. § 440.\*]

**2. APPEAL AND ERROR (§ 662\*)—RECORD—CONCLUSIVENESS.**

The Supreme Court is bound by the record, even though it seems improbable that it can be true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2850-2852; Dec. Dig. § 662.\*]

**3. APPEAL AND ERROR (§ 1064\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS INVADING PROVINCE OF JURY.**

In an action against a railroad for injuries to plaintiff's team at a crossing, where the evidence was conflicting both as to negligence and contributory negligence, a charge substantially to the effect that, if it was not found that plaintiff's driver was guilty of negligence, the issue as to whether the injury was caused by the contributory negligence of the plaintiff's driver should be answered affirmatively, is manifest error, entitling plaintiff to a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

Appeal from Superior Court, Iredell County; Lyon, Judge.

Action by J. A. Davidson against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. New trial.

These issues were submitted without objection:

"(1) Was plaintiff's mules and wagon injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) Was the mules and wagon injured by the contributory negligence of the plaintiff's driver, as alleged in the answer? Answer: Yes.

"(3) What damage, if any, is the plaintiff entitled to recover? Answer: ———."

H. P. Grier and Z. V. Long, for appellant.  
L. C. Caldwell, for appellee.

**BROWN, J.** [1] The evidence for plaintiff tends to prove that his driver, Arthur Johnson, approached defendant's tracks at Statesville with a view to crossing; that the watchman signaled him to cross, and, as he was driving across, the yardmaster hit the mules in the face, and tried to stop them; and that in consequence they were injured by a train. Plaintiff contends that, if the yardmaster had not interfered, his team would have safely crossed. The defendant's evidence tends to prove that the watchman signaled the driver to stop before he started across the tracks; that he did not heed the signal; that, when the yardmaster attempted to stop and turn the mules, the driver whipped them up, in consequence of which the approaching train ran into them.

It is contended that his honor should have submitted an issue as to the last clear chance. Upon the evidence in this case and the contentions of the parties we do not think the

issue is raised. If it was, however, the plaintiff failed to tender the issue and except to those submitted.

The plaintiff excepted to the charge of the court upon the second issue, which is as follows: "Now, the defendant contends that, if you should find that the defendant was negligent, if you should find that it signaled, or invited the plaintiff's driver, Johnson, to come on with the wagon and team, that still plaintiff's servant was guilty of contributory negligence. When he was on the main track, when they tried to stop him, the evidence you will remember tends to show that the plaintiff Johnson was on the middle track, the main track, that Garrison jumped off the car and ran and hit the mules in the face with his hat, caught hold of one of them, and the flagman ran around with his flag trying to flag them down. The evidence tends to show that the driver of plaintiff's team put whip to them and forced them on, if you find that to be a fact, notwithstanding the negligence of the defendant, if you find that the defendant was negligent, if you further find that notwithstanding the defendant's negligence, the plaintiff could have avoided the injury by assisting the flagman and Garrison to stop the mules and not whip them, and if you find that his putting whip to the mules and not trying to stop is the proximate cause, the burden being on the defendant to show by the greater weight of the evidence, it would be your duty to answer the second issue 'Yes.' If you do not so find that it was the negligence on the part of Johnson, the driver, why you would answer the second issue 'Yes.'"

[2, 3] It may be that his honor inadvertently used the word "Yes" at close of the above paragraph, and intended to use the word "No." But we are bound by the record. If the evidence offered by the defendant is believed, the driver, Johnson, was guilty of very gross negligence which directly caused the injury, and would bar a recovery, but this evidence was controverted by plaintiff. The instruction of the court as appearing in the record was tantamount to directing a verdict. He charged substantially: "If you do not find that Johnson was guilty of negligence, you will answer second issue, 'Yes.'"

This is manifest error, and entitles plaintiff to another trial. We doubt not that the record is erroneous, or else that it was a lapsus linguae upon the part of the careful and painstaking judge, but it appears so in the record, and we are bound by it. It is our duty to state that the case on appeal was agreed to by counsel and not submitted to the judge.

New trial.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

156 N. C. 494)

**HORNER v. OXFORD WATER & ELECTRIC CO.**

(Supreme Court of North Carolina. Nov. 9, 1911.)

**1. COSTS (§ 74\*)—POWER OF AWARD—AFTER AFFIRMANCE ON APPEAL.**

Where the court on rendering judgment for defendant makes no allowance to a referee and commissioner, it can adjust and apportion such costs on motion therefor after an affirmance by the Supreme Court has been certified down.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 74.\*]

**2. APPEAL AND ERROR (§ 119\*)—ALLOWANCE OF COSTS—REVIEW.**

A ruling of the court below on a motion to allow and apportion costs founded upon a lack of power is reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 823-839; Dec. Dig. § 119.\*]

**3. COSTS (§ 12\*)—DISCRETION OF COURT—FEES OF REFEREES AND COMMISSIONERS.**

Under Revisal 1905, § 1268, fees of referees and commissioners to take depositions may be taxed against either party or apportioned among the parties, in the discretion of the superior court.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 12.\*]

Appeal from Superior Court, Granville County; Daniels, Judge.

Action by J. C. Horner against the Oxford Water & Electric Company. Motion to divide the fees of a referee and commissioner between plaintiff and defendant denied, and plaintiff appeals. Reversed.

Motion to divide the fees of referee and commissioner between plaintiff and defendant under Revisal, § 1268. The court denied the motion, and plaintiff appealed.

Graham & Devin and B. S. Royster, for appellant. John W. Hinsdale, for appellee.

**BROWN, J.** At August term, 1910, of the superior court of Granville county, Judge Lyon rendered judgment against the plaintiff, dissolving the restraining order theretofore issued, and ordered "that the defendants do recover against the plaintiff and the surety on his prosecution bond the costs of this action." From said judgment plaintiff appealed to Supreme Court, which affirmed the judgment. 153 N. C. 535, 69 S. E. 607, 138 Am. St. Rep. 681. Upon the opinion being certified down, the defendant, at May term, 1911, moved for judgment in accordance with said opinion. Plaintiff moved that the allowance to the referee and stenographer and commissioner to take depositions be paid equally by plaintiff and defendant. The court, "being of opinion that he is concluded by the judgment rendered at a former term, adjudging that the defendant recover of plaintiff the payment by defendant of any part of the costs, adjudged that the defendant above named do recover against plaintiff

above named the costs of this action, including an allowance to the referee of \$375, \$75 of which shall be paid to his stenographer as a part of the costs of the referee, and costs of taking depositions; Francis J. McLaughlin, commissioner, \$38.75, and Harry Winfield, commissioner, \$20. It is ordered that the clerk shall tax the said amounts in the costs in this action." From this ruling the plaintiff appealed.

[1] The court made no allowance to referee and commissioner at August term, 1910, when the judgment was rendered which this court affirmed, but those fees were fixed and allowed by Judge Daniels at May term, 1911. His honor bases his refusal to apportion them upon a supposed lack of power, thinking he was precluded by the former judgment.

[2] In that he was in error, and, as he founds his ruling upon a lack of power, it is reviewable. State v. Fuller, 114 N. C. 894, 19 S. E. 797; Martin v. Bank, 131 N. C. 123, 42 S. E. 558. We think he had as much right to apportion or divide the fees, if he saw fit to do so, as he had to fix them at all.

[3] Under Revisal 1905, § 1268, fees of referees and commissioners to take depositions may be taxed against either party or apportioned among the parties in the discretion of the superior court. Cobb v. Rhea, 137 N. C. 298, 49 S. E. 161; Field v. Wheeler, 120 N. C. 269, 26 S. E. 812. As the judge who tried the cause and rendered judgment failed to pass on the matter of referees' fees and commissions and as the judgment then rendered contains no reference to them, it was entirely within the power of the superior court at a subsequent term to adjust them.

The superior court will hear and pass on the motion and tax the fees as a whole against plaintiff, or apportion them in its sound discretion between plaintiff and defendant.

Reversed.

(157 N. C. 10)

**JEFFORDS et al. v. ALBEMARLE WATERWORKS.**

(Supreme Court of North Carolina. Nov. 15, 1911.)

**1. EVIDENCE (§ 474½\*)—OPINION EVIDENCE—CONDITION OF MACHINE.**

Testimony in an action on a contract for boring an artesian well that witness used the best and latest all-round equipped machine for drilling water wells, that it was equipped with all necessary tools for drilling and straightening crooks in water wells, and that he could have gone on with the machine to any desired depth within 800 feet, was competent, though the witness had not qualified as an expert, since the testimony of a witness as to a physical fact peculiarly within his knowledge is not expert evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220-2233; Dec. Dig. § 474½.\*]

**2. CONTRACTS (§ 346\*) — ACTION — ISSUES — PROOF AND VARIANCE.**

In an action to recover the contract price for boring an artesian well, evidence of a second contract, which was not pleaded, was properly excluded.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1718-1753; Dec. Dig. § 346.\*]

**3. DEPOSITIONS (§ 12\*)—ADMISSION IN EVIDENCE—DEPONENT OUT OF STATE.**

Under the express provisions of Revisal 1905, § 1645, subds. 2, 9, a deposition of a witness not present at the trial who is a resident of another state, or is more than 75 miles from the place where the court is sitting, is admissible.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 27; Dec. Dig. § 12.\*]

**4. EVIDENCE (§ 441\*)—PAROL EVIDENCE—ADMISSIBILITY.**

Conversations preceding the execution of a written contract are not admissible, in the absence of fraud or misrepresentation, to vary the contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.\*]

**5. EVIDENCE (§ 129\*)—ADMISSIBILITY—OTHER TRANSACTIONS.**

In an action on a contract for the boring of an artesian well, the question as to the insufficiency of a prior machine and its equipment is irrelevant, since it would throw no light upon the inquiry of the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388-393, 395-398; Dec. Dig. § 129.\*]

**6. DEPOSITIONS (§ 83\*)—QUASHING—GROUNDS.**

A deposition can be quashed only for irregularities in the taking or for the incompetency of the witness, and not upon the ground that some of the answers were incompetent or irrelevant, as such questions and answers should be excepted to.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 219-228; Dec. Dig. § 83.\*]

**7. DEPOSITIONS (§ 40\*)—COMMISSION AND NOTICE—NAME OF WITNESS.**

Where the notice to take a deposition gives the name of the witness and the address of the commissioner before whom it is to be taken, so that defendant knew that such witness was to be examined, the cause in which, the place where, and the commissioner before whom he was to be examined, the commission was sufficient, though the name of the witness was not stated in the commission.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 61; Dec. Dig. § 40.\*]

**8. REFERENCE (§ 101\*) — RECOMMITTAL — DISCRETION OF COURT.**

The refusal of the court to which a referee's report is returned to recommit the report is a matter which rests in the court's discretion.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 169-180; Dec. Dig. § 101.\*]

**9. APPEAL AND ERROR (§ 1022\*)—FINDINGS OF REFEREE—REPORT—CONCLUSIVENESS.**

Exceptions to the findings of facts by a referee on the ground that they are contrary to the weight of the evidence are addressed solely to the trial judge, and not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.\*]

Appeal from Superior Court, Stanly County, Lyon, Judge.

Action by George Jeffords and others against the Albemarle Waterworks. Judg-

ment for plaintiffs, and defendant appeals affirmed.

J. R. Price and T. F. Kluttz, for appellant. Jerome & Price and R. L. Smith, for appellees.

CLARK, C. J. This is an action to recover the contract price for boring an artesian well. The plaintiffs alleged that they were wrongfully prevented by the defendants from completing the contract; but the defendants denied this, and alleged that the failure of the plaintiffs to complete the contract was caused by their failure or refusal to use the necessary machinery for straightening crooked places in the well, caused by the drill being deflected by hard rock.

[1] The case was referred to a referee, who adjudged the plaintiffs entitled to recover the contract price for the work actually done up to the time they were stopped by the defendants. The exceptions before us are to the judge's overruling the exceptions by the defendants to the referee's report. Exceptions 1, 2, and 3 are to the witness stating in reply to questions asked that the machine was "the best and latest all-round equipped machine for drilling water wells; that it was equipped with all necessary tools for drilling and straightening crooks in water wells; and that he could have gone on any desired depth within 800 feet with that machine." The objection is on the ground that the witness had not qualified as an expert, but we do not think that "the testimony of a witness concerning a physical fact peculiarly within his knowledge" is expert evidence. *Britt v. Railroad*, 148 N. C. 40, 61 S. E. 601, and cases there cited.

[2] The evidence as to the second contract was properly ruled out, as there was no plea of a second contract.

[3] The objection to the deposition of George Jeffords because he was a party to the action, and was in this state when the action was begun cannot be sustained, for the referee finds as a fact that the witness was a resident of Pennsylvania when the deposition was taken. Revisal 1905, § 1645 (2). The deposition is competent, if the witness is out of the state at the time of the trial, and is more than 75 miles from the place where the court is sitting. Revisal 1905, § 1645 (9); *Barnhardt v. Smith*, 86 N. C. 473.

[4] The contract being in writing and no allegation of fraud or misrepresentation, it was not error to exclude conversations preceding the execution of the contract. *Bowser v. Tarry*, 72 S. E. 74, at this term.

[5] The question as to the insufficiency of a prior machine and its equipment was irrelevant, and could throw no light upon the inquiry before the court. It was properly excluded.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[6] Exceptions 8 and 9 for refusal of motion to quash because of the irrelevancy or incompetency of some of the testimony cannot be sustained. A deposition can be quashed only for irregularities in the taking or for the incompetency of the witness, and not upon the ground that some of the answers were incompetent or irrelevant. Such questions and answers should be excepted to.

[7] Exception 10 is that the name of the witness was not given in the commission to take the deposition. But the notice to take the deposition gave the name of the witness and the address of the commissioner before whom it was to be taken. The defendant knew that this witness was to be examined, the cause in which, the place where, and the commissioner before whom, he was to be examined. The statute does not require the name of the witness to be stated in the commission. The names of other witnesses were, however, given in the commission. It does not appear that the defendant was prejudiced, for the notice to take the deposition did name this witness. In *McDougal v. Smith*, 33 N. C. 576, the notice was to take the deposition "of A., B., and C. et al.," and no deposition of A., B. or C. was taken, and it was held that this was not ground for exception to the depositions of the other witnesses which were taken.

[8] The refusal of the judge to recommit the report to the referee was a matter which rested in his discretion.

[9] The exceptions to the findings of fact by the referee are that they are "contrary to the weight of the evidence." That was a matter addressed solely to the trial judge, and cannot be considered here. *Lewis v. Covington*, 130 N. C. 541, 41 S. E. 677. When, as here, the referee's findings of fact are affirmed by the judge, his action is conclusive if there is any evidence to support such findings. *Brown v. Railroad*, 154 N. C. 300, 70 S. E. 625; *Mirror Co. v. Casualty Co.*, 153 N. C. 373, 69 S. E. 261. On examination we find that there was evidence as to each finding of fact, and such findings are not open to review on appeal. *Williams v. Hyman*, 153 N. C. 167, 69 S. E. 50.

Affirmed.

(157 N. C. 16)

#### CURRY v. FLEER.

(Supreme Court of North Carolina. Nov. 15, 1911.)

#### 1. HIGHWAYS (§ 181\*)—CARE REQUIRED IN USE OF HIGHWAYS—AUTOMOBILES.

Under Laws 1909, c. 445, *Fell's Supp.* §§ 3876, "a" to "t," inclusive, it is the duty of the operator of an automobile upon highways to use every reasonable precaution to avoid causing injury; and the fixing of a maximum rate of speed, on approaching horses that are driven on the highways, "not exceeding eight miles an hour," does not always permit that rate of speed; the operator is charged with notice of the tendency of an automobile to frighten ani-

mals, and conditions may require him to move at a slower rate of speed, or stop altogether.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 469; Dec. Dig. § 181.\*]

#### 2. HIGHWAYS (§ 184\*)—ACTION FOR INJURIES—QUESTION FOR JURY.

On evidence in an action for injuries resulting from the running away of plaintiff's horses upon the approach of an automobile, held, that the question of defendant's negligence was for the jury.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 471-474; Dec. Dig. § 184.\*]

#### 3. WITNESSES (§ 370\*)—CREDIBILITY—BIAS—SALE BY WITNESS TO PARTY.

The answer of a witness for the defendant, in an action for damages as to whether he had not sold his land to defendant at a big price is admissible as tending to show a bias in defendant's favor, where, on the facts, it had a reasonable and natural tendency to create such bias.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1189; Dec. Dig. § 370.\*]

#### 4. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—BIAS OF WITNESS.

Where the answer of a witness for defendant, in a civil action for damages, to a question as to whether he had not sold his land to defendant at a big price has no reasonable and natural tendency to create a bias in defendant's favor, its admission is harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4160; Dec. Dig. § 1048.\*]

Appeal from Superior Court, Davidson County; Lyon, Judge.

Action by one Curry against one Fleer. Judgment for plaintiff, and defendant appeals. Affirmed.

There was evidence on part of plaintiff tending to show that on the 7th day of December, 1909, on the road about 1½ miles from Thomasville, plaintiff was driving a two-horse wagon, loaded with 100 chairs, when his horses took fright at defendant's automobile, and, getting beyond his control, ran the wagon against a telephone post, whereby plaintiff was thrown to the ground and received painful physical injuries; that the automobile, driven by defendant, approached from behind, at a speed of 15 or 20 miles an hour, sounded the warning signal when only 25 yards back, and came so suddenly on witness that he had no chance to get control of his team and prevent the running. Speaking to this question, the witness said: "Just passed right by me all at once, and didn't give me any chance to hold onto the horses, trying to do all I could with them. If I had had warning in time, I might have prevented the horses from running away." The evidence of defendant tended to show that he approached at a speed of 12 miles, reduced to 8, when nearing the team, gave the ordinary and usual signals 100 feet back, and passed without observing any sign of fright in the horses, or of any change or disturbance in the movement of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the team, etc. There was further evidence on part of defendant tending to show that the horses were young horses, unused to the road, and that there was no default on part of defendant in the use and operation of the machine, or in failing to give the proper signal. The question of defendant's negligence was submitted to the jury, and the following verdict rendered: "Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Answer: Yes. What damages, if any, is plaintiff entitled to recover? Answer: \$500." Judgment on the verdict, and defendant excepted, alleging for error chiefly the refusal of the court to order a nonsuit.

E. E. Raper and A. F. Sams, for appellant. Phillips & Bower and McCrary & McCrary, for appellee.

HOKER, J. (after stating the facts as above). [1] The General Assembly of 1909 made extended regulation in reference to the ownership, operation, and use of the automobile (Laws 1909, c. 445; Pell's Supplement, § 3876, "a" to "t," inclusive), and on matters more directly relevant the statute provides as follows: "Upon approaching a horse or horses, or other draft animals, being ridden, led or driven thereon, a person operating a motor vehicle shall slow down to a speed not exceeding eight miles an hour and give reasonable warning of its approach and use every reasonable precaution to insure the safety of such person or animal and in case of a horse or horses or other draft animals, to prevent frightening the same." With the exception of establishing speed limits, this legislation is to a great extent an embodiment of the general principles of law, applicable to these motor vehicles, when operated on the highway and on places where their use is likely to be a source of danger to others; principles recognized and applied in two recent cases before the court (*Gaskins v. Hancock*, 72 S. E. 80, present term; *Tudor v. Bowen*, 152 N. C. 441, 67 S. E. 1015, 30 L. R. A. [N. S.] 804, 136 Am. St. Rep. 836). Speaking to the duties incumbent upon chauffeurs and others driving these cars, in *Tudor's Case*, supra, Associate Justice Brown said: "Although the use of automobiles began in recent years, it seems to have caused much litigation, though not in this state. It is the consensus of judicial opinion that it is the duty of the operator of an automobile upon highways and public streets to use every reasonable precaution to avoid causing injury, and this duty requires him to take into consideration 'the character of his machine and its tendency to frighten horses.'" *Hannigan v. Wright*, 5 Pennewill (Del.) 537, 63 Atl. 234; *House v. Cramer*, 13 Am. & Eng. Ann. Cas. 463, note, and cases cited. The possession of a powerful and dangerous vehicle imposes upon the chauffeur the duty of employing a degree of care com-

mensurate with the risk of danger to others engendered by the use of such a machine on a public thoroughfare." And it may be well to note that the legislation referred to establishes, as a rule, a maximum rate of speed, "not exceeding 8 miles an hour," etc., and in doing so it is not at all contemplated or intended that the specified limit is always permissible. The chauffeur or other driving a machine of this character on the public highway is charged with notice of things which he observes or could observe in the exercise of proper care, having regard to the nature of the vehicle he is operating and its tendency to frighten animals; and not infrequently it may become his duty to move at a much slower speed, and stop altogether, if conditions so require. This, too, is in accord with approved precedent (*Christy v. Elliott*, 218 Ill. 81, 74 N. E. 1035, 1 L. R. A. [N. S.] 215, 108 Am. St. Rep. 196), and is expressly recognized in other sections of the statute, notably Pell's Supplement, 3876m, 3876n, 3876p, 3876r, and 3876s; the last citation being in terms as follows: "Nothing in the general law shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injuries to person or property resulting from the negligence of the owner or operator or his agent, employé or servant of any motor vehicle, or resulting from the negligent use of the highway by them or any of them."

[2] Applying the principle, the case was clearly one for the jury. The grievance alleged on part of plaintiff, being not so much and of itself that the speed limit was exceeded—a limit established principally to lessen the danger of collision—but because, by reason in part of exceeding the speed limit, the machine was upon the plaintiff's team without adequate warning; that at 20 miles per hour and a signal at 25 steps behind, to use the plaintiff's own language, the vehicle "just passed right by me all at once, and didn't give me any chance to hold onto my horses, trying to do all I could." True there is evidence on defendant's part in contradiction of this testimony; but, under a correct charge, the jury have accepted the plaintiff's version, and, in our opinion, an actionable wrong is clearly established.

[3, 4] Objection was further made that the court allowed plaintiff to ask a witness who testified for defendant if he had not sold his land to defendant at a big price. The answer was admitted as tending to show a bias in defendant's favor. If on the facts the answer had a reasonable and natural tendency to create a bias in defendant's favor, it was relevant; and if otherwise it should be treated as harmless, and certainly not held for reversible error. We find no error in the record, and the judgment in plaintiff's favor must be affirmed.

No error.

(156 N. C. 575)

**GALLIMORE v. GRUBB et al.**

(Supreme Court of North Carolina. Nov. 15, 1911.)

**1. TRIAL (§ 351\*)—ISSUES—PRESENTATION.**

Where the issues submitted were sufficient to enable the parties to present every phase of the controversy, they have no ground to complain because the court declined certain issues presented.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 834; Dec. Dig. § 351.\*]

**2. EVIDENCE (§ 208\*)—ADMISSIONS—PLEADING.**

In a suit for specific performance of a land contract, the court did not err in allowing the introduction of the complaint and answer solely to show that plaintiff had offered to pay the balance of the purchase money, if defendant would clear the property of liens; the introduction of the complaint being necessary to make clear the admissions in the answer.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.\*]

**3. VENDOR AND PURCHASER (§ 170\*)—WAIVER.**

Where a vendor stated he would not accept plaintiff's offer to pay the balance of the consideration, which plaintiff offered to pay on condition that defendant would free the property from liens, there was a waiver of a formal tender.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 344-348; Dec. Dig. § 170.\*]

**4. VENDOR AND PURCHASER (§ 129\*)—LIENS—DUTY TO CLEAR—TITLE.**

Unless a vendee has otherwise agreed, he may demand a clear title, even though he has agreed to accept a deed without a warranty.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238-244; Dec. Dig. § 129.\*]

**5. SPECIFIC PERFORMANCE (§ 127\*)—CONTRACT—ENFORCEMENT—JUDGMENT.**

Where a vendee refused to clear property of liens which could be discharged by a mere payment thereof, and the amount was not larger than the purchase money due, the court might direct the payment of a sufficient part of the purchase money to the holders of the incumbrances, instead of the vendor, even though such holders were not before the court; or might authorize the vendee to remove the liens on failure of the vendor to remove them, and to reimburse himself out of the deferred payments of the price.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 127.\*]

Appeal from Superior Court, Davidson County; Lyon, Judge.

Action by J. A. Gallimore against Henry K. Grubb and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Walser & Walser and Thos. J. Shaw, for appellants. E. E. Raper, for appellee.

CLARK, C. J. On January 3, 1910, the defendant sold and contracted in writing to convey the land in controversy to plaintiff for \$2,500. Fifty dollars was paid in cash. On the same day, defendant and wife executed a deed for the property, duly signed and acknowledged, and delivered same to one Beck, to hold till the purchase money was paid in full, and then to be delivered

to the plaintiff. This deed was in fee simple, with the usual covenants and warranty. On January 6th, plaintiff paid Grubb \$1,200 more on the purchase price, and arranged to borrow the balance of the money. He repaired the house with his own lumber about January 12th, and January 15th, with consent of Grubb, moved upon the land. Grubb had represented the land to be clear of incumbrances. Plaintiff, learning that there was a mortgage for \$100 on the land, and a judgment in favor of the United States for \$250 penalty, interest, and cost, called Grubb's attention to the liens, who admitted the mortgage, but said it was not due, and he would pay it off when it fell due, and claimed that the judgment had been settled. Plaintiff offered to pay the balance of the price for the land, but wanted the liens satisfied and the title cleared, or proposed to pay the price, less the liens. The defendant refused to clear the title of these liens, or to accept the price, less the amount of the liens, and insisted upon plaintiff paying the price in full. In the latter part of February, Grubb demanded back and obtained from Beck the deed he had deposited with him. On March 10th, plaintiff brought this action to enforce specific performance of the contract, offering to pay balance of money as above. Grubb offered to pay back the money which had been paid, which plaintiff refused to accept. Grubb contended that the deed had been deposited with an agreement that the purchase money should be paid in full in a week or 10 days, and if it was not done that the contract would be canceled. This the plaintiff denied, and the jury found that issue in favor of the plaintiff.

[1] The defendant tendered certain issues, which the court declined, and submitted those in the record. The issues submitted were sufficient to enable the parties to present every phase of the controversy. When such is the case, as this court has repeatedly held, the parties have no ground to complain. *Pretzfelder v. Insurance Co.*, 123 N. C. 163, 31 S. E. 470, 44 L. R. A. 424; *Tuttle v. Tuttle*, 146 N. C. 487, 59 S. E. 1008, 125 Am. St. Rep. 481. On examination of the issues, we do not see that the defendant has been deprived of presenting any contention of his as to the facts.

The exceptions to the charge are not well taken. The case turned almost entirely upon the disputed facts, and were fully answered by the jury in favor of the plaintiff.

[2] The defendant also excepted because the judge allowed the complaint to be put in evidence. The court allowed the complaint and answer to be put in evidence, but solely for the purpose of showing that the plaintiff had offered to pay the balance of the purchase money, if the defendant would clear the property of the liens, and the admissions in the answer which would not have been

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



clear, unless the complaint was also put in evidence.

[3] It was not necessary to present the money when defendant stated he would not take the plaintiff's offer to pay it. This was a waiver of any formal tender. *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586; *Phelps v. Davenport*, 151 N. C. 22, 65 S. E. 459.

[4] The jury find that Grubb agreed to convey said land free from incumbrances. But, if he had not, the law is thus stated in *Leach v. Johnson*, 114 N. C. 88, 19 S. E. 240, 41 Am. St. Rep. 784: "Unless the vendee has otherwise agreed, it is his undoubted right to demand a clear title. 1 War. Vendors, 315. That the vendee agreed to take a deed without warranty is not a waiver of the right to demand a clear title; on the contrary, the fact that a warranty in the conveyance is waived is all the stronger reason why the vendee should insist upon the cancellation of all liens and incumbrances, since he will have no warranty to fall back upon, if the title should prove to be defective. The vendee in such case is not cut off from his rights till he has paid the purchase money and taken the deed."

[5] As to the form of the judgment, "In a suit, either by vendor or vendee, where the incumbrances can be discharged by mere payment thereof, and are not larger in amount than the purchase money due, the court in its decree may direct the payment of a sufficient part of the purchase money for the purpose to the holders of the incumbrances, instead of the vendor, even though such holders are not before the court; or the court may authorize the vendee to remove the lien on failure of the vendor to remove it, and to reimburse himself out of his deferred payments of the purchase price." 38 Cyc. 745(4).

No error.

(157 N. C. 13)

# PATTERSON v. GREENSBORO LOAN & TRUST CO. et al.

(Supreme Court of North Carolina. Nov. 15, 1911.)

## 1. GIFTS (§ 15\*)—REQUISITES—VALIDITY—INTENT.

In order to constitute a valid gift of personal property, there must be an actual or constructive delivery, with a present intent to pass title.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 14; Dec. Dig. § 15.\*]

## 2. GIFTS (§ 22\*)—DELIVERY—EVIDENCE.

Plaintiff having been possessed of a trunk, decedent, her grandfather, on being shown a \$5 gold piece that had been given to the child by another, remarked that he expected to give her \$5 in gold every 22d of the month for her birthday. He then began the practice of putting into the child's trunk \$5 every month. After the death of his wife, the trunk was brought into his room. Some of plaintiff's things were in the trunk, and during decedent's last illness he told plaintiff's mother that he wanted the

trunk moved; that she could move it then, if she wished, or could wait until after his death. The trunk was not then removed, and after decedent's death it was opened, and found to contain \$1,050 in gold. There was no evidence that it contained anything of value belonging to decedent. *Held* to show a sufficient delivery to constitute a valid gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 37; Dec. Dig. § 22.\*]

## 3. GIFTS (§ 22\*)—ELEMENTS—DELIVERY.

Where articles are present, and are capable of actual manual delivery, such delivery must be made, in order to constitute a valid gift; but, where the donor's intention to make the gift plainly appears, and the articles intended to be given are not present, or, if present, are incapable of manual delivery, a constructive delivery is sufficient.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 37; Dec. Dig. § 22.\*]

Appeal from Superior Court, Guilford County; Daniels, Judge.

Action by Lella A. Patterson, by her next friend, against the Greensboro Loan & Trust Company, administrator of William Collins, deceased, and others. The jury found that the money in controversy had been given to plaintiff by decedent in his lifetime, and from a judgment entered thereon in plaintiff's favor defendants appeal. Affirmed.

G. S. Bradshaw and King & Kimball, for appellants. John A. Barringer and Thos. H. Calvert, for appellee.

HOKE, J. [1] The authorities in this state are in full support of the position contended for by defendant that, in order to a valid gift of personal property, there must be an actual or constructive delivery, with the present intent to pass the title. *Gross v. Smith*, 132 N. C. 604, 44 S. E. 111; *Duckworth, Adm'r, v. Orr et al.*, 128 N. C. 674, 36 S. E. 150; *Wilson v. Featherston*, 122 N. C. 747, 30 S. E. 325; *Newman v. Bost*, 122 N. C. 524, 29 S. E. 848; *Medlock v. Powell*, 96 N. C. 499, 2 S. E. 149; *Adams v. Hays*, 24 N. C. 361.

[2] The court is of opinion, however, that, without any impairment of the principle recognized and sustained in these cases, there are facts in evidence from which delivery could be properly inferred by the jury. From the testimony of the principal witness, it appeared: "That Lella A. Patterson is the daughter of Roxie Patterson, and the granddaughter of William Collins. That William Collins died on April 6, 1907, and that the wife of William Collins, grandmother of Lella, died about 18 years ago. That the grandmother of Lella had given Roxie Patterson a trunk for Lella, and that the trunk was always called and used as Lella's, and remained in an upstairs room in the Collins home until after the death of the grandmother. That in the summer after the birth of Lella, while Roxie Patterson and child were on a visit to the grandparents, the mother showed the grandfather a \$5 gold piece which she said Judge Armfield had given to

her for the child; whereupon the grandfather remarked: 'Well, we will keep that up. I will keep that up. I expect to give her \$5 in gold every 22d of the month for her birthday.' He then and there began the practice of putting into the child's trunk \$5 in gold every month, and after the death of the grandmother the trunk was brought down into his room. On several visits of the mother, she saw the grandfather put \$5 in gold into it, when the monthly birthday of Lelia happened at the time. 'Some of Lelia's things were in the trunk; that is to say, shoes, little hose, dresses, and things of that kind.' Lelia's pet name was Hon, and in the grandfather's last illness he said to his daughter: 'There's Hon's trunk; I want you to move it. You may move this trunk now, if you want to, or you can wait and move it after I am dead.' The trunk was not then removed, and after his death it was opened and the sum of \$1,050 in gold was found therein. There is no evidence that the trunk contained anything of value belonging to the deceased; that is, there was no other money in gold, nor were there any valuable papers." True there is a case in our reports (*Brewer v. Harvy*, 72 N. C. 176) where a father, standing on his piazza with his wife and child, a girl 12 years of age, pointed to a colt some distance off, and said to the child: "That is yours; I give it to you." And in another case a colt on the father's farm was always recognized by and spoken of as his son's colt, and the father had told the son he might have the colt, if he would raise it. In both, the court held there was not a valid gift for lack of proper delivery; but in both it will be noted that there was no possession or control of the property given to the alleged donee, or to any one for him. In our case, the money was, from time to time, put by the intestate in the trunk recognized as the child's trunk, and in the last illness of the donor he said to the child's mother, the trunk being present: "There's Hon's trunk; I want you to move it. You may move it now, if you want to, or you can wait and move it after I am dead." On this testimony, we think his honor correctly ruled that the question of delivery was for the jury.

[3] The case comes rather within the principle applied in *Newman v. Bost*, supra, in which it was held: "Where the articles are present, and are capable of actual manual delivery, such delivery must be made, in order to constitute a gift *inter vivos* or *causa mortis*; but, where the intention of the donor to make the gift plainly appears, and the articles intended to be given are not present, or, if present, are incapable of manual delivery, effect will be given to a constructive delivery."

There is no error, and the judgment for plaintiff must be affirmed.

No error.

(155 N. C. 531)

**URQUHART v. DURHAM & S. C. R. CO.**  
(Supreme Court of North Carolina. Nov. 15, 1911.)

**1. MASTER AND SERVANT (§ 204\*)—ASSUMPTION OF RISK—DEFECTIVE APPLIANCES.**

Under Revisal 1905, § 2646, providing that any employé of a railroad company who suffers injury to his person by any defect in the ways or appliances may maintain an action against the company, a railroad brakeman injured because of a defective and dangerous step on the tender could not be held to have assumed the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.\*]

**2. NEW TRIAL (§ 44\*)—GROUNDS—MISCONDUCT OF JURY.**

That the jury only remained out 20 minutes before bringing in their verdict was not of itself ground for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 80-85; Dec. Dig. § 44.\*]

**3. TRIAL (§ 304\*)—MISCONDUCT OF JURY—DISCRETION OF TRIAL COURT.**

The trial court could in the exercise of its discretion compel the jury to reconsider the case or set aside the verdict for contemptuous disregard of their duty in considering the case, but such matter is, as a rule, for the trial court's discretion.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 725-727; Dec. Dig. § 304.\*]

Appeal from Superior Court, Durham County; Daniels, Judge.

Action by R. H. Urquhart against the Durham & South Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Manning & Everett and J. W. Hinsdale, for appellant. Bryant & Brogden, for appellee.

**CLARK, C. J.** This is an action to recover damages for personal injury caused by the negligence of the defendant. The defendant took 94 exceptions, but abandoned 51 of them in this court.

While the record is voluminous and the exceptions numerous, the matter for decision lies in a very small compass. The case comes within the principles of law laid down in *Coley v. Railroad*, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817; *Id.*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817. The plaintiff was employed by the defendant December 1, 1907, as a brakeman on its road. Twenty-four days later he lost his foot by reason, as he alleges, of negligence on the part of the defendant.

The plaintiff contends there was negligence on the part of the defendant, in that (a) it furnished an engine without a step, as was usual and necessary on railroads properly equipped; (b) that the step upon the tender was defective and dangerous, and was too high to be reached with safety in boarding a moving train; (c) that it permitted water to drip from the sprinkler hose on the step of

the tender and form ice there, making a dangerous place to board the train; and (d) that he, being a green hand, without experience, was required in the discharge of his duties to board the train, when in motion, without any proper warning or instructions as to his duties and the dangers. He insisted that, by reason of this negligence when he undertook to board the moving train, his left foot slipped from the tender step, passed under the wheels of the moving tender, and was so crushed that amputation was necessary. The defendant admitted the absence of the step from the engine, contended one was unnecessary, denied the other allegation of negligence, pleaded assumption of risk, and also contributory negligence on part of plaintiff in attempting to board the tender as he did. It especially urged that plaintiff was rear brakeman, and should not have attempted to board the engine or tender at all. In reply, plaintiff contended he had duties in the rear and front; that he boarded the engine and rode there as often as he did elsewhere; that he had been ordered so to do; that this was necessary in the discharge of his duties; was done in the presence of the conductor in charge of the train; and that the duties on the rear of the train were assigned by the superintendent of the road to another on the afternoon of the injury in presence of the plaintiff just a few hours before he (plaintiff) was hurt.

There was evidence that the plaintiff was inexperienced as a brakeman; that no written or printed rules were furnished him, nor in use by the defendant; and that he was not instructed or cautioned as to dangers incident to his employment. The plaintiff was discharging various duties as brakeman on the train, sometimes being in the coach and sometimes on the engine. The train reached Wilson siding about dark, and stopped to unload some freight. Plaintiff helped in the discharge of this duty, and, when the freight had been unloaded, the conductor signaled the train forward. Plaintiff, in order to be in front, to change the switch at next station, undertook to mount the tender. The train was moving at the rate of three or four miles an hour. He could not mount the engine because there was no step. A boy who was permitted to go on the train was also standing in his way. Plaintiff then caught the grabiron on the tender, and undertook to get on board by means of the step on the tender. There was but one step on the tender which was 30 inches from the ground. The first effort resulted in his foot slipping off. He made a second effort with the same result, and his foot that time slipped from the edge of the tender step; there being no side to the step or guard to prevent it. A hose sprinkler was leaking. From this cause the step was wet and covered with ice. The wheel was just a few inches from the rear of this step, and plaintiff's foot when it slipped a second

time passed in front of the wheel, and was crushed between the wheel and iron rail. It was getting dark, and plaintiff did not know that ice was on the steps at that time. When the train started out that afternoon, the superintendent had told the boy to knock the ice off, saying "some one was going to get their neck broke," but the ice had not been removed.

There was also evidence that the defendant was using an old secondhand engine; that there was a grabiron on the engine for the use of those mounting it, but no step on the engine. There was also evidence by experienced engineers that prior to the time of this injury steps for mounting engines and tenders were in general use which were made of iron with sides and backs to them so that the foot when placed therein would not slip out. There is also evidence that such a step was in use on the only other engine on this road and two steps on its tender. There is also evidence that this tender step was too high; that there was but one step 26 inches above the cross-ties and 30 inches from the ground; that it was dangerous, defective, and not a safe appliance; that it had no back to protect the foot from slipping through and no side guards or pieces to keep the foot from slipping off; that it was a wooden step worn so that it was beveled, which caused it to slant; that the hose used by defendant for sprinkling the coal had been carelessly left above the step; that it was leaking, and the water dripping therefrom had frozen on the step, making it dangerous.

The defendant contended that the plaintiff was guilty of contributory negligence, in that he failed to take hold of both grabirons at the same time which the defendant contended was the proper way. But it did not contend that the plaintiff had ever been instructed or warned by it to board the train in that way. The defendant also offered evidence that the plaintiff was a rear brakeman, and should not have attempted to board the engine or tender, but offered no explanation of the fact that prior to the injury he had frequently ridden on the engine with the conductor without reproof.

Upon all the evidence, the case was properly submitted to the jury under a charge which followed our well-settled precedents, and the jury found that there was negligence on the part of the defendant, and that the plaintiff was not guilty of contributory negligence.

[1] There was no issue as to assumption of risk, and this court has held in *Coley v. Railroad*, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817, Id., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, and *Biles v. Railroad*, 139 N. C. 532, 52 S. E. 129, that under the fellow servant law (Rev. 1905, § 2646), assumption of risk is not open to the defendant where the injury was proximately caused by defective ways or appliances. Every phase of the con-

tention of the parties in the case has been so often before the court and the judge in his charge and his rulings upon the evidence has so carefully followed the precedents that it would serve no useful purpose to go over the exceptions in detail and reiterate our former rulings. No new proposition, nor new application of an old, is presented.

[2] The last exception is that the jury did not remain out more than 20 minutes before bringing in their verdict. The case had doubtless been so fully, carefully, and indeed minutely presented to their consideration in every aspect by the able counsel in the cause both in presenting the testimony and in arguing the case as well as by the lucid instructions of his honor that the jury doubtless thoroughly understood the points at issue, and did not need more time. Of that they are usually the best judges. We know of no rule by which this court can estimate the time, or lay down a rule, as to how long a jury shall remain in consultation, before bringing in their verdict.

[3] Of course, if there was misconduct on the part of the jury or a contemptuous or flippant disregard of their duties in considering a matter submitted to them, the trial judge is intrusted with the power and the duty to rebuke them, and either send them back to reconsider the case, or to set aside their verdict. But this is a matter which is left to his sound discretion, and cannot be intelligently reviewed by this court.

No error.

(157 N. C. 106)

**H. L. BECK & CO. v. BANK OF THOMASVILLE et al.**

(Supreme Court of North Carolina. Nov. 15, 1911.)

**APPEAL AND ERROR (§ 80\*)—JUDGMENTS APPEALABLE—FINAL JUDGMENTS.**

Plaintiff brought two actions, one against defendant bank to correct certain errors in plaintiff's account, and the other against its cashier for slander, injury to plaintiff's credit, and the wrongful protest of plaintiff's checks. These actions being consolidated, all matters of account involved in the actions were referred, reserving, however, for trial by jury the issues raised in the pleadings as to slander, refusing payment of checks and protesting checks for nonpayment, and other torts. *Held*, that a judgment for defendant entered on the referee's report prior to the trial of the reserved issues was interlocutory, and not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 80.\*]

Appeal from Superior Court, Davidson County; Long, Judge.

Action by H. L. Beck & Co. against the Bank of Thomasville and another. Judgment for defendants, and plaintiff appeals. Dismissed.

E. M. Raper, Walser & Walser, and Thos. J. Shaw, for appellant. Watson, Buxton & Watson, for appellees.

ALLEN, J. The plaintiff instituted two actions in the superior court of Davidson county; one being against the bank of Thomasville, and the other against J. L. Armfield, its cashier. These actions were consolidated by order of court. The plaintiffs allege certain errors in their account with the bank, which they ask to have corrected, and also that they are entitled to recover damages for slander, injury to their credit, and the wrongful protesting of checks they issued. No objection was made as to misjoinder, and at August term, 1909, an order of reference was made as to "all matters of account involved in the actions," but expressly reserving for trial by jury "the issues raised in the pleadings as to slander, refusing payment of checks, and protesting checks for nonpayment and other torts." The referee filed his report, and, upon exceptions being filed, the judge heard the same, and entered his judgment, from which an appeal is taken to this court. The issues reserved in the order of reference have not been tried.

In this condition of the record, the appeal is premature, and must be dismissed. As was said by Justice Hoke in *Pritchard v. Spring Company*, 151 N. C. 249, 85 S. E. 968: "If a departure from this procedure is allowed in one case, it could be insisted upon in another, and each claimant, conceiving himself aggrieved, could bring the cause here for consideration, and litigation of this character would be indefinitely prolonged, costs unduly enhanced, and the seemingly proper disposal of causes prevented."

The appeal is dismissed without prejudice to the right of the parties to reserve their exceptions, which will be considered upon an appeal from the final judgment.

Appeal dismissed.

(156 N. C. 659)

**STATE v. MITCHELL**

(Supreme Court of North Carolina. Nov. 15, 1911.)

**INTOXICATING LIQUORS (§ 146\*)—PROHIBITORY LAW—SALE—BARTER.**

An exchange or barter of whisky is a violation of Pub. Acts (Ex. Sess.) 1908, c. 71, making it unlawful for any person or persons, firm or corporation, to manufacture, or in any manner make or sell, or otherwise dispose of, intoxicating liquors for gain.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 146.\*]

Appeal from Superior Court, Forsyth County; Adams, Judge.

George Mitchell was convicted of selling liquor in violation of the prohibitory law, both in the recorder's court and on appeal to the superior court, and he appeals. Affirmed.

Louis M. Swink and J. S. Grogan, for appellant. T. W. Bickett, Atty. Gen., and G. L. Jones, Asst. Atty. Gen., for the State.

BROWN, J. There is but one question presented, and that is: Is it a violation of the prohibition act for one to lend another whisky, upon the understanding that other whisky will be returned in place of it? The evidence is contradictory. The prosecuting witness testified that he purchased the liquor for cash, and paid 50 cents down when he made the purchase. The defendant testified that he furnished whisky to the prosecuting witness, but that it was a loan, and upon the understanding that the whisky was to be returned as soon as an order made by prosecuting witness could be received.

The point comes up on the charge of the court, who instructed the jury as follows: "If you find from the evidence, beyond a reasonable doubt, that the witness Curry applied to the defendant for liquor, and it was then and there agreed by and between the witness Curry and the defendant that the defendant would let Curry have whisky, in consideration of an agreement on the part of Curry to deliver to the defendant other whisky in return for that which he received, and after this agreement was made the defendant delivered to the witness Curry a quantity of whisky, in consideration of the agreement of Curry to deliver to the defendant a like quantity when Curry's whisky arrived on the train, such transaction, if not a technical sale, would nevertheless be such as is made unlawful by the statute to which your attention has been directed, and your verdict will be 'guilty.'"

This exact question has never been decided in this state, and it has been decided both ways in other jurisdictions. The *Cyclopædia of Law and Procedure* says: "Where the statute prohibits the sale of liquor by certain persons or under certain conditions, when the indictment distinctly charges the sale, there can be no conviction on evidence which proves a gift or exchange of liquor as distinguished from a sale." Again, on page 181 of the same volume: "A loan of liquor, with the understanding that it is to be repaid in other liquor of the same kind, is not a sale." 23 *Cyc.* 269. The author of the article in *Cyc.* is Henry C. Black, author of the well-known work on *Intoxicating Liquors*. The cases cited in the notes do not appear to fully sustain the text. It is held in Georgia that an exchange of liquor does not constitute a sale. *Skinner v. State*, 97 Ga. 690, 25 S. E. 364. Same in Arkansas. *Robinson v. State*, 59 Ark. 341, 27 S. W. 233. It was so decided in Texas in *Ray v. State*, 46 Tex. Cr. R. 176, 79 S. W. 535, but specially held otherwise, and the *Ray* Case overruled, in *Tombeaugh v. State*, 50 Tex. Cr. R. 286, 98 S. W.

1054, 8 L. R. A. (N. S.) 937, 123 Am. St. Rep. 841.

The true rule, we think, is clearly stated by the Supreme Court of Texas in the latter case: "While the doctrine of an accommodation exchange seems to have been recognized by this court in the *Ray* Case, supra, in our opinion that case should be overruled. There might be a case—to illustrate, where some member of a family should be bitten by a snake, or some venomous insect—that would require the immediate use of whisky, with no time to send for a physician to obtain a prescription. In such case it might be allowable to borrow whisky from a neighbor on account of such emergency. We do not believe the doctrine should be extended beyond some pressing necessity. Certainly not to a case of a loan by one club member of whisky to a stranger in social drinking as a beverage. In our opinion, it makes no difference in this respect whether the party loaning be a club member or not. His exchange of whisky to another person under the circumstances here detailed would be a sale, and comes under the doctrine announced in *Keaton's Case*, 36 Tex. Cr. R. 259, 38 S. W. 522. We fail to see any difference between such transaction and the payment of money for the whisky at the time." These cases appear to sustain that view: *Com. v. Clark*, 14 Gray (Mass.) 367; *Com. v. Abrams*, 150 Mass. 393, 23 N. E. 53; *Leach v. State* (Tex. Cr. App.) 53 S. W. 630; *Taggart v. State* (Tex. Cr. App.) 97 S. W. 95; *Sparks v. State* (Tex. Cr. App.) 99 S. W. 546; *Coleman v. State*, 53 Tex. Cr. R. 578, 111 S. W. 1011; *Beckham v. State*, 54 Tex. Cr. R. 28, 111 S. W. 1017; *Wilson v. State*, 54 Tex. Cr. R. 13, 111 S. W. 1018.

Justice Manning, in *State v. Colonial Club*, 154 N. C. 177, 69 S. E. 771, 31 L. R. A. (N. S.) 387, reviews the authorities to some extent as to what constitutes a sale. Quoting from 2 Black. Com. 446, he says: "A sale is a transmutation of property from one man to another in consideration of some price or recompense in value." Justice Dillard, in *State v. McMinn*, 83 N. C. 668, defines a sale as follows: "A sale is the transmutation of the property in a personal chattel from one to another on a quid pro quo, paid or agreed to be paid, and such a change of property in the retail of spirituous liquors by the small measure is usually effected by the delivery of the article and the payment of the price simultaneously; but it may be made in other modes," etc.

We think, tested by these definitions, in any view of the evidence, the transaction constituted a sale, and was a clear violation of the prohibition law of this state. The transaction was nothing more or less, according to the defendant's own evidence, than a barter of liquor. The title to the liquor passed absolutely, and the same rules

of law are applicable to the transaction, whether the consideration of the contract is money or other liquor to be delivered at some future date. As said in *Commonwealth v. Clark*, supra, by the Supreme Court of Massachusetts: "It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise, instead of by money, which is but the representative of value or property."

In adopting the prohibition statute enacted by the General Assembly, our voters had in view the prevention of the traffic in intoxicating liquors in the state. If it were allowable to carry on an exchange or barter for whisky, the law would be rendered practically worthless and incapable of enforcement. Whenever a person was charged with an illicit sale of liquor, the defense in most cases doubtless would be that the transaction was only an exchange or barter. Our statute is very broad and comprehensive in its terms, and its framers evidently had in view, not only the prohibition of a sale of liquor for money, but for barter likewise. It reads: "It shall be unlawful for any person or persons, firm or corporation to manufacture or in any manner make, or sell, or otherwise dispose of for gain," etc. Public Acts, Extra Session, 1908, c. 71.

We think his honor was correct in his instructions to the jury.

No error.

(90 S. C. 42)

**BOUCHILLON v. CHARLESTON & W. C. RY. CO.**

(Supreme Court of South Carolina. Nov. 15, 1911.)

**1. MASTER AND SERVANT (§ 282\*)—WILLFUL INJURY TO SERVANT—DAMAGES.**

The operation of a work train at a high rate of speed on a straight track supposed to be in good condition is not of itself such willfulness as will justify punitive damages for the death of an employé on the train killed by the derailment of the engine caused by a low joint in the rails not known to the railway company, nor any of its agents prior to the accident; the track having been recently inspected.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 997-999; Dec. Dig. § 282.\*]

**2. MASTER AND SERVANT (§ 243\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

A member of a train crew repairing the track was killed by the derailment of the engine of work train. The rules of the railroad company required the members of the crew to ride in shanty cars, but decedent, in violation of the rule, and without any necessity therefor, rode in the engine when it was derailed. The cars did not leave the track, and he would not have been killed had he obeyed the rules. *Held*, that decedent was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 682, 759-775; Dec. Dig. § 243.\*]

**3. MASTER AND SERVANT (§ 289\*)—ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE.**

Where it appeared from the entire evidence that no other reasonable conclusion could be

reached except that the death was the result of decedent's negligence concurring with that of defendant, and that his negligence was the proximate cause of the death, the question was for the court.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1182; Dec. Dig. § 289.\*]

**4. MASTER AND SERVANT (§ 240\*)—CONTRIBUTORY NEGLIGENCE—OPERATION OF RAILROADS.**

Where a member of a train crew left a shanty car provided for him and in which he was riding, and rode on the engine, and was killed when it was derailed, and the car did not leave the track, he was guilty of contributory negligence in leaving the place of comparative safety provided for him for a place of greater danger known by him to be such.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 751-756; Dec. Dig. § 240.\*]

**5. MASTER AND SERVANT (§ 228\*)—INJURY TO SERVANT—CONSTITUTIONAL PROVISIONS.**

Const. art. 9, § 15, giving to railroad employes the rights and remedies allowed to persons not employes who sustain injuries, applies only to the defense of assumption of risk by an employé and does not refer to the question of contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 228.\*]

Appeal from Common Pleas Circuit Court of Abbeville County; R. C. Watts, Judge.

"To be officially reported."

Action by H. M. Bouchillon, administrator of Stony Bouchillon, deceased, against the Charleston & Western Carolina Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. N. Graydon and C. J. Perryman, for appellant. Wm. P. Greene, for respondent.

**JONES, C. J.** This was an action to recover actual and punitive damages alleged to have been suffered by reason of the death of the plaintiff's intestate, averred to have been caused by the negligent, willful, wanton, and reckless acts of the defendant set forth in the complaint. At the close of the evidence on behalf of the plaintiff, a motion for a nonsuit on the cause of action for punitive damages was granted, and at the conclusion of the entire testimony the presiding judge directed a verdict for defendant upon the cause of action for compensatory damages, upon the ground that the evidence established the fact that the death of the plaintiff's intestate was the result of contributory negligence on his part. The plaintiff now appeals to this court, charging error both in the granting of the order of nonsuit as to the cause of action for vindictive damages and in the direction of a verdict upon the issue as to actual damages.

While the exceptions are numerous and lengthy, they appear to present but three questions for determination, and these propositions alone are presented to this court in the argument. The appellant here contends: (1) That there was evidence to go to the jury upon the cause of action based

upon the allegations of willfulness and recklessness. (2) That there was error in the holding that no other reasonable inference could be drawn from the evidence, but that the injury and death of plaintiff's intestate was due to his own contributory negligence. (3) That the act of negligence on the part of said intestate held by the court to have contributed to his death consisted in a violation of a rule of the defendant company, as to which there was evidence to go to the jury of a waiver by the defendant of such rule.

The evidence shows that the intestate was in the employ of the defendant as a member of a train crew engaged in the work of keeping in repair the track and roadbed of the defendant's railroad, his position being that of engineer of a hoisting engine placed upon a flat car by which was operated a ditching machine. The flat car contained the hoisting engine and tender and four shanty cars for the transportation and use of the employees engaged in the repair of the tracks, among whom was included the plaintiff's intestate. When this work train was being used for the transportation of the employees of defendant to the scene of their labors upon defendant's track, the assigned place of said intestate was in one of the shanty cars, and he had no duties to perform nor work to be done upon the occasion in question, requiring him to go upon the engine by which this train was drawn. Furthermore, the rules of the company then known to the plaintiff's intestate forbade his riding upon the engine, and he had been warned that it was dangerous, and had been expressly forbidden to ride upon the same. Upon the day he was killed, the plaintiff's intestate boarded this work train, going first into the shanty car where he belonged, and where he remained until the train had proceeded for some distance toward the place at which the work was to be done, after which interval, and before such destination had been reached, he climbed over the top of the other cars, and went into the cab of the engine drawing the train, such action on his part being entirely voluntary and without any call of duty or necessity requiring it. This engine, running equally well either way, was then running backward and pulling the train of shanty cars, but the evidence is uncontradicted that there is no more danger upon a straight track in running such an engine backward than forward. A short time after the plaintiff's intestate had thus gone upon the engine, where he went of his own volition, without invitation and for his own private reasons, the work train left the track, and, being then upon the engine, he received injuries in this derailment which resulted in his death. As it appears that the shanty cars were not derailed or otherwise injured in this accident, and no one in those cars received any hurt whatsoever, it is evident that the death of the plaintiff's intestate was due to the fact that he was

not in his proper place upon the train. There was evidence tending to show that the derailling of the engine was caused by a low joint in the rails upon the track, but there was no evidence that this defective condition was known to the defendant or any of its agents prior to the occurrence. The track had been recently inspected, and had been put in good condition a few days before. There was only testimony which tended to establish the fact that the work train in question, shortly before the happening of the wreck, was traveling at a high rate of speed, fixed by some of the witnesses at 38 miles an hour, but there is no witness who states the rate of travel at the very point in question as exceeding 10 or 15 miles an hour.

[1] The act of willfulness and recklessness on the part of the defendant being alleged to consist in the running of this train at a high rate of speed over a defective track, it is apparent that neither willfulness nor recklessness can be said to be inferable from this testimony, unless there be evidence tending to show either knowledge by the defendant of the unsafe condition or some other conscious disregard of duty by the defendant's agents, either in failing to repair the track at the point in question or in running the engine at an unsafe rate of speed. As to these matters, there is nothing appearing in the record which tends to show knowledge by the defendant, prior to the accident, of any unsafe condition of the track, nor any testimony going towards proving that the train was being run at an unsafe or reckless rate of speed at the time of the occurrence in question. The fact that a train was being operated at a high rate of speed at the time, if it were made to appear, would not alone be sufficient to show either willfulness or recklessness, in the absence of evidence that such speed was obviously dangerous under the facts and circumstances as they then appeared to the agents and servants of the defendant in charge of such train. But the evidence was that the track at the point in question was straight, and that, upon such a track, in good condition as it was then supposed to be, it was reasonably safe to operate such a train, with the engine running backward, at a rate of speed of 35 or 40 miles an hour.

Without further rehearsing the evidence, therefore, it appears that there was an entire lack of proof to establish either a conscious failure to observe due care or a reckless disregard of safety in the operation of the train in question. There being thus no evidence to support the allegation of willfulness, wantonness, and recklessness, or either of them, it must be concluded that there was no error by the presiding judge in granting the motion for a nonsuit upon the cause of action for punitive damages. On the contrary, in the absence of such evidence, it would have been reversible error

on the part of the circuit judge had this motion been refused. *Trimmer v. Railroad*, 81 S. C. 203, 62 S. E. 209. Conceding that there was some testimony tending to show negligence on the part of the defendant, even though it be but a scintilla of evidence, the circuit judge directed a verdict in favor of the defendant upon the cause of action for actual damages, upon the ground that there was no evidence in the case upon which any other conclusion could be reached by the jury than that the death of plaintiff's intestate was due to his own contributory negligence.

[2] As to the complaint of error in this ruling and direction of verdict, it is to be remarked that from the facts already recited and from the evidence contained in the entire record, which has been carefully examined, it incontestably appears that the injury and death of the intestate was the result in part of his own negligent act in going to a place of great danger upon the engine away from the place provided by his employers upon the cars and in violation of the rules of his employment, without necessity and without pretense of any call of duty or necessity. Had he remained in the car provided for his transportation, no injury would have befallen him; and it is thus apparent that his negligent act in going to a place of greater danger was a proximate cause of the injury which befell him, and without which it would not have occurred.

[3] It is immaterial by what testimony the fact of such contributory negligence was made to appear, whether it be by that introduced on behalf of the plaintiff or that offered on the part of the defendant, since it does appear from the entire evidence in the cause that no other reasonable conclusion could be reached by the jury, except that the injury and death was the result of his own negligence, combining and concurring with that of the defendant, and being a proximate cause of the injury and damage in question. *McLean v. Railroad*, 81 S. C. 100, 61 S. E. 900, 1071, 18 L. R. A. (N. S.) 763, 128 Am. St. Rep. 892; *Lyon v. Railroad*, 77 S. C. 329, 58 S. E. 12; *Jarrell v. Railroad*, 58 S. C. 494, 36 S. E. 910.

As to the point raised by the exceptions that there was evidence of waiver by the defendant of the rule prohibiting employes to ride on the engine, and that, therefore, there was error by the circuit court in directing the verdict, it is to be remarked that, assuming there was evidence of such waiver, this would not necessarily affect the question of contributory negligence under the facts and circumstances. [4] Even if there had been no such rule of the defendant company, the evidence shows that the plaintiff's intestate was guilty of contributory negligence in leaving the comparatively safe place provided for him by the master without any necessity and not in the performance of his

duty, and going into a place of known and obviously greater danger. He had been told that it was dangerous to ride on the engine, and the evidence shows that he must have been conscious of the greater danger involved in his being there. The rule is applied in the case of passengers, where one voluntarily rides in a place of obvious danger, without any necessity or emergency requiring it, where he knows or by the exercise of ordinary care should have known that he is not in the place provided for him, that such passenger is guilty of contributory negligence, and cannot recover if his act does contribute to his injury as a proximate cause thereof. *McLean v. Railroad*, *supra*. No distinction upon this point can be shown between the case just cited and the one at bar, unless it be found in the fact that in this case the person injured was an employé, and not a passenger. The employé here placed himself in a situation of greater danger entirely of his own volition, without even an invitation from any agent of the defendant, leaving the comparatively safe place provided by his employer, and going to a place of obviously greater danger, and known by him to be such more dangerous position. It cannot be doubted that this act contributed directly to his injury, as a proximate cause thereof, and without which the danger would not have occurred. No reason has been shown or suggested why the same rule applied in the case of the passenger above cited should not also be applicable in this case to the employé. The same rule was applied to employes of a railroad company in the similar case of *Railroad v. Jones*, 95 U. S. 439, 24 L. Ed. 506, in the case of *Railroad Co. v. Myers*, 112 Ga. 237, 37 S. E. 439, and in many other cases which are cited in the argument of the respondent.

[5] It is suggested in one of the exceptions that the defendant company is precluded by the provisions of article 9, § 15, of the Constitution of this state from interposing the defense of contributory negligence in this case, but this suggestion is without force, as that provision applies only to the defense of assumption of risks by an employé of a railroad company, and has no reference to the question of contributory negligence here presented. See *Bodie v. Railroad*, 61 S. C. 468, 39 S. E. 715.

There is therefore no reason either in the nature of the case or in the constitutional provision mentioned for the adoption in the case of an employé upon a railroad train of a rule as to the effect of contributory negligence different from that applied in the case of a passenger upon such train; and it must, therefore, be held that where an employé leaves the place provided for him on the train, without any call of duty or necessity or direction from a superior officer, and voluntarily places himself in a position of obviously greater peril or one known to be



more dangerous, and in consequence thereof is injured or killed, even though by the negligence of the railroad company, if it appears that such act of the employé was one proximately contributing to his injury or death and without which the same would not have occurred, such act must be held as in the case of a passenger an act of contributory negligence which would defeat any right of recovery otherwise existing.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HY-  
DRICK, JJ., concur.

(90 S. C. 79)

### SAUNDERS v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Nov. 18, 1911.)

#### 1. CARRIERS (§ 134\*)—FREIGHT CLAIMS—ADJUSTMENT—VALUE AT PLACE OF SHIPMENT.

Under provision in a bill of lading that the amount of any loss shall be computed at the value of the property at the time and place of shipment, the invoice price of the goods is not conclusive as to value.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 134.\*]

#### 2. APPEAL AND ERROR (§ 1010\*)—REVIEW—CONCLUSIVENESS OF FINDING.

A finding supported by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

#### 3. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the value of a shipment at the place of shipment was in issue, any error in admitting testimony as to value at the destination was harmless, where the points were not far apart, and the value at the point of shipment was sufficiently established.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

#### 4. TRIAL (§ 253\*)—FREIGHT CLAIMS—FAILURE TO ADJUST—ACTION FOR PENALTY—INSTRUCTIONS.

In an action against a carrier for failing to adjust a freight loss claim, an instruction, ignoring the proposition that in estimating value at the place of shipment freight charges might be considered, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

#### 5. CARRIERS (§ 137\*)—FREIGHT CLAIMS—FAILURE TO ADJUST—ACTION FOR PENALTY—INSTRUCTIONS.

In an action for failure to adjust a freight loss claim, it was proper to refuse to instruct as to the liability of a gratuitous bailee, where there was no testimony that the company had given notice that it would no longer hold as warehouseman; its liability being either that of carrier or warehouseman.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 137.\*]

#### 6. CARRIERS (§ 140\*)—WAREHOUSEMEN—LIABILITY FOR LOSS.

That a consignee paid freight charges on a shipment and signed the waybill without removing the shipment, which arrived a few days be-

fore, did not show release of the company's liability as warehouseman.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 609½-616; Dec. Dig. § 140.\*]

#### 7. CARRIERS (§ 121\*)—FREIGHT CLAIMS—FAILURE TO ADJUST—ACTION FOR PENALTY—EVIDENCE.

In an action for the value of goods and for penalty for refusing to adjust a freight loss claim, the fact that the shipment remained in the depot at the destination five days after plaintiff paid the freight charges and signed the waybill does not show contributory negligence, though it might tend to show that the company's liability as a carrier had ceased, and that its liability was only that of a warehouseman.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 531-536; Dec. Dig. § 121.\*]

Appeal from Common Pleas Circuit Court of Sumter County; W. C. Davis, Special Judge.

"To be officially reported."

Action by George M. Saunders against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mark Reynolds, for appellant. L. D. Jennings, for respondent.

JONES, C. J. This action was brought in a magistrate court to recover \$16, alleged value of a shipment of goods, consisting of one sack of sugar, one sack of rice, and one box of soap, and \$50 penalty for failure to adjust the claim within the time required by law. The magistrate gave judgment for \$66, the full amount claimed, and on appeal therefrom the circuit court, Hon. W. C. Davis, special judge, presiding, affirmed the judgment, holding that no prejudicial error had been committed, and that substantial justice had been rendered.

It appears that the goods were shipped at Camden, S. C., by the Camden Wholesale Grocery Company, on March 1, 1909, consigned to plaintiff at Claremont, S. C., and were destroyed in the fire which burned up the Claremont depot and contents on March 9, 1909.

[1] The bill of lading stipulated that "the amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment," etc. Granting that such a stipulation is binding on a shipper or consignee, there was some testimony that the value of the goods at the place of shipment was equal to the amount claimed therefor, and the circuit court held that the testimony was ample to show that fact. It is true the invoice of the goods showed the invoice price to be \$15.15, but the invoice price is not the conclusive test of value. The goods may have been worth more or less than the invoice price, dependent upon the circumstances. Value at the place of shipment means value when delivered to the carrier under contract of shipment, and would certainly allow

freight to be added to the invoice price. *Kelly v. Southern Ry.*, 84 S. C. 252, 66 S. E. 198, 137 Am. St. Rep. 842; *Des Champs v. Railroad Co.*, 84 S. C. 360, 66 S. E. 414.

[2] The freight paid was 30 cents. But plaintiff testified that the goods were worth more than \$16 in Camden, S. C., the place of shipment. The conclusion of the circuit court that the value of the goods at the place of shipment was as great as claimed, being supported by the evidence, is final; hence the first, second, and third exceptions, which depend upon a contrary view of the facts, cannot be sustained.

[3] The admission of testimony as to the market value of the goods at Claremont, S. C., the point of destination, which is the basis of the fourth and fifth exceptions, can only be sustained as bearing somewhat remotely on the question of value at the place of shipment, since the two places are not far apart, and the conditions creating value may not be materially different; but, waiving this, there was no prejudice in the ruling, since the circuit court has finally adjudged that the evidence showed the value at the place of shipment sufficient to support the claim as filed.

[4] The magistrate refused to charge certain requests of defendant, to the effect that the carrier would not be liable for the value of the property at the place of shipment, and that the consignee cannot add to this the value at Claremont, the destination, and in addition thereto the freight charges. The requests were faulty in not making it clear that in estimating value at the place of shipment the freight charges may be taken into consideration, as shown in the *Kelly* and *Des Champs* Cases, *supra*. Hence the sixth and seventh exceptions cannot be sustained.

[5] The defendant requested the magistrate to instruct the jury as to the rule of liability with respect to a gratuitous bailee, and that such rule required the exercise of only slight care on the part of the bailee, and imposed liability for only gross negligence. The magistrate modified the request, so as to hold the carrier to the duty of ordinary care. There was no testimony to show that the defendant gave notice that it would no longer hold as warehouseman, and would not insist on charges as such; hence there was no basis in the testimony for instruction on the subject of a gratuitous bailee. *Brunson & Boatwright v. Railroad*, 76 S. C. 13, 56 S. E. 538, 9 L. R. A. (N. S.) 577. Whatever liability existed against defendant in this case was either as carrier, liable as an insurer, or as warehouseman, liable for failure to exercise ordinary care. Hence the charge as given was too favorable for defendant, and the eighth exception must be overruled.

The refusal of the magistrate to charge defendant's fourth request, which is the basis of the ninth exception, does not warrant re-

versal, because there was no testimony tending to show that the defendant's agent agreed to hold the goods in the depot as a mere matter of personal accommodation and convenience, and at the risk of the consignee, contrary to the rule of the company.

[6] The fact that the plaintiff paid the freight charges and signed the waybill, without immediately removing the goods, which had arrived a few days before the fire, would not tend to show that defendant was not liable as warehouseman for negligence.

[7] The refusal to submit the matter of contributory negligence to the jury, of which complaint is made in the tenth exception, affords no ground for disturbing the judgment, as there was no testimony of any such negligence of plaintiff. The fact that the goods may have remained in the depot from March 4th to March 9th after plaintiff had paid the freight charges and signed the waybill does not tend to show contributory negligence of the plaintiff. This may tend to show that defendant's liability as common carrier had ceased, and that the liability was only as warehouseman.

We do not understand that the circuit court held defendant liable as common carrier, as complained in the eleventh exception. The conclusions of the circuit court were that substantial justice has been done between the parties, and if there was error committed by the magistrate it was harmless. The judgment may well be rested on the theory of defendant's liability as warehouseman.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 90)

EDWARDS et al. v. JOHNSON.

(Supreme Court of South Carolina. Oct. 20, 1911.)

1. JOINT ADVENTURES (§ 1\*)—CONTRACT—CONSTRUCTION—PARTNERSHIP.

Complainant E., having an option on a large tract of timber land, an agreement was made between complainants and defendant that, if the land should be sold at any time through the efforts of any of them, all profits arising over and above the price paid to the owners should be divided as thereafter specified. After reciting that the price asked by the owners was \$125,000, and providing that any commission to E. from the owners out of the price should go to him individually, as compensation for expenses incurred by him and time spent in investigation of the property, it was stipulated that any other profits should be divided in the proportion of one-third to defendant J., and the remaining two-thirds to be equally divided among the complainants; all expenses to be borne by the parties in the same proportion. *Held*, that the agreement constituted a joint adventure, and that the parties were joint adventurers.

[Ed. Note.—For other cases, see *Joint Adventures*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 2. JOINT ADVENTURES (§ 2\*)—SALE OF LAND—AGREEMENT.

Where complainants and defendant entered into an agreement for a joint adventure in the sale of timber land on which complainant E. had an option, but no reference was made to such option in the agreement, the fact that it may have been without consideration and not binding on the signers, or that it might have expired on or before the date when defendant J. obtained a new option to himself from the owners, in violation of the agreement, had no bearing on the question of the existence of the relation of joint adventurers between complainants and defendant, except so far as the alleged expiration of the option might tend to show the term the relation was intended to endure.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 2; Dec. Dig. § 2.\*]

## 3. JOINT ADVENTURES (§ 1\*)—CONTRACT—CONTINUANCE OF PARTNERSHIP.

Where a contract between complainants and defendant to jointly promote the sale of a large tract of timber land contained no limit as to the duration of the term, except as specified in a provision that the parties would use their best efforts to effect a sale of the property, and if at any time the land should be sold through the efforts of any of the parties there should be a division of the profits, the term of its existence was a matter of inference from the nature of the engagement; the agreement being necessarily construed as terminable at the will of any one of the parties, on notice.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 4. JOINT ADVENTURES (§ 1\*)—CONTRACT—TERMINATION—TRUST RELATION—VIOLATION.

Complainants and defendant entered into an agreement for a joint adventure in the sale of timber land on which complainant E. had an option, which was extended to the close of September 23, 1904. The agreement contained no provision for the termination of the relation, but declared that the parties should use their best efforts to effect a sale, and if the lands at any time should be sold through the efforts of any of the parties then there should be a division of the profits. There being no sale up to September 23, 1904, defendant, before the close of that day, secretly obtained a new option from the owners, and then sold the property to a corporation organized by him to purchase the same, to his great profit. *Held* that, there having been no notice by any member to terminate the same prior to defendant's acquiring a new option, the relationship continued in existence on and after that date; and hence defendant would be regarded as having obtained the option and sold the property for the benefit of the firm.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 5. PARTNERSHIP (§ 70\*)—DUTY OF PARTNERS—GOOD FAITH.

Each member of a partnership is held to the highest degree of good faith in his dealings with reference to any matter concerning the business of the common engagement, and each partner, being an agent of the firm, must be held, during the existence of the relation, to the same accountability as other trustees in all matters affecting the common interest.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 114; Dec. Dig. § 70.\*]

## 6. JOINT ADVENTURES (§ 5\*)—PRIVATE INTEREST—EVIDENCE.

In a suit for an accounting of the profits of a joint adventure, evidence *held* to warrant a finding that defendant, during the time the agreement was in force, not only failed to carry

out his part thereof in good faith, but began a course of deception which was intended to promote his secret purpose to prevent a sale of the property in question by the firm, in order that he might thereafter, as he did, obtain an option to purchase the property himself, and obtain for himself the entire profits of such sale.

[Ed. Note.—For other cases, see Joint Adventures, Dec. Dig. § 5.\*]

## 7. ABATEMENT AND REVIVAL (§ 17\*)—ELECTION OF OTHER REMEDY—PLEADING.

An election of remedies, being an affirmative defense, must be pleaded in order to be available.

[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 17.\*]

## 8. ELECTION OF REMEDIES (§ 8\*)—REMEDIAL RIGHTS—RECONCILIABILITY.

Complainants and defendant having entered into an agreement to sell a timber tract on which complainant E. had an option, defendant during the continuance of the relation, obtained a new option in his own name, and sold the land to a corporation for his individual benefit. Thereafter one or more of the present complainants brought a suit in the North Carolina state court against defendant J. and others, to which the other complainants in the present action were made parties defendant, and a third action was commenced by one of the present complainants against the same defendants and the corporation which purchased the land in a United States court for the District of North Carolina, seeking an accounting, and also praying relief by way of a judgment in rem. The first action was brought against the original owners of the property, to recover commissions alleged to be due E. on the sale of the property, which were the same commissions recognized by the agreement between complainants and defendants as belonging to E. alone. There was no adjudication nor relief granted on the merits in either of such actions. *Held*, that they did not constitute an election of remedies, precluding complainants from maintaining a subsequent action against defendant for an accounting of the profits realized on the sale of the property to the corporation, under the rule that no act constitutes a conclusive election, unless the remedial right on which it is based is irreconcilable with the remedial right which the subsequent action is brought to enforce.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.\*]

## 9. JOINT ADVENTURES (§ 5\*)—SUIT FOR ACCOUNTING—LACHES.

Where, from the time complainants first received information of defendant's attempted violation of a joint agreement to accomplish the sale of certain lands, complainants had undeviatingly insisted on their right to a participation in the profits, and had repeatedly endeavored to induce defendant to make a satisfactory settlement, and a comparatively brief delay in commencing prior suits had been induced by defendant's conduct and statements, calculated to inspire complainants with the belief that an amicable adjustment of the matter might be reached, complainants' suit for an accounting was not barred by laches, under the rule that, to constitute laches, there must be not merely neglect to enforce a right, where such neglect is not long enough to be a bar under the statute of limitations, but there must also be either a failure to perform a legal duty prejudicial to the defendant, or some act of complainant which operated to mislead the defendant to his prejudice, so that it would be inequitable thereafter to permit the enforcement of the right.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. § 5.\*]

# 10. JOINT ADVENTURES (§ 4\*)—ACCOUNTING—TENDER.

Where defendant breached a contract of joint adventure with complainants for the sale of a tract of timber land by obtaining a new option to himself from the owners, and making an individual sale of the property to a corporation, and refused to account to complainants for their share of the profits, defendant was estopped to complain that complainants did not tender him their proportionate shares of the expenses incurred by him.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. §§ 3-6; Dec. Dig. § 4.\*]

# 11. JUDGMENT (§ 253\*)—PLEADING—RELIEF DEMANDED—PRAYER.

Where, in a suit for an accounting of profits made by defendant pursuant to a joint adventure, the complaint alleged that complainants' interest in the profits would amount to "at least \$100,000," and that complainants were entitled to recover that sum against defendant, and to have him account for any further sums realized by him, and prayed for a judgment "for the sum of \$100,000, and that he account for any further sums realized by him," complainants were not limited by such prayer to a judgment for \$100,000 but could recover such sum as they appeared to be entitled to on an accounting.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.\*]

Appeal from Common Pleas Circuit Court of Greenville County; Robt. Aldrich, Judge. "To be officially reported."

Action by H. A. Edwards and others against R. E. Johnson. Judgment for complainants for less than the relief demanded, and both parties appeal. Affirmed on defendant's appeal, and reversed on complainants' appeal, with directions.

C. F. Haynsworth, Cothran, Dean & Cothran, and Busbee & Busbee, for plaintiffs. John C. Gittings and Jos. A. McCullough, for defendant.

JONES, C. J. This is an action for an accounting by the defendant to the plaintiffs for their shares in profits alleged to have been realized by the defendant in a certain joint undertaking of the parties, and which the plaintiffs claim to be entitled to recover by reason of the relation of trust alleged to have existed. Both the plaintiffs and the defendant appeal from the decree of Judge Watts, which overruled certain findings and conclusions of the master, and directed judgment in favor of the plaintiffs for the sum of \$100,000.

The appeal by the defendant is upon numerous exceptions to the findings of fact and conclusions of law by the circuit judge, and questions the correctness of the decree, not only as to the right of the plaintiffs to judgment against the defendant for any sum whatever, but also as to the amount for which the defendant can in any event be held liable. The plaintiffs' appeal concedes the correctness of the findings and conclusions of the circuit judgment as to all par-

ticulars, except as to the amount which they are entitled to recover.

[1] It appears that, on or about the 15th day of June, 1904, an agreement in writing, under seal, was entered into between the parties plaintiff and defendant, whereby they associated themselves together for the purpose of making sale of a certain tract of timber land in Dare county, N. C., containing about 169,000 acres; the said agreement embracing the statement that the said lands "are owned by certain parties who desire to dispose of the same, and who have approached the said H. A. Edwards for the said purpose," and also reciting that "said H. A. Edwards has in turn approached H. J. Haynesworth, R. E. Johnson, and W. J. Thackston with the view of effecting a sale thereof." By this agreement, it was covenanted between the plaintiffs and the defendant "that all of the said property, and, if the said lands should at any time be sold through the efforts of any of the said parties, then all profits arising over and above the price paid by the owners, shall be divided in the manner hereinafter indicated." It may be remarked in passing that it is evident from the context that the words "by the owners," in the clause last above quoted, were intended and should be made to read "to the owners."

After reciting in said agreement that the price asked by the owners for the said lands was the sum of \$125,000, and providing that "any commission which the said H. A. Edwards may be able to obtain from the owners out of said price shall go to him individually, this being compensation to him for all expenses heretofore incurred by him and all time spent in investigation of said property," it was stipulated that any other profits should be divided between the parties in the proportion of one-third thereof to the defendant, and the remaining two-thirds to be equally divided among the plaintiffs, and that all expenses incurred in investigating said property and in efforts to make a sale thereof should be borne by the said parties in the same proportions as stipulated for the division of the profits, provided that no such expense should be contracted, unless three of the said parties should consent in advance to the incurring thereof, and that any expense incurred otherwise than with such consent should be borne by the party contracting the same.

Irrespective of any question as to whether the plaintiff Edwards then held any valid option, authorizing the sale by him of the said lands, it is manifest that the provisions of the agreement just recited are such as to constitute a partnership of the plaintiffs in the joint enterprise of endeavoring to sell the lands in question for a price which would net a profit over and above the sum at which the owners were willing to sell. The agree-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment between the parties substantially was that they would each contribute to the expenses of the joint adventure in certain proportions, and would each share in the profits in a like degree. Beyond doubt, such agreement constituted a partnership in a joint adventure. See 30 Cyc. 366, 371. The test of a partnership is the agreement to engage in a common business or adventure, and to share the profits to be realized therefrom, as well as the expenses or losses incident thereto; and there can be no hesitation in reaching the conclusion, which does not appear to be seriously questioned, that the agreement was of such a character as to establish a partnership. 1 Lindley on Partnership (4th Ed.) pp. 15, 18; Williams, Black & Co. v. Connor, 14 S. C. 621.

[2] The fact that the so-called option obtained by the plaintiff H. A. Edwards from the owners of the property may have been without consideration, and may not have been binding upon the signers thereof, has no bearing upon the question of the existence of the partnership between the plaintiffs and the defendant, as no reference is made to such option in the partnership agreement. Nor does the fact that this option may have expired, on or before the 23d of September, 1904, have any such bearing, further than that it may be taken as tending to show how long the partnership was intended to endure. Even, however, if the evidence as to the options be considered as shedding some light upon the last-mentioned inquiry, it has a tendency to show that the parties contemplated the partnership as possibly extending to and beyond the date named.

[3] By the term of this partnership agreement, no limit of its duration was fixed, other than is contained in the provision that "the said parties will use their best efforts to effect a sale of said property, and, if the said lands should at any time be sold through the efforts of any of said parties," then there should be a division of the profits. As there is no definite statement in the agreement as to the date at which the partnership should determine, the term during which it was to continue in existence is a matter of inference from the nature of the engagement between the partners, the contract provisions, and the facts and circumstances surrounding the parties; but, if no such inference of an intention for its continuance for some period can be so ascertained, then the partnership agreement would necessarily be construed as being determinable at the will of any one of the partners, upon notice. 30 Cyc. 417; 1 Lindley on Partnership, par. 218.

[4] Conceding the existence of the partnership prior to that time, it may be important to determine whether it was still in force on the 23d day of September, 1904, when the acts of the defendant were done in alleged violation of the trust relation. In the first place, it appears that the first option was extended to June 25, 1904, but before the

expiration it was extended 90 days from that date, which carried the option to the close of September 23, 1904. Furthermore, language is used in the agreement which tends to show that the parties contemplated that the efforts of the partners in the common enterprise might extend over some considerable period, since the expression used with reference to the time within which a sale of the land might be consummated is the indefinite phrase "at any time," which phrase would seem to involve the meaning by the parties that their agreement should continue in force for such period as might reasonably be necessary to accomplish the purpose of the partnership, or for such time as might reasonably be required to make it appear that such purpose could not be attained.

When the language of the partnership contract is considered with reference to the nature of the engagement undertaken, the limit of the options given by the owners, and the facts and circumstances surrounding the parties, and their acts and conduct at the inception of the common undertaking, it is practically certain that the parties intended that the partnership should endure for a period longer than the 23d of September, 1904, if such longer time should become necessary for the accomplishment of the partnership undertaking. Be this as it may, however, the partnership was nevertheless still in existence on and after the 23d of September, 1904, as, even if it be considered as a partnership for a term entirely indefinite, and therefore determinable at the will of any partner, it had not in fact been determined at the date in question. While a partnership at will is, of course, capable of being brought to an end at the will of any partner, this result can only be accomplished by a notice of such determination, given by the one partner to all of the others, and the partnership continues to exist until such notice is actually given. 30 Cyc. 418; 1 Lindley on Partnership, p. 222.

It is clear from the evidence in the case that no such notice was ever given by defendant; nor was there any intimation to his copartners of intention by him to end the partnership until after September 23, 1904, on which day the acts were done by defendant upon which the plaintiffs seek to hold him to account for the profits realized by him in breach of the partnership engagement. Indeed, there is no evidence that any notice was ever given to plaintiffs by defendant of his intention to end the partnership, and certainly they had no knowledge of any such intention on his part until some time after the date last above named.

On September 23, 1904, during the continuance of the partnership relation, as already found, without the knowledge or consent of the plaintiffs, and in violation of the partnership agreement, acting upon the supposition that there had been an expiration of the

time limit of the option therefor originally held by one of the partners and which had become an asset of the partnership, the defendant, R. E. Johnson, secretly procured from the owners a contract for the sale by them to the said defendant of the same tract of land at the price of \$125,000, of which amount the sum of \$2,000 was agreed to be paid in cash, and was so paid by the defendant; the sum of \$3,000 was to be paid on January 1, 1905; and the balance in five equal semiannual payments thereafter. The evidence shows, not only that this contract was made during the continuance of the partnership, as already stated, but that such purchase had been covertly contemplated by the defendant for some period of time prior to the date of the making thereof, and that some arrangements looking to that end had been previously made by him.

It further appeared that the defendant obtained the knowledge of the facts which enabled him to negotiate the contract solely by reason of the information derived by him through his partnership relations with the said plaintiffs. Having thus obtained for himself individually an interest in these timber lands in abuse of the partnership trust and confidence, in violation of his engagement as a member of the partnership, the defendant forthwith proceeded to promote and assist in the formation of a corporation, of which he himself became the largest stockholder, and which was manifestly designed chiefly for the purpose of purchasing the timber lands in question; and, having duly procured the organization of said corporation with a capital stock of \$5,000,000, on the 14th day of October, 1904, the defendant transferred and assigned to the said corporation his contract for the purchase of the lands aforesaid, and received in exchange therefor fully paid stock of the said corporation of the par value of \$358,000. The proof is by the admissions of the defendant himself, as testified to by witnesses for the plaintiffs, that the stock in this corporation was worth at least par, and that therefore the defendant received from the corporation, as profits on the transaction by which he had obtained the contract for the sale of the said timber lands, the said sum of \$358,000, less the sum of \$2,000, which he had paid to the original owners in part, and on account of the purchase price.

It is argued on behalf of the defendant that the profits here under consideration were realized by him through his own individual exertions after the termination of the partnership engagement and by the expenditure of his own funds, and that no trust relation then existed, by reason whereof the plaintiffs can be held to share in the profits of this transaction. But the conclusions already announced show that, even if the view of the partnership agreement favorable to the defendant should be entertained, and the

partnership were held determinable at will and upon notice by any one partner, yet no such determination thereof had in fact taken place at the time of the acts in question, and that the plaintiffs and the defendant were then and thereafter partners, so as to require the defendant to be held to account for the profits so obtained by him. It is hardly necessary to cite the practically unbroken line of authorities holding that, where partners engage in a common enterprise, each being the agent of the others for the promotion of the common purpose, no one of the partners, during the continuance of the partnership contract, can make a profit to himself in any matter of partnership endeavor, even by the use of his own private funds therein, without being held liable to account to his copartners for his shares of the profits so realized, just as if the undertaking had been in the name of the partnership.

[8] In the work on partnership already mentioned, the rule is well stated as being that a partner "shall never obtain a private advantage at the expense of the firm," and is "bound in all transactions affecting the partnership to do his best for the common body, and to share with his copartners any benefit which he may have been able to obtain from other people, and in which the firm is in honor and conscience entitled to participate." 2 Lindley on Partnership, p. 572; 30 Cyc. 438, 454. There can be no question but that the law holds each member of a partnership to the highest degree of good faith in his dealings with reference to any matter which concerns the business of the common engagement, and that each partner, being the agent of the firm, must be held, during the existence of the relation, to the same accountability as other trustees, in all matters which affect the common interest. Story on Partnership, 174, 178; Mitchell v. Reed, 61 N. Y. 125, 19 Am. Rep. 252; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Henson v. Byrne (Tex. Civ. App.) 41 S. W. 494.

[8] The finding of the circuit judge is fully sustained by the evidence that the defendant did not act in good faith in the partnership relation with the plaintiffs, but that, during the time when it is admitted that the partnership engagement was in force, the defendant secretly formed the purpose of so acting with reference to the partnership interest as to defeat the object of the partnership, and thereafter to obtain for himself the entire benefit which the firm had hoped to realize from a sale of the lands in question. We are satisfied from the evidence that, during the time the partnership agreement was admittedly in force, the defendant not only failed to carry out his agreement with his copartners in good faith, but that he then began a course of deception which was intended to promote his own secret purpose to prevent a sale of

the property by the partnership, in order that he might thereafter be able to do that which eventually he did, and thus obtain for himself the entire profits of such sale. This is shown by the proof as to the secret violation by the defendant, in August, 1904, of the verbal undertaking had by him with his copartners that he would not have any personal interview, correspondence or other dealings with the owners from whom the options had been obtained, by his course of conduct towards his partners thereafter in advising against the purchase by the firm of the property, by the making of arrangements by him for the formation of the corporation which afterwards took title to the lands, and of which he became the principal stockholder, by the fact that, for the second time and without notice to his copartners, he made a journey to the distant city in which the owners of the said lands resided, appearing there on the very day on which he calculated that the option held by the partners would expire, by his making a contract for such purchase on that day in his own name, and by his procuring on that day the preparation and signature by widely scattered corporators of a petition for a charter for the very corporation which shortly afterwards became the purchaser of these lands. In view of these facts, there can be no doubt that, so far from using "his best efforts to effect a sale of the said property" for the benefit of the partnership, as stipulated in the partnership agreement, he had been theretofore and was then engaged in exerting himself solely and entirely in the promotion of his own private ends, with the purpose and intention of depriving them of their shares in the profits to be made by a sale of the lands in question. In equity and good conscience, he cannot be permitted to retain for his own use profits so acquired, but must be held to account for the same precisely to the same extent as if they had been obtained in the name and for the benefit of the partnership. See *Trice v Comstock*, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; *Winn v. Dillon*, 27 Miss. 494; *Plugger v. Overysell*, 11 Mich. 222; *Grumbley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Lockart v. Rollins*, 2 Idaho (Hasb.) 540, 21 Pac. 413; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541.

The cases of *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. 803, *Kennedy v. Porter*, 109 N. Y. 526, 17 N. E. 426, and *Lafferty v. Lafferty*, 174 Pa. 536, 34 Atl. 203, are not in conflict with the proposition just announced, as those cases proceed upon the finding that the trust relation had ended before the acts alleged to be in violation thereof were done, and that there had been no breach of good faith during the continuance of the trust relation.

Our conclusion is also sustained by the ap-

plication of practically the same principles in the cases of *Johnson v. Hayward*, 74 Neb. 157, 103 N. W. 1058, 107 N. W. 884, 5 L. R. A. (N. S.) 118, *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 645, *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 153, *Butler v. Prentise*, 158 N. Y. 49, 52 N. E. 652, *Hayward v. Leeson*, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725, and in other cases in the circuit decree.

[7] But it is urged by the defendant that the plaintiffs were put to an election as to whether they would seek their remedy by an action for an accounting of profits, or by a suit to impress the lands with a trust in their favor, or to have the stock in the said corporation issued to the defendant decreed to be held in trust for the benefit of the partnership; and that by the bringing of certain actions in North Carolina, both in the courts of that state and of the United States, in which the latter remedies were sought before the commencement of this action, the plaintiffs have already elected remedies inconsistent with that which is prayed in the suit at bar. As, however, no such defense was pleaded by answer in this case, it would be sufficient to say that no such issue is made by the pleadings; and hence no such question is presented for determination. The defense being an affirmative one, the requirement of the Code is imperative that the same must be set up by answer, in order to be available to the defendant. See Code of Civil Procedure 1902, § 170; L. Enc. Pl. & Pr. 837; *Henry v. Herrington*, 193 N. Y. 218, 86 N. E. 29, 20 L. R. A. (N. S.) 249; *Roberge v. Winne*, 144 N. Y. 709, 39 N. E. 631. The decree upon this point should therefore be affirmed for the reasons urged by the plaintiffs in their additional grounds in support of the same.

[8] Waiving this consideration, however, it appears from the record that there is no real inconsistency between the remedy sought in the present action and that which some of the parties plaintiff herein endeavored to invoke in the actions heretofore commenced in the courts of such sister state and of the United States; nor was any adjudication had or relief granted upon the merits in any of said former actions. Indeed, it appears that one of the two actions, brought by one or more of the present plaintiffs in the state courts of North Carolina against the defendant, Johnson, and others, and to which the other plaintiff or plaintiffs in the present action were made parties defendant, as well as the third action, commenced by one of the present plaintiffs against the same defendants and the corporation above mentioned in a United States court for the District of North Carolina, were suits seeking substantially the same relief which is sought in the present action, the primary remedy which was invoked in each of the said suits being an accounting, although re-

lief was also prayed by way of a judgment in rem; while the first action was brought by the said H. A. Edwards alone against the parties who had given him the option for the sale of the said lands, and was for the recovery of commissions alleged to be due to him on the sale thereof, being the same commissions recognized by the said partnership contract between plaintiffs and defendants as belonging to said H. A. Edwards alone. As is said in 18 Cyc. 261, "no act is decisive, so as to constitute a conclusive election, unless the remedial right upon which such act is based is irreconcilable with the remedial right which the subsequent action or suit is brought to enforce." It is plain from the record that the remedies invoked in the three actions mentioned were not inconsistent with the relief demanded in this suit.

[9] The appeal of the defendant also assigns error in the circuit decree in the failure to hold that the plaintiffs are barred by laches from now maintaining this suit; such laches being claimed to consist in the delay in bringing this action, and also in the failure of the plaintiffs to tender in due time to the defendant any part of the expenses said to have been incurred by the latter in making sale of the property in controversy.

In order to constitute laches, there must be shown, not merely neglect for a time to enforce a legal or equitable right, where such neglect is for a period short of that which is a bar under the statute of limitations, but it must further be made to appear that such delay was accompanied either by a failure to perform some legal duty, whereby prejudice has resulted to the person pleading such neglect, or that such delay was accompanied by some act on the part of the person so negligent, which operated to mislead the person pleading such neglect, to his prejudice to such an extent that it would be unjust and inequitable thereafter to permit such negligent party to enforce such right. See *Demuth v. Old Town Bank*, 85 Md. 315, 37 Atl. 266, 60 Am. St. Rep. 322; *Ripley v. Seligman*, 88 Mich. 177, 50 N. W. 143; *Selby v. Abithoe*, 4 Maule & S. 462; *Hellams v. Pryor*, 64 S. C. 296, 42 S. E. 106.

The evidence in this case entirely and completely fails to establish the claim that the plaintiffs were guilty of such laches. The evidence shows that, from the time of first receiving information of the action of the defendant in the matter of making a contract on his own account with reference to said lands, the plaintiffs undeviatingly insisted upon their right to a participation in the profits, and repeatedly endeavored to induce the defendant to make a satisfactory settlement. Even the comparatively brief delay in commencing the suits in North Carolina appears to have been induced by the conduct and statements of the defendant himself, which seem to have been calculated

to inspire the hope and belief on the part of the plaintiffs that an amicable adjustment of the matter might be reached.

[10] It was the duty of the defendant to fully account to the plaintiffs for their shares of the profits realized in the transaction by which the lands were disposed of by him, and to pay over to the plaintiffs their respective shares thereof. Failing to do this, it does not lie in his mouth to complain that the plaintiffs did not tender him their proportionate shares of the expenses incurred by him in that transaction. As is shown in the circuit decree, no genuine offer of settlement was ever made by the defendant, and, although it seems that one or more of the plaintiffs were for a time misled by him into the belief that he would ultimately make a fair accounting and settlement, no showing whatever has been made by the defendant of any action on the part of the plaintiffs, or of any negligent delay on their part, by reason whereof he was misled to his prejudice. The decree of the circuit court is regarded as being correct as to all material findings of fact, and as being substantially free from error in its conclusions of law as to the rights of the parties in the relations between them as therein considered, and should be affirmed in all the particulars in which the same is questioned by the exceptions on the part of the defendant.

[11] It remains to consider the appeal of the plaintiffs, by which it is averred that there was error in the conclusion of the circuit court that, by reason of the terms of the prayer for relief of the complaint herein, the plaintiffs were precluded from recovering against the defendant any sum in excess of \$100,000; whereas, as plaintiffs contend, there was no such limitations of the amount sought to be recovered in the prayer of the complaint. By their exceptions to said decree, the plaintiffs further contended that, under the findings of fact of the circuit decree, judgment should have been rendered in their favor and against the defendant for the sum of \$237,333.20, instead of the sum so found by the said decree.

An examination of the complaint will show that it is therein alleged that the interest of the plaintiffs in the proceeds and profits realized by the defendant in the transaction in controversy would amount to "at least \$100,000," and that it was therein further averred that "plaintiffs are entitled to recover said sum against the said R. E. Johnson, and are entitled to have the defendant account for any further sums realized by him." The prayer of the said complaint for judgment against the said defendant is "for the sum of \$100,000, and that he account for any further sums realized by him."

It is apparent, therefore, both from the terms of the allegation as to the accountability of the defendant and from the wording of the prayer for relief, that the circuit judge was in error in the conclusions that



"the prayer of the complaint, after asking for an accounting, seeks judgment for \$100,000," and that "the plaintiffs are therefore limited in their recovery to that sum."

The circuit judge found substantially that the defendant realized a profit of \$356,000 upon the purchase and sale of the timber lands, the same being the cash value of the \$358,000 received in stock therefor by defendant, less the \$2,000 cash paid by him on the purchase price of the lands, and was inclined to allow plaintiffs their full pro rata share of that sum, but under his construction of the complaint limited recovery to \$100,000.

After careful consideration, this court is satisfied that the amount of recovery allowed by the circuit court is fully supported by the testimony, and is well vindicated by the able circuit decree, so far as it goes. We hesitate, however, to give absolute judgment beyond the recovery awarded by the circuit decree, in the absence of a further and fuller showing as to the value of the stock or property acquired by defendant as the result of the transaction under consideration.

The judgment of this court is that the decree of the circuit court be affirmed to the extent of the relief granted, with leave to plaintiffs, if they be so advised, to prosecute this proceeding for further relief in accordance with the prayer of the complaint.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 87)

DU BOSE v. DU BOSE et al.

(Supreme Court of South Carolina. Nov. 20, 1911.)

PROCESS (§ 98\*)—SERVICE—PUBLICATION—ORDER FOR PUBLICATION—SIGNATURE BY CLERK.

An affidavit and order for publication of summons were folded together, and were in the usual form, except that the clerk neglected to subscribe the order until after the publication. He, however, indorsed the character of the paper and the date of filing on the back thereof, to which he signed his name. *Held*, that such indorsement did not constitute a signing of the order, and, there being no signature thereon by the clerk prior to publication, the service was void.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 121-124; Dec. Dig. § 98.\*]

Appeal from Common Pleas Circuit Court of Abbeville County; R. C. Watts, Judge.

"To be officially reported."

Action by Porter Du Bose against Major Du Bose and others. Judgment for plaintiff, and defendants appeal. Reversed.

J. Frank Clinkscales, for appellants. Wm. N. Graydon and J. M. Nickles, for respondents.

WOODS, J. The plaintiff brings this action for the purpose of foreclosing five mortgages covering four tracts of land situated in Abbeville county. Four of these mortgages were made by Major Du Bose, defendant herein, the plaintiff, his brother, and William Du Bose, their father, as co-mortgagors, and were later assigned to the plaintiff, Porter Du Bose. The fifth mortgage was executed by Major Du Bose in favor of the plaintiff. The defendants Boykin Tate and Janie Tate are joined in the cause as the heirs and distributees of Sara Du Bose, widow of William Du Bose, deceased, and R. F. Morris is made defendant as a junior mortgagee. The remaining defendants are the heirs of William Du Bose. The defendants Major Du Bose and R. F. Morris live in this state; the remaining defendants reside in Georgia. After the filing of the summons and complaint and a *lis pendens*, plaintiff applied to the clerk of the court for Abbeville county for an order allowing service to be made by publication upon the nonresident defendants. The affidavit contained the usual allegations, and the order of publication was in the usual form, except that the clerk neglected to sign it at the foot. The two papers, however, were folded together, and on the back of the order the clerk made this indorsement: "State of South Carolina, County of Abbeville. Court of Common Pleas. Porter Du Bose, Plaintiff, v. Major Du Bose et al., Defendants. Affidavit and order of publication. Wm. N. Graydon and J. M. Nickles, plaintiff's Attorneys. Filed December 16, 1910, J. L. Perrin, C. C. C. P." The cause was referred to the master to take testimony, and on March 10, 1911, a decree of Hon. R. C. Watts, circuit judge, was filed, affirming the report of the master, and ordering a sale of the various tracts of land and the application of the proceeds to the satisfaction of the mortgages.

On March 25, 1911, notice was served on plaintiff's attorneys, by J. Frank Clinkscales, Esq., representing the nonresident defendants, of a motion to set aside the judgment entered in the case, on the ground that these defendants "have not been properly served with summons in the above-entitled action." The notice was accompanied by an affidavit of J. L. Perrin, clerk of court, stating that the order for publication of the summons had been signed by him on March 23, 1911. Affidavits were also filed from Elizabeth Tate and Jake Du Bose, two of the nonresident defendants, in which they deny that they have ever received notice of the bringing of the action, and allege further that they have a good and valid defense to the suit. Judge Watts filed an order, on March 31, 1911, refusing to set aside the

summons and open the judgment, and from this order the movants appeal.

The first question is whether the failure of the clerk to sign the order of publication was a fatal defect, which was not cured by his indorsement on the back of the paper, or by his signature after publication had been made. The rule that the statutory requirements as to constructive service by publication must be strictly carried out does not mean that any irregularity, however slight, is fatal. But it seems clear that the signing of the order after publication was unavailing, because the statute expressly requires that the order shall be the basis of the publication. We cannot help thinking that it is yielding much to technicality to hold that the indorsement, written on the back and signed by the clerk, that the paper was an order of publication was not in substance a signing of the order, within the meaning of the statute. A paper, in form a decree of a judge, is in fact his decree, if the judge, omitting to sign at the foot, writes and signs a statement on the back that it is his decree. But it has been decided that, when an officer is performing the ministerial duty of issuing a paper on compliance with certain conditions prescribed by law, his signature at the foot of the paper he intended to sign is necessary to its validity. In *Davis v. Sanders*, 40 S. C. 507, 19 S. E. 138, a magistrate, intending to "issue" a warrant of arrest, inadvertently failed to sign at the foot of the paper, but indorsed it: "The State of South Carolina, County of Sumter. The State v. Murray Davis, Lafayette Davis, Joshua Davis. Arrest warrant. Offense, resisting an officer. C. C. Manning, trial justice. Officer, sheriff. Date Jan. 27, 1893." The court held that the warrant was not "issued" as required by law, and conferred no authority on the sheriff to make the arrest, because the magistrate did not sign at the foot as he intended to do, and because he did not intend the indorsement on the back as his signature of the warrant. This authority is controlling, for in this case, also, it is evident that the clerk intended to sign at the foot, and did not intend the signature on the back to be his signature of the order. The case of *Davis v. Sanders*, it is true, involved a warrant of arrest, but the principle and rule on which it was decided does not apply more strongly to a criminal proceeding than to the methods of acquiring jurisdiction over nonresidents without personal service of the summons.

The judgment of this court is that the judgment of the circuit court be reversed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(69 W. Va. 550)

SMITH'S ADM'R v. NELSON BROS. & CO.  
(Supreme Court of Appeals of West Virginia.  
Oct. 24, 1911.)

(Syllabus by the Court.)

1. PROCESS (§ 6\*)—AMENDED DECLARATION—NECESSITY.

Where an amended declaration, not presenting a new cause of action, is filed by leave of the court, and remanded to rules, process thereon is unnecessary, and it may be regularly proceeded with by rule to plead, either to an office judgment, or an issue, without service of summons to answer the same.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 5; Dec. Dig. § 6.\*]

2. JUDGMENT (§ 17\*)—AMENDED DECLARATION—NECESSITY OF SERVICE—REMOVAL FROM COUNTY.

The removal by defendants to a county other than that in which suit is brought, after service of process on them to answer the original declaration, and where they then resided, will not deprive the court of jurisdiction to proceed to judgment against them on such amended declaration, though served with new process, directed to and served on them by the sheriff of the county to which they may have removed, and their plea in abatement to such amended declaration should be rejected, or stricken out.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 17.\*]

Error to Circuit Court, Randolph County.

Action by Thaddeus Pritt, Sheriff, etc., against R. L. Nelson and others, partners as Nelson Bros. & Co. Judgment for defendants and plaintiff brings error. Reversed and remanded.

W. H. Griffith and Cunningham & Stallings, for plaintiff in error.

MILLER, J. In an action on the case, brought in Randolph County, for damages for breaking and entering the plaintiff's close, and cutting down and removing the growing timber, plaintiff had leave, in term, without objection by defendants, duly served with process on the original declaration, in the county where suit was brought, and appearance thereto by them, to file an amended declaration, and on the filing thereof the same was remanded to rules, as the order recited, "for process thereon."

After process on the original declaration was executed, and before process issued on the amended declaration, defendants removed from Randolph to Harrison County, and the process on the amended declaration, directed to the Sheriff of that County, was executed upon them there.

On the return day of the writ on the amended declaration, defendants appeared at rules, and filed a plea in abatement, alleging that before and at the commencement of said action upon the amended declaration, and at the time of the issuance of the summons thereon, they were and continued to be residents of Harrison and not Randolph County, and that said process, directed to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the Sheriff of Harrison County, had been served upon them in that county, and not in the county of Randolph.

On the trial of said plea, and the motion of the plaintiff to strike out the same, the motion was overruled, and the further judgment of the court was, that the process on the amended declaration be quashed and that the plaintiff's action upon his amended declaration be and the same was dismissed. The present writ of error is to review that judgment for alleged errors therein.

Defendants below, defendants in error, have entered no appearance in this court, and no brief or argument had been filed on their behalf. The amended declaration, which the plaintiff was permitted to file, is for identically the same cause of action pleaded in the original declaration, and no point seems to have been made in the court below, and none is made here, on that score.

[1, 2] The ruling question presented, therefore, is, was process on the amended declaration necessary to give the court below jurisdiction of the parties? We believe it to be the practice in some counties to award process on amended declarations, but whether this is necessary to maintain, or give jurisdiction of the parties, properly served with process on the original declaration, we do not find has ever been adjudicated in this state, but in Virginia and in other states is has.

Back in 1840, Judge Tucker, in *Couch v. Fretwell*, 10 Leigh (Va.) 578, said: "The judgment in this case is altogether irregular. The cause having been remanded to the rules, to enable the plaintiff to amend his declaration, ought to have been there regularly proceeded in, upon the filing of the declaration, *by rule to plead, &c., to an office judgment or an issue.* Parties indeed may amend their pleadings in court, where they are willing and consent to make up an issue there; but there can be no judgment by default for want of a plea, except at the rules." The judgment below was reversed and the case remanded, with direction to the court below to send it back to rules for proceedings there to be had in accordance with the directions given. There was no intimation that process on the amended declaration was necessary.

In *Norfolk & W. Ry. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465, a later Virginia case, it is distinctly decided that on remanding a cause to rules, and after the filing of an amended declaration it may be regularly proceeded with, by rule to plead, either to an office judgment or an issue, without the service of a summons to answer the amended declaration, and the court, at page 466, says: "The reasons in favor of the practice that new process is not necessary in such a case seem to us to be much stronger than those against it. The defendant is already a party to the action and in court. The object of the writ of summons is to ap-

prise the defendant of the nature of the proceedings against him. *New River Min. Co. v. Painter*, 100 Va. 507, 509, 42 S. E. 300, and cases cited. Where he is in court and knows what the proceeding is, why should the plaintiff be put to the expense and delay of having new process issued and served upon the defendant to inform him of what he already knows? Again, if it be necessary to issue and serve process upon him to answer the amended declaration, it might frequently result in defeating the plaintiff's action entirely, because the defendant might be a nonresident of the state, upon whom such process could not be served; or he might be a resident of another county or city of the state upon whom process could not be executed, under the prohibition of section 3220 of the Code of 1904 that process against a defendant to answer any action brought under section 3215 of the Code of 1904 shall not be directed to an officer of another county or corporation than that wherein the action is brought, except in certain cases.

"The proper practice in such a case is, we think, for the plaintiff to file his amended declaration at the first rules after the order of the court remanding the case to rules, and then, without new process, for the cause to be regularly proceeded in at rules in the manner provided by sections 3239 and 3240 of the Code of 1904. See *Couch v. Fretwell*, supra; *Alvis v. Johnson* [1 Va. Dec. 381], supra; 1 Rob. Pr. (old) 233; 4 Min. Inst. (3rd Ed.) 684." Mr. Minor says, at the page cited by the Virginia Court: "*Of this rule or order (the rule or order to plead entered at rules) the defendant, in all actions, including ejectment, is bound to take notice, as he is also of all that passes in court or at rules, after he has been once summoned.*"

The rule in Virginia is the same in other jurisdictions. In 3 Am. & Eng. Enc. L. & P. 799, citing in notes many cases, it is said: "The rule seems to be well settled that where parties have once been brought under the jurisdiction of the court, they are there for all purposes, and amendments of the pleadings thereafter will not require a new service of process. This rule is especially applicable where the amendment is in effect merely formal in its nature and does not set up any new cause of action or work any substantial change in the cause of action already alleged. But it has been said that where the amendment touches a matter of substance, the court may order new process to be served."

Among the cases cited in the notes in 3 Enc. L. & P. is *Stevens v. Thompson*, 5 Kan. 305. The court in this case says, apropos to the case at bar: "The reissue and service of the summons can have no bearing on this question (the question whether Stevens was in default), for the summons had already performed its functions of bringing

the parties before the court and it can serve no other purpose." Our statute like the Kansas statute permits amendments by plaintiff of his declaration or bill at any time before or after appearance by defendant, if substantial justice will be promoted thereby.

Section 12, chapter 125, Code 1906, is somewhat different from the statute of Virginia, at the time of *Couch v. Fretwell*, supra, and from the present statute of that state, covering the subject of amendments to pleadings, but so far as our statute relates to amendments allowed by the court in term, and of which a party must at all times take notice, it is not materially different. It differs from the statute of the old state in providing that "The plaintiff may also at any time before or after the appearance of the defendant, in the vacation of the court wherein the suit is pending, file in the clerk's office, with the other papers in the cause, an amended declaration or bill, supplemental bill, or bill of revivor; whereupon the clerk shall issue a summons against the defendant, requiring him to plead to, or answer such amended declaration or bill." Clearly this provision was intended to cover amendments made in the vacation of the court, without the previous leave of the court, and of which a party would not be presumed to have notice. Another statute, section 8, chapter 131, Code 1906, permits amendments even at the trial, for variance between the evidence and allegations or recitals, and the practice in such cases is, where substantial justice will be promoted thereby, to permit such amendments, without continuance, or intermission in the trial, unless such continuance is thereby rendered necessary.

The judgment below will be reversed, and the case remanded to the circuit court, with directions to re-instate the same on the docket, to strike out defendants plea in abatement to the amended declaration, and to be further proceeded with, in accordance with the directions given, and further according to rules governing courts of law.

(69 W. Va. 544)

GRAY et al. v. MANKIN.

(Supreme Court of Appeals of West Virginia.  
Oct. 24, 1911.)

(Syllabus by the Court.)

**1. JUDGMENT (§ 111\*) — DEFAULT — OFFICE JUDGMENT.**

It is only in actions wherein no writ of inquiry is requisite that office judgment becomes final so as to bar counter affidavit and plea at a subsequent term.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 202; Dec. Dig. § 111.\*]

**2. APPEAL AND ERROR (§ 907\*) — REVIEW — PRESUMPTIONS.**

When the record does not exhibit a counter affidavit, tendered and refused in a case in which counter affidavit is admissible under Code 1906, c. 125, § 46, it must be presumed

that the same was so defective as to justify the refusal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 907.\*]

**3. APPEAL AND ERROR (§ 1040\*) — REVIEW — HARMLESS ERROR.**

Refusal to consider a properly interposed demurrer cannot be ground for reversal when the record shows that the demurrer was not well taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

**4. APPEAL AND ERROR (§ 1073\*) — REVIEW — HARMLESS ERROR.**

A judgment entered as upon an office judgment confirmed, in a case in which a writ of inquiry is proper, while technically irregular as to procedure, is not reversible when the record shows that no jury was demanded and the same judgment must have been entered on inquiry of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. § 1073.\*]

Error to Circuit Court, Raleigh County.

Action by W. R. Gray and others against Crockett Mankin. Judgment for plaintiffs, and defendant brings error. Affirmed.

Matheny & Hutchinson, for plaintiff in error. W. H. Rardin, for defendants in error.

ROBINSON, J. By this writ of error Mankin seeks to reverse a judgment against him, in favor of W. R. and J. E. Gray, as partners. The action is one in debt. With the declaration plaintiffs filed an affidavit of the amount claimed, pursuant to Code 1906, c. 125, § 46. The trial court, evidently considering that there was a final office judgment by reason of the filing of this affidavit, refused to receive a demurrer to the declaration which defendant tendered at a term subsequent to that at which an office judgment in the case would become final, if a final one were proper. The court also refused to allow the defendant to file his counter affidavit and set off account, both of which were tendered for the first time at that subsequent term. No jury being demanded by either party, the court entered judgment for the amount claimed in plaintiffs' affidavit, as upon an office judgment confirmed.

On proper exceptions saved, defendant assigns that it was error to refuse consideration of his demurrer to the declaration, to refuse the filing of his counter affidavit and set off account, and to enter judgment as upon an office judgment confirmed. Some other assignments of error are made, but they are so clearly untenable that we need not notice them in this opinion.

[1, 2] There was no such final office judgment in the case that a counter affidavit could not be filed at the subsequent term. The action was debt on a mere open account, not on a bond or writing, and a writ of inquiry was requisite. Code 1906, c. 125, § 45;

4 Minor's Inst. (3d Ed.) 724; Hunt v. McRea, 6 Munf. (Va.) 458; Shelton v. Welsh, 7 Leigh (Va.) 175. In such case a defendant may file his counter affidavit and plea at any time before the writ of inquiry is executed. Carey Mfg. Co. v. Watson, 58 W. Va. 189, 52 S. E. 515. It is only in cases wherein no writ of inquiry is necessary that the office judgment becomes final so as to bar a counter affidavit and plea at a subsequent term. Still, though this case was one for a counter affidavit, we cannot say that the court erred in not admitting the counter affidavit tendered. The record does not exhibit that counter affidavit. Its exclusion may have been justified on tenable ground other than the untenable one that it came too late. It may not have been a good and sufficient affidavit—one in compliance with the statute. Defendant does not show us by the record that the counter affidavit was one that should have been admitted. In the absence of that showing, we must presume that its exclusion was warranted. And, of course defendant was not entitled to file his offset account until he had filed a sufficient counter affidavit. The exclusion of the one on proper ground was the warranted exclusion of the other.

[3] However, defendant insists that his demurrer to the declaration was not a plea to issue and should have been considered, counter affidavit or no counter affidavit. That may be true. We need not digress on this subject. It suffices to say that if the point is well taken, no harm came to defendant. A careful consideration of the declaration convinces us that a demurrer thereto, if it had been admitted, would rightfully have been overruled. Defendant suffered no prejudice in the exclusion of his demurrer. The declaration is sufficient.

[4] Technically, we may say, it was not proper to enter a judgment in this case as upon an office judgment confirmed. The case was not of the character to warrant that procedure. It demanded the execution of a writ of inquiry. But the execution of such writ was all that remained to be done when defendant, so far as we can see from the record, was properly denied the filing of a counter affidavit. The amount due plaintiffs remained to be determined by executing the writ of inquiry which the nature of the case made requisite therein. That amount was determinable by plaintiffs' affidavit since nothing else was offered as on inquiry of damages. No jury was required on this inquiry, since the record discloses no demand for one by either party. Code 1906, c. 131, § 7. The judgment which the court did enter was exactly the amount claimed by plaintiffs in their affidavit. So the same judgment was reached by the court that it must have reached under the form of executing a writ of inquiry. Defendant has not been

prejudiced by styling the judgment one on an office judgment confirmed, since the same judgment would have been entered against him on an inquiry of damages. The court virtually executed an inquiry of damages and followed a finding therein to judgment.

There is no error in the record prejudicial to defendant. The judgment will be affirmed.

(69 W. Va. 547)

# STATE v. WELCH.

(Supreme Court of Appeals of West Virginia.  
Oct. 24, 1911.)

(Syllabus by the Court.)

## 1. WEAPONS (§ 17\*)—CARRYING WEAPONS—ELEMENTS OF OFFENSE.

An indictment for carrying a revolver, under Code 1906, c. 148, § 7, as amended by Acts 1909, c. 51 (Code Supp. 1909, c. 148, § 7 [section 4338]), must charge that the act was done without a state license therefor.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 20-33; Dec. Dig. § 17.\*]

## 2. INDICTMENT AND INFORMATION (§ 70\*)—REQUISITES OF ACCUSATION—DIRECTNESS AND POSITIVENESS.

In an indictment every fact necessary to constitute the crime intended to be charged must be directly and positively alleged.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 192; Dec. Dig. § 70.\*]

## 3. INDICTMENT AND INFORMATION (§ 93\*)—REQUISITES OF ACCUSATION—UNLAWFUL NATURE OF ACT.

The omission of essential matter in the description of the offense intended to be charged in an indictment cannot be supplied by a charge therein that the act was committed "unlawfully."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 266, 267; Dec. Dig. § 93.\*]

Error to Circuit Court, McDowell County. Frank Welch was convicted of carrying a revolver, and brings error. Reversed, and defendant discharged.

Cook, Litz & Howard, for plaintiff in error. James A. Seaman, for the State.

ROBINSON, J. Frank Welch complains that a judgment sentencing him to fine and imprisonment for carrying a revolver is erroneous. Our consideration of the case leads us to the conclusion that his motion to quash the indictment should have been sustained. The trial court clearly erred in refusing to quash the indictment. No violation of law is charged against him.

[1] The indictment merely charges that Welch, on a certain day, in the county in which the presentment was made, "did unlawfully carry about his person certain revolvers and other pistols, against the peace and dignity of the state." Now, these words do not make a statement that Welch transgressed the law; for, under the statute, one

may carry a revolver or pistol in a legal way. The charge in the indictment does not state facts sufficient to show that Welch carried a revolver illegally. It simply says that he carried a revolver. He could carry a revolver and not violate any law, if he had a state license under the law now in force, and which was in force at the time alleged in the indictment. Acts 1909, c. 51; Code Supp. 1909, § 4338. The indictment does not, by a charge of facts, show whether he carried a revolver legally or illegally. In failing to state facts showing that Welch illegally carried a revolver, the indictment is bad. An indictment under the statute cited must allege that the accused carried the weapon without having a state license so to do. If it does not allege the fact that the accused had no state license, it clearly does not state a case against him; for, the fact of the absence of a state license is an affirmative element in the description of the offense against which the statute provides. The words "without a state license therefor" are plainly used in the statute in describing the offense. The want of a state license is the very gist of the offense. Indeed the statutory offense cannot be charged without using these words. The words "without a state license therefor" are really not used in the statute as an exception or proviso, but as words directly descriptive of the offense. Were we, however, to consider the words as an exception or proviso in the act prohibiting the carrying of weapons, then the well known rule of criminal pleading would apply: "Where the statute has exceptions, provisos, and the like, the indictment on it must aver the contrary of those the negative whereof constitutes an affirmative element in the offense." Bishop, Crim. Pro. (3d Ed.) § 631.

[2] A charge cannot be made in an indictment by mere implication, intendment, or conclusion. Facts constituting an offense must be stated. Every fact necessary to constitute the crime must be directly and positively alleged. 22 Cyc. 293, 326; 1 Bishop, Crim. Pro. (3d Ed.) 519. In an indictment for the offense of carrying a revolver, there are two very essential facts that must be stated. One of these facts is that the accused carried a revolver, and the other is that he had no state license so to do. Unless both facts are stated, no crime is charged, for it takes both to constitute the violation of the law as described by the terms of the statute.

[3] The use of the word "unlawfully" does not make the charge sufficient. It has been suggested that this indictment states that the accused unlawfully carried a revolver, and that, therefore, it indirectly charges that he had no state license. But no such indirect method of accusation will do. "The omission of material matter in the descrip-

tion of an offense cannot be supplied by a charge that the act was committed 'contrary to law,' or 'unlawfully,' or 'against the peace,' etc." 22 Cyc. 326. In point are also the following: 2 Hale's Pleas of the Crown (1st Amer. Ed.) 169; Chitty on Crim. Law (5th Amer. Ed.) 281; State v. Helm, 6 Mo., side page 263; Redfield v. State, 24 Tex. 133; State v. Casey, 45 Me. 435; State v. Stroud, 99 Iowa, 16, 68 N. W. 450. In Roberts' Case, 10 Leigh (Va.) 686, it was held that the indictment was defective in not stating essential facts constituting the crime, though the charge was that the act was "unlawfully" done. And in Bishop's Case, 13 Grat. (Va.) 785, it was held that the words "contrary to law" could not supply an omission in stating facts material to show that an offense had been committed. Judge Lee there said: "These terms in an indictment serve to preclude all legal cause of excuse for the act imputed, but never to enlarge or extend the force and effect of those employed to describe it so as to make the act unlawful when it is not so by the description itself."

The judgment against the defendant will be reversed, the verdict on which it is based set aside, the indictment quashed, and the defendant discharged.

(69 W. Va. 611)

#### MORGAN v. MOORE et al.

(Supreme Court of Appeals of West Virginia. Oct. 24, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 980\*)—TAX SALE—FAILURE TO RECORD TAX LIST.

Points of syllabus in Ritchie Lumber Co. v. Nutter, 66 W. Va. 444, 66 S. E. 646, reaffirmed and applied.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 980.\*]

Appeal from Circuit Court, Wood County.

Bill by George P. Morgan against S. P. Moore and others. Decree for plaintiff, and S. P. Moore appeals. Affirmed.

Hiteshew & McDougale and James A. Watson, for appellant. F. P. Moats, for appellee.

WILLIAMS, P. This is a suit to enjoin W. E. Stout, clerk of the county court of Wood county, from making a tax deed to S. P. Moore, claimant, under a tax sale, of three-eighths of a certain lot of land in the city of Parkersburg, sold on the 2d day of January, 1906, for city taxes delinquent for the year 1902. It does not appear to have been delinquent for either state or county taxes. On the 18th of June, 1908, the circuit court of Wood county perpetually enjoined the execution of a deed, and declared the tax sale void. From that decree, S. P. Moore has appealed.

Jennie E. Johnson was the owner of the land, and conveyed it to George McDonald by deed, dated March 14, 1902, which was not recorded until May 16, 1902. It was therefore properly assessed with taxes in the name of Jennie E. Johnson for the year 1902, and was returned delinquent by the city collector, and the return approved by the city council on the 12th of October, 1904, and ordered to be certified to the State Auditor for sale according to law. But, after the delinquent list was approved by the city council, a copy of it was not filed with the clerk of the county court; nor was it recorded by him, as provided by section 37 of the city charter. It appears that the delinquent list was recorded by the city recorder in a book which was usually kept in the county clerk's office, but which it was the custom of the city recorder to take from the office and retain in his own possession, so long as it was necessary, in order to make entries therein. But the entries were not signed by the clerk or his deputy; nor were they attested in any manner, so as to make such entries records of the county clerk's office. The keeping of a book in the county clerk's office containing entries, not made or attested by the clerk, is not a recording by the clerk in his office, within the meaning of section 31 of the amended charter of the city of Parkersburg, passed by the Legislature in 1903 (Laws 1903, c. 66). And the recordation of the delinquent list in the county court clerk's office is one of the essential prerequisites to the right to sell land for delinquent city taxes. The omission of this important step defeats the tax sale. This identical question was decided by us in *Ritchie Lumber Co. v. Nutter*, 66 W. Va. 444, 66 S. E. 646. This case is governed by the principles announced and the points decided in that case; we adhere to those principles, and it is unnecessary to repeat the discussion of them here.

We see no error in the decree appealed from, and will affirm it.

(69 W. Va. 598)

**RALEIGH LUMBER CO. v. WILLIAM A. WILSON & SON.**

(Supreme Court of Appeals of West Virginia. Oct. 24, 1911.)

*(Syllabus by the Court.)*

**1. CONTRACTS (§ 169\*)—CONSTRUCTION—EXTRINSIC MATTERS.**

To ascertain the intent of the parties to a contract, respecting a portion thereof, stated in general and indefinite terms, reference may be had to the subject-matter, the situation of the parties, their aims and purposes and the circumstances, as well as the other provisions of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 752; Dec. Dig. § 169.\*]

**2. LOGS AND LOGGING (§ 34\*)—SALE OF LUMBER—CONSTRUCTION OF CONTRACT.**

Under a contract of sale of a large quantity of lumber by a manufacturer thereof to a dealer for resale in the market, providing for certain percentages of the entire quantity in certain lengths, and stipulating for widths by the use of the phrase "4 to 12" wide," the vendor is bound to furnish in all large shipments reasonable percentages of all widths and lengths covered by the contract, if demanded by the vendee.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 104-111; Dec. Dig. § 34.\*]

**3. LOGS AND LOGGING (§ 34\*)—SALE OF LUMBER—PERFORMANCE OF CONTRACT.**

In such case, refusal of the vendor to deliver a portion of the amount sold, because the vendee declined to receive a large portion of it in a single installment, containing only narrow and short boards, constitutes a breach of the contract.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 104-111; Dec. Dig. § 34.\*]

**4. SALES (§ 348\*)—ACTION FOR PRICE—SET-OFF—PROFITS.**

Gains or profits of the vendee, prevented by such breach, may be recouped in an action for purchase money of the lumber furnished under the contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 973-986; Dec. Dig. § 348.\*]

**5. CUSTOMS AND USAGES (§ 10\*)—EFFECT ON CONTRACT.**

In an action involving the interpretation of a contract, a custom or usage, consistent with the terms of the contract, peculiar to the subject-matter thereof, known to the parties, and probably intended to be included in the contract, as shown by their situation and purposes, the nature of the subject-matter, and the attendant circumstances, is admissible in evidence.

[Ed. Note.—For other cases, see *Customs and Usages*, Cent. Dig. §§ 11-39; Dec. Dig. § 10.\*]

**6. WITNESSES (§ 237\*)—EXAMINATION—ASSUMPTION AS TO FACTS.**

If, on the trial of an action for damages for a breach of contract, the breach appears, as matter of law, from undisputed facts and circumstances, the court may permit an attorney, in examining witnesses as to the quantum of damages, to assume the existence of the breach.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 829-832; Dec. Dig. § 237.\*]

Error to Circuit Court, Ohio County.

Action by the Raleigh Lumber Company against William A. Wilson & Son. From the judgment, plaintiff brings error. Affirmed.

Hubbard & Hubbard, for plaintiff in error. Russell & Russell, for defendants in error.

POFFENBARGER, J. The plaintiff in error complains of the allowance of a deduction, by way of recoupment, of about \$400 from the amount claimed in its action of assumpsit against the defendants in error, to recover the purchase price of lumber sold and delivered to them. The matters in difference were submitted to a jury, and most of the numerous assignments of error relate to rulings made in the course of the trial,

all of which will be better understood after a statement of the facts and the positions assumed by the parties.

The plaintiff, engaged in the manufacture and sale of lumber, undertook to furnish the defendants, general dealers in that commodity, 400,000 feet of two-inch hemlock lumber, within the reasonable period of about four months. The contract was evidenced by letters. Before any lumber had been delivered or accepted under it, a controversy arose as to the mode of execution. While all the lumber was to be two inches thick, different lengths and widths were provided for or contemplated. On the 10th of November, 1905, the plaintiff tendered to the defendants 166,239 feet of lumber, ranging from 10 to 18 feet in length, but having only two widths, namely, 4 inches and 6 inches. Near the same time, the defendants made an order on the plaintiff for 157,000 feet, ranging in lengths from 10 to 20 feet, and in widths from 4 to 12 inches. The offer and order were both by letter, and passed each other in transmission. The defendants declined to accept the lumber offered, but said so much of it as was covered by their order for lumber, about 30,000 feet, would be received. Thereupon the plaintiff gave notice of its intention to sell this particular lumber to other parties, and deduct it from the amount which it had obligated itself to furnish the defendants. Against this there was a protest, and thereafter lumber was furnished and accepted from time to time until the defendants had received about 263,000 feet. The plaintiff refused to deliver any more, and the defendants, insisting that the contract had not been fully performed, demanded an additional 137,000 feet, at the prices stipulated in the agreement, and gave notice of their intention to claim damages for breach of the contract in the case of refusal on the part of the plaintiff. Confident of the correctness of its interpretation of the contract and lack of any breach on its part, the plaintiff declined to furnish more. At the time this action was brought, all of the purchase money for the lumber actually delivered had been paid, except \$965.75. Estimating their damages at \$473.74 and interest, the defendants paid into court \$511.69, and declined to pay the balance. They filed with their plea an account, designated as one of set-off, claiming the difference between the contract prices of the undelivered lumber and the subsequent market prices within the life of the contract. The judgment, conforming to the verdict, was for \$61.69.

The most important provisions of the written offer and acceptance, constituting the contract, read as follows: "In accordance with our talk with your Mr. Smith, this a. m., we propose to furnish you 400 M ft. of 2" hemlock lumber, 10 to 20' long and 4 to 12" wide, in about the following proportions: 35% 14' and under long; 35% 16' long; and 30% 18 and 20' long." The reply

was: "In reference to proposition made our Mr. Smith in confirmation of same under date of the 30th ult., beg to state that we will accept your proposition to furnish us 400,000 ft. of 2 in. hemlock sizes, as enumerated in your letter and also at the price which you made." The third letter says: "We have your favor of Oct 2, and have entered your order for the 400 M ft. of 2" hemlock." It further appears from this correspondence and other evidence adduced that the plaintiff expected to furnish the lumber in installments, as manufactured, within about four months; that the defendants desired a larger percentage of 18 and 20 foot lumber than the contract provided for; and that the plaintiff knew the defendants were general dealers in lumber, buying to resell, not to store for use. A condition of the contract named in the first letter was that shipping directions should be furnished as fast as the stock should be ready for loading. The defendants bound themselves to remove it as fast as it should be prepared for shipment.

The defendants refused the lumber tendered November 10, 1905, because, in their opinion, it contained an undue percentage of short lengths and narrow widths, protesting their inability to handle the lumber in that form advantageously, and insisting upon their right to a reasonable percentage in each installment of all widths and all lengths, to enable them to dispose of the lumber in the market as the market called for it. They further insisted that the narrow widths and short lengths were the less desirable portions of the lumber contracted for, and not salable at a fair price, unless mixed with lumber of greater dimensions in length and breadth. The contract allowed 140,000 feet in short lengths. The lumber of these lengths tendered as the first installment amounted to about 104,000 feet. As stated, it had only two dimensions in width, four and six inches. The contract did not guarantee any percentage of any particular width, but it did contemplate lumber ranging in width from four to twelve inches. The plaintiff insisted upon its right to furnish its full percentage of any lengths all at one time and any width it saw fit. As the material facts are practically uncontroverted, the construction of the contract was a legal question, which, no doubt, the court would have settled, had it been called upon to do so. The settlement of that question will dispose of practically all of the assignments of error.

[2. 3] We have said the defendants were dealers in lumber, buying to resell in the market. The evidence fully establishes this. Presumptively the plaintiff knew it, but we are not left to mere presumption. The letter of acceptance clearly indicated it, saying, "You are no doubt aware that on an ordinary order the percentage of 18 and 20 ft. stock is usually a little more than 14 ft. and under;" and, again, "We are just completing



an order of two million feet of hemlock now, we had with one mill this summer." Before these letters were written, the agent of defendants conferred with plaintiff's representatives, and the contract was then made. The conversation between them is not in the record, but it must be presumed that, in making a contract for six or eight thousand dollars worth of lumber, the plaintiff previously obtained some knowledge of the character and business of the vendees. It must have known, therefore, the disadvantages to the vendees of the kind of performance it offered, and that no such thing was contemplated by the latter in entering into the agreement. In undertaking to furnish them with lumber for sale in the general market, it impliedly, if not expressly, agreed to furnish the lumber in a condition suitable for disposition in the general market. The specifications of widths and lengths and percentages of lengths fairly indicate the kinds of lumber desired and expected by the defendants. The failure to stipulate for certain percentages of widths was clearly not a waiver of all right on the part of the vendees in respect to that. Nothing in the contract or circumstances indicates intent on their part to make a one-sided contract in regard to widths. They stipulated as positively for twelve-inch widths as for four-inch widths, and also for the intermediate widths. The nature and purpose of the contract and all the circumstances must be taken into consideration. Failure to stipulate for quantities of certain widths left the plaintiff free from obligation to furnish any certain percentage of the lumber in any width, and prevented the defendants from demanding it; but the latter were entitled to have, and the former was bound to furnish, reasonable percentages of the lumber in all of the widths contemplated, and in all of the installments in which deliveries were made. What would have been a reasonable percentage would have been a question of fact for a jury, had a controversy arisen involving that question.

[1] If the language of a contract or agreement is on its face ambiguous, the courts will look at the surrounding circumstances, at the situation of the parties, and the subject-matter of the contract for aid in giving a construction to its language. *Titchenell v. Jackson*, 26 W. Va. 460; *Heatherly v. Bank*, 31 W. Va. 70, 5 S. E. 754; *Caperton's Adm'r v. Caperton's Heirs*, 36 W. Va. 479, 15 S. E. 257; *Scraggs v. Hill*, 37 W. Va. 706, 17 S. E. 185; *Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692; 9 Cyc. 587. The court is not limited in the interpretation of the contract to the mere letter of its words. Its spirit and purpose may be considered. We may here repeat the observation made in *Gas Co. v. Oil Co.*, 56 W. Va. 402, 49 S. E. 548: "This method of interpreting the contract may, to some extent, seem to go beyond its terms, in dealing with them in the light of the subject-matter, the situation of

the parties, the purpose of the contract, the attendant circumstances, and the conduct of the parties, but, when the terms of an instrument are uncertain or indefinite, it is proper to do so." That which is not inconsistent with the terms of a written contract and plainly within its purpose, as indicated by the situation of the parties and all the circumstances, may be supplied, or treated as included in it. Such construction does no violence to the terms of the contract. This agreement is silent upon the subject of percentages of widths. From this a mere slight implication arises against the conclusion here stated, but it is only an implication, and, being such, the plain intent of the parties, deduced from their purposes, their situation, and all the circumstances, completely overthrows it. "Where a manufacturer contracts to sell to a dealer or middleman, who buys, as the manufacturer knows, to sell again, there is an implied warranty on the part of the manufacturer that the thing sold shall be reasonably fit for the purpose for which it is made, and for which the dealer intends to sell it." 12 A. & E. Enc. L. 1235. Of course, this relates to quality, but it applies the principle here enforced. Though perhaps not so material as quality, assortment or condition was, under the circumstances of this case, vital to the vendees. Absence thereof deprived them, in large measure, of the benefit of their contract.

[5] Under the designation of "custom," the defendants were permitted to prove that, in the execution of such contracts as the one involved here, the buyer demanded and the seller furnished the lumber in installments, containing reasonable percentages of the lengths and widths contemplated. Their knowledge of the subject was derived chiefly from their own practice and experience in the business. This evidence was objected to, on the ground that the witnesses had not shown themselves qualified to testify to it as a usage or custom, and also that it failed to prove one. The designation of the evidence as that of custom, usage, or practice was to some extent, a misnomer and misinterpretation of it. To a very considerable extent, it was proof of the market conditions contemplated by the contract, and in view of which it was made. The witnesses stated these conditions and their experience under them. If, however, they correctly designated the practice, and it amounted to a usage or custom, they were qualified to testify on the subject, by their experience and knowledge. Smith said he had had experience with the sawmill people of every state. W. A. Wilson's testimony showed extensive experience in the lumber business and great familiarity with timber and lumber transactions. Moreover, his competency seems not to have been questioned. The custom, usage, experience, description of methods of manufacture, shipment, and sale, or whatever it may be, strictly considered, harmonizes with the legal con-

struction of the contract, and was relevant, material, and admissible.

An exception was taken to the action of the court in sustaining an objection to a question, asking a witness whether there was a custom, giving the buyer right to dictate sizes to be shipped, in the case of a contract like the one in question. Though the court sustained such an exception, the question was repropounded in different form, and answered. The action of the court in sustaining an objection to a question of the same kind, relating to the first shipment under such a contract, is also complained of. The cross-examination on this subject was very lengthy, and the questions propounded in numerous ways. A great many answers were given, some of which we think would cover this question. Whether they do or not, the defendants were not prejudiced by this ruling. Nor was there any error in refusing to strike out the witness' answer, saying he never knew "a millman being so unreasonable as to insist upon furnishing any one width to the exclusion of others." That purported to give the witness' experience. The question was evasive, but its substance not material. The witness afterward answered the question to the best of his ability. Exceptions were taken to the action of the court in allowing a witness, in explanation of the objection to the plaintiff's first offer of lumber, the one giving rise to the controversy, to show what that offer ought to have contained to make it conform to the contract. What we have said on the subject of the interpretation of the contract shows these rulings were not erroneous.

[8] Exceptions were also taken to the action of the court in allowing counsel, in the examination of witnesses, in two instances, to assume that the contract had been broken by the plaintiff. Our conclusion as to the interpretation of the contract sustains these rulings. As a matter of law, it did break the contract, hence the court did not err in allowing counsel to assume the existence of the breach.

[4] Numerous objections were made to testimony tending to prove the difference between the contract prices of the lumber and the market prices, when it should have been delivered or was demanded and refused, as showing what profits the defendants lost in consequence of the plaintiff's breach of the contract. All of these exceptions, as well as others based upon the action of the court in refusing to direct a verdict for the plaintiff for the amount of its claim, and to set aside the verdict, were founded upon the view that the deducted claim was not a proper subject of set-off; it being a claim for unliquidated damages. Though called a set-off, it was really a claim of recoupment. It was not a debt due the defendants, growing out of a different transaction and founded

upon a consideration, other than the contract out of which the controversy arose, constituting a proper subject of set-off. It was for damages growing directly out of a breach of the contract sued on. Hence it was a claim for recoupment, not one of set-off. This being so, the character of the damages, whether liquidated or unliquidated, was wholly immaterial. Unliquidated damages may be proved under a claim of recoupment. *Railroad Co. v. Jameson*, 13 W. Va. 833, 31 Am. Rep. 775. The erroneous designation of the claim as one of set-off does not change its character, nor prevent allowance thereof. Courts determine the character of claims or notices by their substance, rather than names. The notice gave full information of the nature of the claim, apprising the plaintiff thereof. This in the record; there could be no surprise, prevention of which is the sole purpose of a notice of recoupment.

Seeing no error in the judgment, we affirm it.

Affirmed.

(69 W. Va. 554)

**WOOLDRIDGE et al. v. WOOLDRIDGE et al.**

(Supreme Court of Appeals of West Virginia.  
Oct. 24, 1911.)

(Syllabus by the Court.)

**1. SUNDAY (§ 13\*)—VALIDITY OF SUNDAY CONTRACT—DEED.**

A deed made on Sunday is not for that reason invalid, section 17, c. 149, Code 1906, providing that "no contract shall be deemed void because it is made on the Sabbath day."

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. §§ 36-44; Dec. Dig. § 13.\*]

**2. ACKNOWLEDGMENT (§ 62\*)—CERTIFICATE—IMPEACHMENT.**

The evidence of a justice of the peace, who takes and certifies an acknowledgment to a deed, is incompetent so far as it tends to impeach his official act.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 345-347; Dec. Dig. § 62.\*]

**3. DEEDS (§§ 207, 211\*)—VALIDITY—CAPACITY OF GRANTOR—FORGERY.**

A case in which the evidence is held insufficient to invalidate the deed of a deceased grantor for alleged fraud and forgery, and the mental incompetency of the grantor to make a deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 614-625, 637-647; Dec. Dig. §§ 207, 211.\*]

(Additional Syllabus by Editorial Staff.)

**4. WITNESSES (§ 176\*)—COMPETENCY—TESTIMONY AS TO TRANSACTIONS WITH PERSONS SINCE DECEASED.**

Under Code 1906, c. 130, § 23, relating to testimony as to transactions with persons since deceased, the evidence of a grantee of a deceased grantor was rendered competent by the previous testimony of the adverse parties in their own behalf with reference to the same transaction.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 714-719; Dec. Dig. § 176.\*]

Appeal from Circuit Court, McDowell County.

Action by Henry Wooldridge and others against James Wooldridge and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

D. J. F. Strother and M. O. Litz, for appellants. Chapman & Gillespie, for appellees.

MILLER, J. The original bill, which sought partition only of a tract alleged to contain one hundred and forty-three acres, by survey actually containing one hundred and nine acres, was, after answers filed, amended by bringing in, as a new party plaintiff, John D. Peery. The amended bill, adopting the allegations of the original bill, alleged in addition, that subsequent to the bringing of the original suit, November 22, 1905, the plaintiffs in the original bill, or some of them, had sold and conveyed their interests as co-parceners in the land, sought to have partitioned, to said Peery, wherefore the necessity of his presence as plaintiff; that the title bond of February 28, 1887, and the deed of September 7, 1895, purporting to have been made by W. C. Wooldridge and wife to James Wooldridge, pleaded and relied on by said James Wooldridge and Thomas Fisher, his successor in title, in their answers to the original bill, were void and of no effect: First, because the title bond was intended only to secure to James Wooldridge title to the interest already conveyed to him; second, because said deed was a fraud and forgery, and had not vested in said James Wooldridge, nor in his successors in title, any title to said land.

The answers of James Wooldridge and Thomas Fisher to the amended bill, as did their answers to the original bill, deny all material allegations thereof; and the sufficiency of the amended bill was also challenged by demurrer thereto. Besides James Wooldridge and Thomas Fisher, in their answers, plead possession, the statute of limitations, laches on the part of plaintiffs, and estoppel by deed and by conduct, barring them of all rights, and precluding them from any relief.

The court below, by decree of February 18, 1909, dismissed the plaintiffs' bill, and they have brought the case here to review that decree for alleged errors therein.

The material facts developed by the pleadings and proofs, and on which the rights of the parties depend, are substantially these: On November 20, 1880, the land in controversy, in consideration of seventy-one dollars and fifty cents, paid, was conveyed by one Shannon, attorney in fact for John H. Divine, to said W. C. Wooldridge and James Wooldridge, his son, jointly. It was on this deed that the plaintiffs in the original bill predicated the allegation that said W. C. Wooldridge died seized and possessed of a half undivided interest in said land, and that

they, as children and heirs at law, and coparceners with the said James Wooldridge, or his grantees, were entitled to a partition thereof.

By the title bond of February 28, 1887, which the amended bill charges was made under a mistaken notion as to the effect of the Shannon deed, W. C. Wooldridge bound himself and his heirs to make James Wooldridge "a general warranty of title to seventy-one and two-thirds acres of land" described as "lying on Long Branch of Big Creek, known as the Wooldridge Mill," when said James Wooldridge should pay him, as provided, in two equal payments, the sum of two hundred dollars, evidenced by the notes or bonds of said James Wooldridge. These notes are proven to have been paid by James Wooldridge long before the date of the deed of September 7, 1895, and it is also proven, beyond controversy, that upon the making of this title bond, James Wooldridge, took possession of the entire tract of land, built and occupied a house upon it, and so remained in possession of the land some fourteen years, until he sold and conveyed it, April 17, 1901, to the McCormicks, the immediate grantors of said Fisher.

The deed of September 7, 1895, in consideration of two hundred dollars, acknowledged to have been paid in hand, grants, bargains, sells and conveys to James Wooldridge, "seventy-one and two-thirds acres of land," described as "being the same land that W. C. Wooldridge and James Wooldridge bought from J. H. Shannon." Following the granting clause, the deed also contains this clause, further descriptive of the land granted: "Which W. C. Wooldridge and Mary C. Wooldridge deeds to the said James Wooldridge the parties of the first part, convey all their right, title and interest in and to that said tract of land which land never was divided between the said parties, the land is situate in McDowell County, State of West Virginia, lying on Long Branch waters of Big Creek, better known as the James Wooldridge Mill." This deed purports to have been duly acknowledged by the grantors on the day of its date, and duly recorded in McDowell county, October 15, 1895.

Numerous questions are argued by counsel with reference to the validity and legal effect of, and failure to record said title bond, upon the interests of the alleged purchaser, Peery. It is conceded, however, that Peery took whatever interests he acquired by sundry deeds from his co-appellants, subject to the deed of W. C. Wooldridge and wife to James Wooldridge, which being recorded was notice to him of the rights of the grantee and his successors in title; so that, if we hold, as did the circuit court, contrary to the contentions of appellants, that that deed is good and valid, and sufficient to pass the title to the whole interest of the grantors in said tract, we need not concern ourselves

with the questions presented respecting the title bond. Indeed the title bond is not so much relied on by the appellees as evidence of title, as it is on the questions of alleged fraud, forgery and want of good faith charged against James Wooldridge in procuring the execution of said deed, and as evidence of the adverse holding of the land from the date thereof. The latter question becomes unimportant, however, if the deed be good.

[1] Several questions are presented as to the validity of the deed. First, it is charged to have been made, executed and acknowledged on a Sunday, and invalid for that reason. The deed purports to have been made and acknowledged on September 7, 1895, a Saturday; but there is conflict in the evidence as to whether it was in fact made on Sunday, September 8, and post-dated for that reason. The fact is immaterial. At common law judicial acts done on Sunday were invalid; but as to all other acts, not of a judicial nature the common law made no distinction between Sunday and any other day. 2 Par. on Cont. (9th Ed.) 923, and note N. In many states statutes, similar to sections 16 and 17, chapter 149, Code 1906, relating to Sabbath breaking, have been held applicable to deeds and contracts executed on Sunday, and as rendering them void as violative of those statutes. 37 Cyc. 564, and notes; *Love v. Wells*, 25 Ind. 503, 87 Am. Dec. 375; 2 Par. on Cont. (9th Ed.) 923. But said section 17 of our statute specifically provides that "no contract shall be deemed void because it is made on the Sabbath day."

The fact that the deed was also signed and acknowledged by Mrs. Wooldridge, is not noted. It is not claimed that she was also incapacitated by sickness or otherwise to make a deed, nor that the deed was a forgery as to her.

[3, 4] Another point made against the deed is that it is a forgery, that it was never in fact signed or acknowledged by W. C. Wooldridge, one of the grantors, that at the time the deed was made W. C. Wooldridge was in an unconscious state, about to die, and did not then have mental capacity to make a deed or other contract. This point the court below, on conflicting evidence decided adversely to the contentions of appellants. We think the evidence, with the corroborating facts and circumstances largely preponderates in favor of appellees. The evidence of James Wooldridge, the grantee, objected to because it respected a transaction with a deceased person, corroborated by the two attesting witnesses, was rendered competent by the previous testimony of some of appellants previously examined in their own behalf, with reference to the same transaction. Section 23, chapter 130, Code 1906.

[2] Appellants rely greatly on the testimony of James S. Brewster, a Justice of the

Peace, who not only took and certified the acknowledgments of the grantors, but actually prepared the deed, and who also, years before, prepared the title bond and notes. His evidence is to the effect that W. C. Wooldridge, at the time the deed was made was in an unconscious state, and did not in fact sign or acknowledge the deed. In the mean time two of his sons had married daughters of W. C. Wooldridge, and all are plaintiffs and appellants in this suit. His testimony, that of a public officer, objected to, could not be received to impeach his official act in taking and certifying the acknowledgments to the deed. *Hockman v. McClanahan*, 87 Va. 33, 12 S. E. 230; *Harkins v. Forsyth*, 11 Leigh (Va.) 301. G. W. Cyphers the subscribing witness to the deed, and his wife, also present, swear positively that W. C. Wooldridge, though sick, after the deed was read to him, signed and acknowledged it, remarking at the time, that it should have been attended to sooner. The testimony of Nancy Rose, a sister of deceased, is to the same effect. A most significant fact in connection with the due and proper execution of the deed is, that Jane Brewster, who in her bill charges forgery, admits, that she signed her father's name to the deed, which, if he was incapacitated, as she now swears, would convict her of aiding and abetting, if not actually committing the forgery. The decree below must remain undisturbed so far as this point is concerned.

Another point strongly urged on behalf of appellants, based largely on the testimony of said James S. Brewster, Justice, is, that the title bond and deed were intended simply to sell and convey to James Wooldridge the original interest conveyed to him and his father by Shannon, attorney in fact, in 1880. In view of the terms of the deed, and of all the concurrent and subsequent facts and circumstances this is a most unreasonable and improbable story. The consideration for the Shannon deed was seventy-one dollars and fifty cents, half of which is proven to have been paid by James Wooldridge in a particular way. The deed was made to him and his father jointly. The story of James Brewster is clearly a fabrication, is inconsistent with established facts, and is wholly incredible. The deed which the witness admits he prepared, and to which he added his certificate of acknowledgment, as clearly shown from the clause therein quoted, purported to convey not only seventy-one and two-third acres, just half the number of acres supposed to be in the entire tract, but to make the intention clear, also, "all their right, title and interest in \* \* \* said tract \* \* \* which \* \* \* never was divided between the said parties." Moreover, after the death of W. C. Wooldridge, all other lands of the decedent were partitioned between appellants and James Wooldridge. There was then no pretence that the land

now in controversy belonged to his estate. Many years elapsed, and it was not until long after James Wooldridge had parted with the land and it had come to the appellee, Thomas Fisher, an innocent purchaser, that the present claim thereto was made by appellants to an interest therein. A fact most inconsistent with appellants' theory is that the consideration for the deed of September 7, 1895, as shown by the title bond and notes, and the evidence of the witnesses, was two hundred dollars, which was more than half the original purchase price paid for the joint interests of W. C. Wooldridge and James Wooldridge.

These views demand an affirmance of the decree below without reference to any other questions presented for our consideration, and it will be so ordered.

(69 W. Va. 612)

**CAPITAL CITY SUPPLY CO. v. BEURY.**  
(Supreme Court of Appeals of West Virginia.  
Oct. 24, 1911.)

*(Syllabus by the Court.)*

**1. APPEAL AND ERROR (§ 659\*)—EXCEPTIONS, BILL OF (§ 56\*)—RECORD—AMENDMENTS—AUTHORITY OF APPELLATE COURT.**

When a bill of exceptions is signed in vacation, it is much the better practice for the trial court to certify that it was done within 30 days from the adjournment of the term. But, if it does not appear from the record that it was signed within time, this court may, on its own motion, supplement the record by bringing up a certified copy of the final order adjourning the term of the trial court, to determine the fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2834-2843; Dec. Dig. § 659; \* Exceptions, Bill of, Cent. Dig. §§ 94-96; Dec. Dig. § 56.\*]

**2. APPEAL AND ERROR (§ 282\*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL.**

In case of a trial by the court in lieu of a jury, it is not necessary that a motion for a new trial should have been made and overruled, in order to entitle a party to apply for a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1662-1665; Dec. Dig. § 282.\*]

**3. EVIDENCE (§ 378\*)—DOCUMENTARY EVIDENCE—AUTHENTICATION—LETTER.**

A reply letter received, in due course of mail, from the addressee of a former letter is presumed to be genuine, and if otherwise proper evidence may go to the jury without proof of the handwriting of the person whose signature appears thereto.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1648-1665; Dec. Dig. § 378.\*]

**4. EVIDENCE (§ 378\*)—DOCUMENTARY EVIDENCE—AUTHENTICATION—LETTER.**

Evidence offered to impeach such letter, which goes only to the extent of proving that the name was signed to it by the bookkeeper in the office of the person whose name is placed to the letter, is not sufficient to overcome the

presumption that he authorized his bookkeeper's act.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 378.\*]

**Error to Circuit Court, Kanawha County.**

Action by the Capital City Supply Company against Thomas C. Beury. From a judgment for plaintiff, defendant brings error. Affirmed.

U. S. Albertson, for plaintiff in error.  
Payne & Payne and J. F. Bouchelle, for defendant in error.

**WILLIAMS, P.** [1] The motion to dismiss the writ of error, on the alleged ground that the bill of exceptions is not a part of the record, is overruled. The bill of exceptions was signed in vacation, and it does not appear by the record that it was signed within 30 days after the adjournment of the term. It is much the better practice for the judge to make this fact appear by his certificate, but the judge's certificate is not the only method of showing it. This court has established the practice of reading the order adjourning the term in connection with the record, to determine whether the bill of exceptions was signed in time. *Scott v. Hughes*, 66 W. Va. 573, 66 S. E. 737; *Whyel v. Coal & Coke Co.*, 67 W. Va. 651, 69 S. E. 192. A certiorari, issued on the court's own motion, has brought up a certified copy of the adjourning order of the term of the intermediate court of Kanawha county, at which the judgment was rendered, and from this it appears that the term was adjourned on the 4th of December, 1907. The bill of exceptions was signed on the 30th of December, 1907, and therefore in time.

[2] It is insisted that, according to the practice prevailing in Virginia and in this state, the judgment cannot be reviewed, because no motion for a new trial was made and overruled. But it has been decided in both states that such motion is not required, where the trial is by the court in lieu of a jury, as was the fact in this case. *Fisher v. Bell*, 65 W. Va. 10, 63 S. E. 620; *Bank v. Walton*, 96 Va. 435, 31 S. E. 890.

This brings us to a consideration of the merits of the case. The action is assumpsit on an account for goods sold to the Thayer Lumber Company, a corporation, of which Thomas C. Beury was president. The suit is against said Beury personally, and was originally brought before a justice of the peace, and appealed to the intermediate court of Kanawha county. There plaintiff obtained judgment for \$225.75. Defendant made application to the circuit court of Kanawha county for a writ of error, which was refused, and he later obtained one from this court.

That the goods were sold to the Thayer Lumber Company, and were originally charged to it on plaintiff's books of account, are

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

facts admitted by the testimony of Mr. Clark Howell, who is president of the plaintiff company. Consequently the personal liability of Mr. Beury for the debt depends upon whether he has subsequently obligated himself by a writing to pay it. Two letters were introduced by plaintiff to prove his written promise to pay the debt, one dated December 22, 1906, and signed "Thos. C. Beury, L.," and another, dated February 14, 1907, and signed "Thos. C. Beury." Both were received in regular course of mail, and are replies to letters written by Mr. Howell to the Thayer Lumber Company concerning the collection of the account sued on, and addressed to said company at its principal office, in care of T. C. Beury. Both replies are written on the Thayer Lumber Company's printed stationery, which advertises Thos. C. Beury as its president. The first of these letters was admitted as evidence, over defendant's objection, and he excepted. Omitting the printed heading, the letter is as follows, viz.: "Dec. 22, 1906. Capital City Supply Co., City—Gentlemen: I have your favor of the 18th inst. in regard to your account against the Thayer Lumber Company. In reply, beg to say that I myself being the principal creditor of the Thayer Lumber Company have taken over the property and assumed all the debts and just as soon as I am able to do so will pay off the various accounts. At the present time I am very much in need of funds, and am not able to do anything for you, but you may rest assured that I will personally see to it that when able your account is paid. Yours truly, [Signed] Thos. C. Beury, L."

[3] There can be no doubt that the letter contains sufficient promise to bind defendant, provided it was sufficiently authenticated to allow it to be read as evidence. It is signed "Thos. C. Beury, L.," and it is insisted that the initial "L," after the name, imports that Thos. C. Beury's name was signed to the letter by another, and that the authority of such other to so sign his name should have been first proven before admitting the letter as evidence, and *Winkler v. C. & O. Ry. Co.*, 12 W. Va. 699, is cited as authority for this proposition. The writing on which it was sought to hold the railroad company liable in that case differs from the writing in the present case, in that it does not purport to be a reply to any communication addressed to, and received by, the railroad company. It was signed "W. A. Keeper, Pr. Assistant Engineer." We do not doubt that the writing in that case was not sufficient to bind the railroad company without proof of Keeper's agency. But in the present case the writing in question is a letter which came through the mail in due course, and is a reply to another letter which plaintiff had addressed and mailed to the Thayer Lumber Company, in care of Thos. C. Beury, and relates to a matter of which Mr. Beury himself is supposed to have special knowledge,

because of his official connection with said company. In such case, a reply letter so received is presumed to be genuine, and may be received as evidence without proof of the handwriting of the signature. We find the rule stated by Wigmore, in his valuable work on Evidence, vol. 3, § 2153, to be that: "The arrival by mail of a reply purporting to be from the addressee of a prior letter, duly addressed and mailed, are sufficient evidence of the reply's genuineness to go to the jury. Such a rule—varying slightly in the phraseology of the different judges—seems now to be universally accepted." See, also, the *Norwegian Plow Co. v. Munger*, 52 Kan. 371, 35 Pac. 11; *White v. Tolliver*, 110 Ala. 300, 20 South. 97; *Ragan v. Smith & Gordon*, 103 Ga. 556, 29 S. E. 759; *City National Bank v. Jordan*, 139 Iowa, 499, 117 N. W. 758; *Boykin v. State of Florida*, 40 Fla. 484, 24 South. 141; 2 Wharton on Evidence (2d Ed.) § 1328.

[4] But it is proven by a witness for defendant that the signature was not made in the handwriting of Thomas C. Beury. The question then arises, should the letter have been excluded? We do not think so. While we have not found any authority directly bearing on this point, we think the true rule is that, even though such a reply letter may not have been signed by the person whose name appears to it, still the presumption is that it was signed by proper authority; and the presumption of genuineness is not overcome by simply proving that he did not sign it himself, but it was necessary to go further, and prove that he did not authorize the signing of it, or adopt the signature as his own. In these modern days of large and multiplied business, it is well known that much correspondence is carried on, and important business transacted, through dictations, made to clerks and stenographers, who take down the dictation, and then transcribe it into longhand. It is also known that clerks employed in offices of large business concerns are often directed to write the signature of their employers to their letters. It is scarcely to be supposed in the present case, in view of the subject-matter of the letter in question, that Lewis, Mr. Beury's bookkeeper, would have either written the body of the letter, or signed Mr. Beury's name to it, without his authority. We think it is entirely within the rule relating to the presumed genuineness of reply letters purporting to come from the addressee of another letter, in due course of mail, to include the authority to sign the name which appears to it. It was therefore not enough to overcome the presumption of the genuineness of the letter to prove simply that the signature was not in the handwriting of Mr. Thomas C. Beury. It should also have been made to appear that the signature was made without his authority.

It is admitted that the other letter, dated February 14, 1907, is signed by Thomas C.

Beury in person. But we are of the opinion that, while it relates to the same matter of account spoken of in the first letter, it does not contain a promise of Mr. Beury to answer personally for the debt. However, we see that defendant was not prejudiced by the admission of this letter as evidence, over his objection.

Finding no error, we will affirm the judgment.

BRANNON, J. I doubt point 4.

(112 Va. 335)

VAN DYKE et al. v. NORFOLK SOUTHERN R. CO. et al.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

1. EQUITY (§ 239\*)—PLEADING—DEMURRER—ADMISSIONS.

A demurrer to a bill in equity admits the truth of all facts well pleaded, but not conclusions of law suggested in the bill or inferences from facts stated.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 494; Dec. Dig. § 239.\*]

2. SPECIFIC PERFORMANCE (§ 116½\*)—PLEADING—REQUISITES.

The rule governing the consideration of a bill in equity on demurrer thereto, where the relief asked is specific performance of a contract, applies to all cases, regardless of the magnitude of the interests involved; and the court may not overrule a demurrer to an insufficient bill, where the questions involve inferences of facts, and the interests at stake are weighty, and postpone the questions of law until they are determined on a full discovery of all the facts.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 116½.\*]

3. SPECIFIC PERFORMANCE (§ 28\*)—CONTRACTS ENFORCEABLE.

Equity will not enforce a contract, the terms of which are uncertain.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68; Dec. Dig. § 28.\*]

4. SPECIFIC PERFORMANCE (§ 116½\*)—PLEADING—REQUISITES.

A bill in equity to enforce a contract must, when considered on demurrer, show that the contract is complete and certain, and that equity will not risk doing injustice by enforcing the contract; otherwise a demurrer must be sustained.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 116½.\*]

5. SPECIFIC PERFORMANCE (§ 116½\*)—BILL—DEMURRER.

A bill in equity to enforce a contract between a syndicate and a reorganization committee for the bondholders of a corporation, which sets out in full an agreement, designated as "preliminary agreement," and indicating a more complete agreement to follow, and which shows modifications of the agreement embodied in an exhibit, making substantial changes, and which avers that plaintiffs, suing on behalf of themselves and others composing the syndicate, did not assent to the modifications, etc., is demurrable for failing to show a complete, certain, and definite contract.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 116½.\*]

6. SPECIFIC PERFORMANCE (§ 28\*)—CONTRACTS ENFORCEABLE — "COMPLETENESS"—"CERTAINTY."

The element of "completeness" of a contract, requisite to its specific performance, denotes that the contract embraces all the material terms, while the element of "certainty," also a requisite, denotes that each of the terms is expressed in a sufficiently exact and definite manner; and an incomplete contract, which equity will not enforce, is one from which one or more material terms have been omitted; and an uncertain contract, likewise unenforceable, is one wherein one or more of the material terms is expressed in such indefinite language that the intent of the parties cannot be ascertained, to enable equity to carry the same into effect.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68; Dec. Dig. § 28.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1028, 1366-1368.]

Appeal from Circuit Court of City of Norfolk.

Suit by one Van Dyke and another, on behalf of themselves and others, composing a syndicate, against the Norfolk Southern Railroad Company and others. From a decree sustaining demurrers to the bill, plaintiffs appeal. Affirmed.

R. T. Thorp, Tazewell Taylor, and Thomas Leaming, for appellants. E. R. Baird, Jr., T. L. Chadbourne, Jr., and Frederick Hoff, for appellees.

CARDWELL, J. This appeal is taken from a decree of the circuit court, sustaining the demurrers of appellees to a bill filed by appellants, seeking specific enforcement of a certain written memorandum of a contract, bearing date January 19, 1909, made by and between appellants Van Dyke and Zell, on behalf of themselves and others, composing a syndicate, and appellees Schoonmaker and Clark, on behalf of themselves and others, acting as a reorganization committee for the bondholders of the Norfolk Southern Railroad Company.

The contention of appellants is that by the alleged contract the syndicate agreed to purchase certain of the bonds of a new company to be organized, and to procure a certain guaranty of other bonds, and that the reorganization committee agreed to complete foreclosure and to convey the properties of the railroad company, when acquired, to the new corporation to be created by the syndicate. It is further contended that the agreement, although oral, was perpetuated by a memorandum, signed by the parties on the day of its making, and is also evidenced by a subsequent memorandum, signed by appellees; the agreement or contract sought to be enforced being as follows:

"Preliminary agreement reached January 19, 1909, by the undersigned, respecting the Norfolk & Southern Railway Company reorganization.

"First Mortgage: \$9,000,000 4 per cent. on railroad to be taken by syndicate at 90.

"General Mortgage: First on lumber company, and second on railroad, \$16,000,000, to bear 4½ per cent. interest, to be given present refunding bondholders (\$14,000,000) and balance \$2,000,000 to remain in treasury of the company, and to be used for the acquisition of new property and strict betterments.

"\$14,000,000.00 of general mortgage bonds to have the interest guaranteed for five years (surety company guarantee) as approved by committee's counsel.

"\$16,000,000.00 of stock, of which \$6,500,000 goes to present bondholders, and balance, \$9,500,000, goes to syndicate.

"Sinking Fund: To begin to operate two years from date of conveyance to new company.

S. L. S. J. W. V. D.  
"G. C. C. F. D. Z."

The memorandum signed by appellees, and which, as appellants claim, evidenced the written contract of January 19, 1909, is filed with the bill as Exhibit 2, but we deem it only necessary to refer to that memorandum as we review appellants' bill upon the demurrers thereto.

Exhibit 1, with the bill, is called "Modified Plan and Agreement," bearing no date, and containing only a notice addressed to the holders of the first and refunding mortgage bonds of the old company, not signed by any committee or any one else, and annexed to the notice is a proposed plan of reorganization, but which does not contain any agreement of reorganization. In this draft ("modified plan") is contained a statement that when, in the discretion of the reorganization committee, "a sufficient amount of all the outstanding first and refunding mortgage bonds of the company shall have been deposited under the accompanying agreement, the property of the existing Norfolk & Southern Railway Company will be foreclosed."

The material facts out of which this suit arises, appearing from the bill and the exhibits therewith, are as follows: The Norfolk & Southern Railway Company was a consolidated corporation, existing under the laws of Virginia and North Carolina, owning a valuable line of railroad extending from Norfolk, Va., through the states of Virginia and North Carolina for about 600 miles, and also controlling valuable timber property in both of said states, held by the John L. Roper Company. The railway company had executed its first and refunding mortgage to the Trust Company of America, as trustee, creating a lien upon the properties owned by the company, under which mortgage it had issued bonds, which were outstanding in the public, to the extent of \$14,000,000, par value, each bond being of the par value of \$1,000, and in addition thereto had pledged a further issue of \$1,000,000, par value of such bonds.

On or about July 1, 1908, the said trust company, as trustee under the aforesaid

mortgage, instituted proceedings in the United States Court for the Eastern District of Virginia to foreclose the mortgage securing said bonds, and receivers were appointed; whereupon some of the first and refunding mortgage bondholders, desirous of protecting their interests, and for the purpose of reorganizing the Norfolk & Southern Railway Company, formulated a plan and agreement of reorganization, under which appellees Clark, Schoonmaker, Thorne, Gardner, and Waterbury became a reorganization committee, and, as appears from the preamble to Exhibit 2, holders of a large majority of bonds had deposited their holdings and accepted, in accordance with the plan and agreement of reorganization, certificates of deposit therefor. The plan and agreement of reorganization, which was the initial step taken by certain of the bondholders, and under which other bondholders necessarily would have the right to participate in accordance with its terms, is referred to in the preamble to Exhibit 2 as Schedule A, but it is not attached, and there is no reference to it contained in appellants' bill, other than such as appears in Exhibit 2.

It is to be noted in this connection, and as a matter to be considered throughout the case, that those bondholders who had deposited their bonds under the original plan of reorganization became the owners of certificates of deposit, which themselves no longer represented first and refunding mortgage bonds, but such rights and properties as such certificates would be entitled to upon reorganization, in accordance with such original plan of reorganization.

We shall confine our consideration of the allegations of the bill to such as are essential to the relief asked, and which are called in question by the demurrers of the respondents, which demurrers are filed by the Norfolk Southern Railroad Company, the corporate respondent, and by Rathbone Gardner and the other respondents jointly, acting as a reorganization committee of the bondholders of the Norfolk & Southern Railway Company, and for themselves, jointly and severally, as individuals.

The first paragraph of the bill states that appellants associated themselves together as a syndicate, for the purpose of acquiring the properties formerly belonging to the Norfolk & Southern Railway Company, and organizing a corporation to take over and operate the same; but, as pointed out in the demurrers filed by appellees, it does not appear that such corporation was ever formed by appellants. On the contrary, it is later alleged in the bill that the individual appellees composing the reorganization committee organized the Norfolk Southern Railroad Company, with the intent to vest in said company the property of the old company. To this, however, we do not attach much importance.



In paragraph 2 of the bill, it is stated that the individual respondents constitute a committee representing first and refunding mortgage bondholders of the Norfolk & Southern Railway Company; that in the transaction narrated in the bill this committee were acting on behalf of themselves and the holders of the first and refunding mortgage bonds, whom they represented; and that the appellee Norfolk Southern Railroad Company was created at the instance of the reorganization committee, for the purpose of taking over the properties acquired by them at the foreclosure of the mortgage of the old company. It is therefore sought in this connection to charge the individual respondents solely in a representative capacity, while their principals, the first and refunding mortgage bondholders, are not made parties to the bill.

The third paragraph of the bill is but a recital of the incorporation of the old company, and the making by it of the first and refunding mortgage to the Trust Company of America, as trustee, which recitals are followed by a description of the property and the action taken upon the foreclosure of the said first and refunding mortgage.

In its fourth paragraph, the bill states that a meeting was had, on January 19, 1909, between appellees Clark and Schoonmaker and appellants Zell and Van Dyke, and that at said meeting Clark and Schoonmaker told Zell and Van Dyke that they appeared as the representatives of the individual appellees, acting as a reorganization committee, and that they were further acting as agents for a majority of the first and refunding mortgage bondholders, and that they were authorized and empowered by the committee and by such majority of said mortgage bondholders to conclude an agreement with appellants. It is further stated that appellants expected to prove that Clark and Schoonmaker had been empowered by resolution of the committee to negotiate and conclude an agreement, and that they had been empowered by a majority of the first and refunding mortgage bondholders to negotiate and conclude an agreement. A statement follows the foregoing, to the effect that Zell and Van Dyke stated to Clark and Schoonmaker that they represented a syndicate comprising the appellants, and were authorized to negotiate and conclude an agreement with Clark and Schoonmaker as the agents of the committee and of said bondholders.

Exhibit 2, which is attached to the bill, shows that the appellants had knowledge of an existing agreement of reorganization, wherein the powers of the committee, or its members, must of necessity have been fixed and expressed, and under which there had become parties thereto holders of certificates of deposit representing the securities thereunder deposited. This original plan and agreement of reorganization, referred to in

Exhibit 2, is not attached to appellants' bill, although whatever power or authority was vested in Clark and Schoonmaker, or the committee itself, was so vested and fixed by such plan and agreement of reorganization, and in the absence of which it is by no means made clear how the court could ascertain the authority of the committee to act, or of a majority of the bondholders to bind all. In this connection, it is also stated that, prior to said meeting (of January 19, 1909), a plan of reorganization had been adopted by the counsel for the reorganization committee; and, without stating in what manner and by what authority, but merely as a conclusion, it is alleged that Clark and Schoonmaker, acting for the committee and the first and refunding mortgage bondholders, modified such plan of reorganization as set forth, which alleged modifications were of substantial difference and import, in that they changed the securities to be issued by the proposed new company under the prior plan of reorganization by increase and decrease of millions of dollars.

The next allegation is that at said meeting a complete, final, and binding contract, etc., was reached, to the effect that the draft thereof, modified in the particulars stated, should be put into effect by means of a further agreement, then finally and completely made as a binding contract between the parties to the negotiations, and to the effect that the syndicate should purchase \$9,000,000 of first mortgage bonds at 90 per cent., and procure a guaranty by a surety company (in a form to be approved by the counsel for the reorganization committee) of the interest upon \$14,000,000 general mortgage bonds for five years, and that the reorganization committee agreed, in consideration of the same, that the syndicate should receive \$9,500,000 of the capital stock of the new company.

Then follows the statement that the effect of the agreement reached was to modify the plan of reorganization, making it more favorable to the bondholders, and to bind the syndicate to finance the reorganization upon that basis. It was further agreed that the reorganization committee, on behalf of the first and refunding mortgage bondholders, should endeavor to buy at the foreclosure sale the properties, rights, and franchises of the Norfolk & Southern Railway Company, and that a new company should be incorporated, in which should be vested the said properties, rights, and franchises, which company should issue the securities specified in the plan marked "Exhibit 1," modified as above set forth.

Exhibit 1, labeled "Modified Plan and Agreement," bears no date, and contains a notice addressed to holders of first and refunding mortgage bonds, not signed by any committee, nor having annexed to it any plan of reorganization, and omits to state any agreement of reorganization. In this "mod-

ified plan" appears the statement, that when, in the discretion of the reorganization committee, "a sufficient amount of all the outstanding first and refunding mortgage bonds of the company shall have been deposited under the accompanying agreement, the property of the existing Norfolk & Southern Railway Company will be foreclosed." Here we have presented by the bill of complaint a draft of a "modified plan," providing for the deposit of bonds under an agreement of reorganization, which does not accompany the draft of the plan, and which the bill does not show or allege; nor is it shown or alleged that bonds were deposited thereunder; so that, upon the face of the bill, all that had been approved by any one was a draft of "modified plan," in which there is a reference to an agreement of reorganization, but whether such an agreement ever existed does not appear.

Paragraph 5 of the bill again refers to and alleges the execution of the memorandum, made on the 19th of January, 1909, which memorandum of agreement is the basis of appellants' entire case, and which they ask to be specifically enforced. It is entitled "Preliminary Agreement—reached January 19, 1909."

In the sixth paragraph of the bill, it is alleged that the act of Clark and Schoonmaker was ratified, approved, and confirmed as the act and deed of the first and refunding mortgage bondholders; but this is but an allegation of a conclusion of law, since there are no facts stated or data exhibited with the bill to show upon what the allegation is based; in fact, it is stated that the appellants "are not aware of the full and exact manner and methods by which said ratification, approval, and adoption was effected," "but they were informed, believe, and expect to prove that their [the bondholders'] assent was had in writing, partly by power of attorney, duly executed, etc.; that appellants had called upon the reorganization committee and its counsel for discovery as to all papers and documents showing the assent of the bondholders to said agreement, but were refused access to any and all information on the subject; but they particularly aver that they were continuously advised by said reorganization committee and its counsel that, prior to the delivery of a certain more formal contract on or about January 30, 1909, hereto attached and referred to as Exhibit 2, the full, express, and written approval of the bondholders to said agreement [of January 19, 1909] was obtained."

It is apparent from their indefinite allegations and an examination of Exhibit 2 that, while the said bondholders (how many, who they were, and how they could bind their assigns or other bondholders, does not appear) may have approved of the act of Clark and Schoonmaker, which from the bill itself was preliminary only, there is nothing

to show that the bondholders ever deposited their bonds under the agreement referred to in the draft of "modified plan," or how those who deposited their bonds under an original plan and agreement could have deposited under another plan bonds they had already relinquished; nor is it made to appear in the bill or in the exhibits therewith under which plan appellants seek to charge the individual defendants (appellees here) as a committee. As proof of the fact that the bondholders have approved of the alleged agreement of January 19, 1909, here sought to be enforced, great reliance is placed upon a recital in the proposed draft of an agreement (Exhibit 2). It is recited in the preamble to this proposed agreement that certain *certificate holders*, representing in amount a majority of outstanding first and refunding mortgage bonds, had approved an amended plan which that agreement contemplated would be attached thereto; but this proposed agreement (Exhibit 2) was never executed by both parties, and therefore, was never brought into effect. On the contrary, the bill, after stating how this proposed agreement came to be drawn up as "a more formal contract to be executed by the committee and the members of the syndicate," proceeds to state the reasons why the members of the syndicate (appellants) would not acquiesce in certain of its provisions and affix their signatures thereto. Had this proposed "more formal agreement" been executed by the parties, it plainly contemplated that the committee would use its efforts as a committee to have an amended plan adopted by all the bondholders; and it does not appear from the bill that the alleged draft of modified plan was ever adopted by the bondholders; nor does it appear that the committee purchased the properties of the railroad company at foreclosure under the draft of modified plan, which plan provided that it would be discretionary with the committee to buy thereunder.

In fact, it is not made to appear in the bill that there was any express agreement that the committee would purchase under the draft of modified plan, or any other named plan; but it contains only an allegation to the effect that the committee was to endeavor to buy at foreclosure and issue the securities specified in the draft of modified plan. How the committee could have exercised the discretionary right alleged to have been conferred upon them by the draft of modified plan, until there had been a deposit of the bonds of the old railway company under that plan, is not made to appear.

Paragraph 7 of the bill is characterized by vague and indefinite allegations of facts. Here it is repeated how the proposed agreement (Exhibit 2) came to be drawn to embody the provisions of the alleged agreement, reached January 19, 1909, in a more formal contract "to be executed by the committee and the members of the syndicate,"

and following it is alleged that Exhibit 2 was drafted by Burr, of counsel for the syndicate, and Chadbourne, of counsel for the committee, and one copy thereof signed and retained by the committee, and an unsigned copy forwarded to Burr, and that a Schedule A and an Exhibit B were referred to in such draft of agreement, but not annexed. What was contained in Schedule A the bill does not state; but the agreement (Exhibit 2) designates it as the original plan and agreement of reorganization, under which bonds had been deposited. It is alleged that Exhibit B was in existence and designed to be attached to Exhibit 2; but it is admitted that no copy thereof was in fact attached to the copy of the agreement delivered to Burr. If it be accepted as true the statement in the bill that the Exhibit B to be attached represented appellants' Exhibit 1, that exhibit itself (the modified plan) was not in existence, but would have required subsequent action by the bondholders becoming parties to an agreement of reorganization. No such action on the part of the bondholders is shown by appellants, or attached to the papers they rely on, and as to which they make no comment; nor do they recognize that the action of the committee in purchasing at the foreclosure sale was discretionary, and that discretion to be exercised when sufficient bonds had been deposited, etc.

In paragraph 8 of the bill, it is related that the form of the contract executed by the committee (Chadbourne—draft of contract, Exhibit 2) having no date, was executed before it was submitted to the syndicate or Burr, as counsel for the syndicate, and that he (Burr), on behalf of the syndicate, advised counsel for the committee "that, while the same substantially represented the agreement between the parties," in certain particulars it did not accord therewith; and then follows in this paragraph of the bill a specification of the particulars referred to. It is here also alleged and set forth that various notices were sent to the committee by the syndicate from time to time, in which they refer to a contract having been made by the reorganization committee and a large majority of the first and refunding mortgage bondholders; and it is further stated that on December 7, 1909, the reorganization committee purchased all the assets of the Norfolk & Southern Railway Company at foreclosure sale, but it is not alleged in this connection whether said committee purchased such properties in accordance with the existing plan and agreement of reorganization, or of any other plan. Reference is also made in this connection to an attempt made by appellants, on or about September 23, 1910, to intervene in the foreclosure suit pending in the federal court, and that court's refusal to take jurisdiction of their controversy; but to this statement of fact and the conclusion of law,

that such refusal was made for want of jurisdiction, we attach no importance.

The only other feature of the bill to which we deem it necessary to refer is the sixteenth paragraph thereof, in which it is alleged that the reorganization committee caused to be organized the Norfolk Southern Railroad Company, and that it was organized by the committee with the intent to vest in said company the property so purchased, contrary to the rights of the appellants and in breach of the alleged contract of January 19, 1909; that said company was an instrumentality created by the individual defendants (appellees), as the reorganization committee, for the purpose of defeating the rights of the appellants and depriving them of the property, formerly of the Norfolk & Southern Railway Company, to which appellants claim they are entitled under the agreement of January 19, 1909, "upon payment to said reorganization committee of the consideration provided for in the contract;" and that it is sought by the committee to carry out a plan of reorganization wholly at variance with the agreement of January 19, 1909, and in fraud of the rights of the appellants.

The special relief prayed in the bill is that the defendant Norfolk Southern Railroad Company be required either (a) to issue its securities to appellants in the manner provided in the plan of reorganization (to this bill attached marked "Exhibit 1"), as modified by the agreement between the reorganization committee and appellants, dated January 19, 1909, upon performance by appellants of the various matters and things stipulated to be done by them in said contract, or (b) that it be adjudicated and decreed that the properties, rights and franchises acquired by the reorganization committee at the foreclosure sale shall be transferred to a new corporation to be formed by appellants in accordance with the terms of the agreement between themselves and the reorganization committee, and that the securities of said new corporation be issued in accordance with the terms and provisions of the contract between the parties.

[1] The general rule is that, by demurrer to a bill in equity, the truth of material and relevant matters, i. e., matters of fact, set forth with requisite precision, and which are well pleaded, is admitted, but not conclusions of law suggested in the bill or inferred from the facts stated. 1 Daniel's Chy. Pr. (5th Am. Ed.) 546; Stephen on Pleading, p. 138; 12 Enc. Pl. & Pr. p. 1026; Foster on Fed. Practice (4th Ed.) p. 474; Dillon v. Barnard, 21 Wall. 430, 22 L. Ed. 673.

"A demurrer admits as true all facts which are properly pleaded, but does not admit the conclusions of law from those facts which the pleader may have seen fit to introduce." Trumbo v. Fulk, 103 Va. 73, 48 S. E. 525. See, also, Latham v. Westervelt, 26 Barb. (N. Y.) 259; Ryan v. McLane, 91

Md. 175, 46 Atl. 340, 50 L. R. A. 501, 80 Am. St. Am. Rep. 438; 1 Barton's Chy. Pr. 368.

[2] Recognizing the force and effect of the general rule just adverted to, when applied to the bill in this case, the learned counsel for appellants invoke the doctrine, that, where all the questions involve inferences of fact, and the interests at stake are weighty, it is entirely within the discretion of the court to overrule the demurrer and postpone the questions of law until they can be determined upon a full discovery and development of all the facts; and it is argued that, not only is such a course of procedure within the discretion of the court, but it may be said to be essential, in a case of magnitude, and where conclusions of law rest upon inferences to be drawn from a series of complex and involved occurrences and facts.

Among the cases cited in support of this contention is that of *Kansas v. Colorado*, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838, where the opinion does cite *Daniell's Chy. Pr.* for the proposition that a court of equity sometimes declines to decide a doubtful question (of title) on demurrer; but we need only say here that to apply that doctrine to all cases of magnitude, i. e., where large interests are involved, would be practically to abolish the office of a demurrer in such cases. Moreover, the character of the case in which the citation of *Daniell's Chy. Pr.* was made and followed was very different from the case at bar, and none of the conditions upon which the court might depart from the general rule governing in the consideration of a bill in equity upon a demurrer thereto, pointed out by Mr. *Daniell*, exist in this case.

[3] The rule governing the consideration of a bill in equity upon a demurrer thereto, where the relief asked is the specific performance or rescission of a contract, applies alike to all such cases, regardless of the magnitude of the interests involved. That equity will not enforce a contract, the terms of which are uncertain, is well established.

As said by this court in the opinion by *Harrison, J.*, in *Berry v. Wortham*, 96 Va. 89, 30 S. E. 444: "It is an elementary doctrine of courts of equity that they will not specifically enforce any contract, unless it be complete and certain."

[4] It must appear from the bill, considered upon demurrer thereto, that the contract asked to be enforced is complete and certain, so that it may be seen that a court of equity would not encounter risk of doing injustice to the defendants and others if it enforced the contract; otherwise the demurrer has to be sustained. *Clinchfield Coal Co. v. Clintwood Coal Co.*, 108 Va. 433, 62 S. E. 329.

In other words, the court must be enabled to say from the facts and circumstances alleged in the bill whether the minds of the parties met upon all the essential particulars of the contract, and, if they did, then

can say exactly upon what substantial terms they agreed, and trace out the particular line where their minds met. This is the settled rule where such a case is determined upon the proofs (*Clinchfield Coal Co. v. Powers*, 107 Va. 393, 59 S. E. 370), and must necessarily be applied in the consideration of a bill upon demurrer thereto, where specific enforcement of a contract is asked; otherwise the pleader could make one case by his bill and prove another or different one, or make an imperfect statement of it and supply its lacking essentials by proof, as to which the defendant had no notice from the bill of complaint filed against him.

[5] The allegations of the bill we are considering here are very unsatisfactory and in many particulars difficult to comprehend, due to the fact admitted that the negotiations between appellants and the individual appellees, relied on as evidencing the contract asked to be enforced, were so complicated that they are not and could not be precisely stated so as to show that a contract which a court of equity could undertake to enforce was ever entered into and consummated by the parties. As we have seen, the alleged agreement of January 19, 1909, set out in full above, is the contract asked to be enforced, yet that document is designated in its caption "Preliminary Agreement," indicating a more complete agreement to follow, and the parties asking its enforcement have to rely upon Exhibit 2, with their bill, as a ratification of the contract sought to be enforced, and that, too, in face of the fact that they state that they refused to consent to this modified plan (Exhibit 2), and give their reasons for refusing. As we have observed, the modifications embodied in Exhibit 2 were of substantial difference and import, and from the allegations of the bill they wrought changes of the securities stipulated for in the "preliminary agreement" by increase and decrease of millions of dollars; so that we have, according to the allegations of the bill, this case: The agreement of January 19, 1909, declared to be a "preliminary agreement"—a mere skeleton of an agreement itself, plainly indicating that there were other essential conditions and terms to be agreed upon between the contracting parties—never signed or assented to by the individual appellees, acting as a reorganization committee, or ratified or approved by the bondholders of the old company, on the one hand, and, on the other, Exhibit 2, with the bill, signed only by the committee, disapproved of by appellants, and never signed by them or any one for them.

[6] "A contract that is incomplete, uncertain, or indefinite in its material terms will not be specifically enforced in equity. Following the general principles of equity, there is required a greater degree of certainty and definiteness for specific performance than to obtain damages at law.

For specific performance is required that degree of certainty which leaves in the mind of the chancellor or court no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is to compel done. The element of *completeness* denotes that the contract embraces all the material terms; that of certainty denotes that each one of these terms is expressed in a sufficiently exact and definite manner. An incomplete contract, therefore, is one from which one or more material terms have been entirely omitted. An uncertain contract is one which may, indeed, embrace all the material terms, but one or more of them is expressed in so inexact, indefinite, or obscure language that the intent of the parties cannot be sufficiently ascertained to enable the court to carry it into effect." 6 Pom. Eq. Jur. § 764. *Creedy v. Grief*, 108 Va. 320, 61 S. E. 769; *Clinchfield Coal Co. v. Powers*, supra; *Ford v. Euker*, 86 Va. 75, 9 S. E. 500.

Giving to appellants the benefit of all the admissions of facts well pleaded in their bill to which they are entitled upon the demurrers thereto, they have not set out a completed contract with that degree of certainty and definiteness which the general principles of equity require. Indeed, they fail to show that the minds of the parties ever met on all the essential particulars of any contract, or in fact upon what substantial terms they agreed. On the contrary, the bill but sets out various negotiations between the parties, which, doubtless, had in view the making of a completed contract in the nature of the one asked to be enforced, but does not allege facts to show that any such contract was in fact entered into; nor from the facts stated could a court of equity trace out any particular line where the minds of the parties met in said negotiations, with respect to the terms of any contract, sufficiently certain and definite to enable the court to determine with any degree of accuracy what the parties intended.

It follows that we are of opinion that the decree appealed from, sustaining the demurrer to the bill and dismissing the same, should be affirmed.

Affirmed.

(112 Va. 780)

ROLLER v. MURRAY et al.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

1. CONTRACTS (§ 138\*)—UNENFORCEABLE CONTRACTS—ILLEGAL CONTRACTS—RIGHTS OF PARTIES.

Where money is paid or services are rendered under a contract void merely because not enforceable, an implied assumpsit lies for the money paid or the value of the services rendered; but where the contract is illegal, because contrary to positive law or against public pol-

icy, an action does not lie to recover the money paid on it, or the value of the services rendered under it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 681-700; Dec. Dig. § 138.\*]

2. CHAMPERTY AND MAINTENANCE (§ 4\*)—ILLEGALITY OF CHAMPERTOUS CONTRACTS.

A champertous agreement is unlawful and void; the common law as to champerty being in force.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 4, 9, 11-19; Dec. Dig. § 4.\*]

3. CHAMPERTY AND MAINTENANCE (§ 5\*)—RECOVERY FOR SERVICES RENDERED UNDER ILLEGAL CONTRACT.

An attorney, rendering services pursuant to a champertous contract, whereby he undertook to carry on a litigation at his own risk and without costs to his client, for a part of the recovery, may not recover on quantum meruit the value of the services rendered, though they are in themselves legal.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 24-51; Dec. Dig. § 5.\*]

Appeal from Circuit Court, Rockingham County.

Suit by John E. Roller against Mary H. Murray and others. There was a decree for defendants, and plaintiff appeals. Affirmed.

John E. Roller, for appellant. Conrad & Conrad and Holmes Conrad, for appellee.

BUCHANAN, J. This is an attachment in equity to subject the estate of a nonresident to the satisfaction of a claim alleged to be due the complainant for services rendered as attorney. The services sued for were performed under a contract sought to be enforced in a suit between the same parties, which was held to be champertous and void by the circuit court of Rockingham county, whose decree was affirmed by this court. That case (*Roller v. Murray*) is reported in 107 Va. 528-547, 59 S. E. 421, where the champertous contract is set out.

The contract was held to be contrary to public policy and void, because it was an agreement by an attorney to undertake and carry on litigation at his own risk, or without costs to his client, for a share of the recovery. While it was held in that case that there could be no recovery upon the contract, the question whether the attorney could recover the value of his services was left open.

The contention of the complainant (appellant here) is that, notwithstanding the fact that the contract under which the services sued for were rendered was contrary to public policy and void, he is entitled to recover the value of those services upon a quantum meruit.

Upon this question the courts are not in accord.

Page, in his work on *Contracts* (section 345), says that, while such contracts are clearly void, the courts are divided as to the

question whether they are illegal—that the courts which hold them to be illegal, not only do not enforce the champertous contract, but do not allow a recovery for the value of the services rendered upon a quantum meruit, while the courts which treat such contracts as merely void, and not illegal, permit a recovery upon a quantum meruit for the value of services rendered. Whether this statement of the learned author be entirely accurate as to the ground upon which the two lines of decision are based is not altogether clear from the decisions, since some of them do not give the reasons for their conclusion; but, if that be the true distinction between the two lines of cases, it would seem to render each consistent with well-settled legal principles.

[1] The general rule is that where an agreement is treated as void merely because it is not enforceable, as in cases under the statute of frauds or of parol agreements where the contract is not in writing and money is paid or services are rendered under it by one party and the other avoids it, there can be a recovery upon an implied assumption for the money paid or the value of the services rendered. In such cases there has been the mere omission of a legal formality, and while by the terms of the statute he must lose the benefit of his contract, yet, there being nothing illegal or immoral in it, he is entitled to be compensated for the services rendered under it. See *Johnson v. Jennings*, 10 Grat. 1, 6, 7, 60 Am. Dec. 323; 1 Smith's Lead. Cases (5th Am. Ed.) note to *Peter v. Compton*, at page 438; *Pollock on Contracts* (Wald's Ed.) pp. 597-599, 609.

On the other hand, it is also well settled, as a general rule, that where the contract is illegal, because contrary to positive law or against public policy, an action cannot be maintained, either to enforce it directly, or to recover the value of services rendered under it, or money paid on it. See *Johnson v. Jennings*, 10 Grat. 6, 7, 60 Am. Dec. 323; *Marshall v. Railroad Co.*, 16 How. 314, 14 L. Ed. 953, cited with approval in *Yates & Ayres v. Robertson*, 80 Va. at page 484; note to *Chapman v. Haley*, 4 Am. & Eng. Ann. Cas. 712, 714-716, where numerous cases are cited; *Webb v. Fulchire*, 25 N. C. 485, 40 Am. Dec. 419, 420; *Wald's Pollock on Contracts*, pp. 233, 234, 338, 339.

The general rule is stated as follows in 9 Cyc. 546, and is sustained by the decided cases: "The law in short will not aid either party to an illegal agreement. It leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed, in whole or in part, by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the rule refusing relief to either party to an illegal contract, when

the contract is executed, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of, or relief from, the illegal agreement. \* \* \* Money paid under an agreement which is executed, whether as the consideration or in performance of the promise, cannot be recovered back where the parties are in pari delicto; and goods delivered or lands conveyed under an illegal agreement are subject to the same rule."

And for like reasons the same rule would apply to services rendered.

*Pollock*, in his work on *Contracts* (Wald's Ed.), after stating the general rule that money or property paid or delivered under an unlawful agreement cannot be recovered back, says that "the principle proper in this class of cases is that persons who have entered into dealings forbidden by law must not expect any assistance from the law, save so far as the simple refusal to enforce such an agreement is unavoidably beneficial to the party sued upon it. As it is sometimes expressed, the court is neutral between the parties. The matter is thus put by Lord Mansfield: 'The objection that a contract is immoral or illegal, as between the plaintiff and defendant, sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of public policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: "Ex dolo malo non oritur actio." No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act, if from the plaintiff's own stating or otherwise the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country. There the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for, where both are equally in fault, "potior est conditio defendentis."'"

[2] Whatever view be taken in some jurisdictions as to the ground upon which a champertous agreement is held to be void, whether upon the ground merely that it is not enforceable, or because it is illegal, in most jurisdictions, and certainly in this state, such an agreement is considered unlawful, and held to be void on that ground. Champerty is a criminal offense at common law (*Bishop's Cr. Law* [6th Ed.] §§ 132, 134; *Clark on Contracts*, § 134; 2 *Chit. on Contracts* [11th Ed.] 906; *Wald's Pollock on Contracts*, 293, 294), and the common law as to champerty with respect to the validity of contracts is

still in force in this state (*Nickels v. Kane*, 82 Va. 312; *Roller v. Murray*, 107 Va. at page 544, 59 S. E. 421).

[3] A champertous agreement being unlawful, it would seem clear that compensation for services rendered under it could not be recovered upon a quantum meruit, any more than upon the agreement itself, without overturning the very foundations upon which the rule refusing to enforce unlawful agreements is based. Of what value would the rule be, if the courts permit that to be done by indirection which they refuse to allow to be done directly? Why say to the attorney, "You shall not recover upon the champertous agreement the agreed value of the services rendered by you, but you may recover upon an implied contract (which in fact never existed) the value of such services," which in this case is claimed and shown to be the same as the agreement provided for? How would any such result uphold the policy of the law, deter others from entering into similar contracts, or promote the public good? To permit a recovery upon a quantum meruit, instead of discouraging, would encourage, the making of such contracts; for, if the client kept and performed his unlawful agreement, the attorney would get the benefit of it, and, if he did not, the attorney would suffer no loss, since he could recover upon the quantum meruit all that his services were worth. Any process of reasoning which leads to such a result we think must be unsound.

In *Butler v. Legro*, 62 N. H. 350, 13 Am. St. Rep. 573, it was held that, as a champertous contract was illegal, the law did not imply a promise to pay an attorney what his services were worth.

In *Thurston v. Percival*, 1 Pick. (Mass.) 415, an attorney, after rendering some services for his client, entered into a champertous agreement with him. At the trial of the case before Chief Justice Parker, he was of opinion that the attorney, upon a quantum meruit for services rendered, etc., was entitled to recover the reasonable value of his services rendered prior to the making of the champertous agreement, and the jury were directed to distinguish in their verdict the value of the attorney's services rendered before and after the champertous agreement was entered into. They found a verdict accordingly, subject to the opinion of the court. When considered by the whole court, it was held that the attorney was entitled to recover the value of his services rendered before the champertous agreement was entered into, but the court did not permit a recovery for services rendered under the champertous agreement. See, also, *Ackert v. Barker*, 131 Mass. 436.

In the case of *Mazureau & Hennin v. Morgan*, 25 La. Ann. 281, an attorney was not permitted to recover upon a quantum meruit the value of his services rendered under a champertous agreement.

In *Barngrover v. Pettigrew*, 128 Iowa, 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, 111 Am. St. Rep. 206, in which it was held that a contract was champertous, the court said: "The appellants contend that, if the agreement be held to be invalid, they are still entitled to recover the reasonable value of their services on a quantum meruit. But the law will not imply a promise to pay for services which are in derogation of public policy, any more than it will enforce a specific contract having that object in view; and when a plaintiff cannot establish his cause of action without relying on an illegal contract, or on services which by their very nature contravene public policy, he cannot recover." The illegal contract in that case was to procure a divorce.

It is claimed that there is a distinction between the right of an attorney to recover upon a quantum meruit for services rendered in a case where the services agreed to be rendered are in themselves illegal, and where the services to be rendered are in themselves legal, but the agreement under which they were rendered is for some other cause champertous.

There are cases that so hold, some where the contract is held to be champertous because it provides for a contingent fee for the attorney proportionate to the amount recovered, and others because it stipulated against the client's right to compromise without the attorney's consent. See *Davis v. Webber*, 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81; *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563. That class of cases seems to be based upon the ground that what the attorney agreed to do was in itself legal.

In the case under consideration, what the attorney undertook to do, viz., to carry on the litigation at his own risk, or without costs to his client, was in itself illegal, and it was upon that ground that the contract was held to be champertous. *Roller v. Murray*, supra. It was further held in that case that the agreement was indivisible, quoting with approval the decision of the Supreme Court of the United States in *Trist v. Child*, 21 Wall. 441, 452 (22 L. Ed. 623), in which it was held that, where that which the attorney had the right to do was so blended and confused with that which was forbidden, the whole contract is a unit and indivisible. "That which is void destroys that which is good, and they perish together."

We are of opinion that to permit an attorney to recover upon a quantum meruit the value of his services rendered under an unlawful agreement, by which he undertook to carry on litigation at his own risk and without costs to his client for a part of the recovery, would be to encourage the making of such contracts on the part of attorneys, and would furnish an easy expedient for escaping the consequences of entering into con-

tracts in violation of laws based upon considerations of public policy.

Having reached the conclusion, upon the main question involved, that there can be no recovery in this case, it is unnecessary to consider any of the other questions discussed, since their decision could not affect the result, no matter how decided.

The decree complained of must be affirmed.

**Affirmed.**

(112 Va. 754)

**NORTH BRITISH & MERCANTILE INS.  
CO. v. ROBINETT & GREEN.**

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**1. INSURANCE (§§ 567, 612\*)—ADJUSTMENT OF LOSS—STIPULATIONS—VALIDITY—CONDITION PRECEDENT TO ACTION.**

A stipulation in a fire policy for appraisal of a loss when required, as a condition precedent to an action on the policy, is valid, and when required is a condition precedent to an action for a loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1420, 1421, 1520-1528; Dec. Dig. §§ 567, 612.\*]

**2. INSURANCE (§ 146\*)—CONTRACTS—CONSTRUCTION.**

Though contracts of insurance are liberally construed in favor of insured, he must comply with the plain provisions of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

**3. INSURANCE (§ 567\*)—ADJUSTMENT OF LOSS—STIPULATIONS—CONSTRUCTION.**

A fire policy, stipulating that insured shall have 60 days from the date of a fire to deliver proof of loss, and that the loss shall not become payable until 60 days after delivery of proof of loss, including an award by appraisers, where an appraisal is required, gives to insurer the right, at any time within 60 days after the delivery of proof of loss, to demand an appraisal.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1420, 1421; Dec. Dig. § 567.\*]

**4. INSURANCE (§ 576\*)—ADJUSTMENT OF LOSS—STIPULATIONS—WAIVER.**

A fire policy stipulated for an award by appraisers when required. Insured gave prompt notice of a loss, and furnished proof of loss. An agent of insurer notified an attorney of insured that the amount of the loss claimed was excessive, and demanded an appraisal. During the investigation, the agent made no response to a question put to him as to whether an appraisal was desired. *Held*, that insurer did not waive its right to an appraisal; a waiver, to be effective, must have occurred with full knowledge of all material facts, and must be distinctly made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1436-1438; Dec. Dig. § 576.\*]

**5. INSURANCE (§ 576\*)—ADJUSTMENT OF LOSS—STIPULATIONS—"ESTOPPEL BY CONDUCT."**

The insurer was not estopped from insisting on an appraisal; for, to create an "estoppel by conduct," the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than

that which he would have occupied, except for such conduct.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1436-1438; Dec. Dig. § 576.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7654.]

**Error to Circuit Court, Wise County.**

Action by Robinett & Green against the North British & Mercantile Insurance Company. There was a judgment for plaintiffs, and defendant brings error. Reversed and rendered.

Geo. W. St. Clair and Bond & Bruce, for plaintiff in error. Morton & Parker and W. S. Cox, for defendant in error.

**CARDWELL, J.** This suit is brought upon a policy of insurance issued by plaintiff in error to defendants in error, insuring the latter against loss or damage by fire to their stock of merchandise, situated at Appalachia, Wise county, Va., for the period of one year from the date and delivery of the policy, not to exceed three-fourths of the actual cash value of each item of property insured at the time of loss or damage, less the amount covered by any concurrent insurance, not to exceed, however, \$1,500, while contained in a certain building in the town of Appalachia; the consideration for the insurance being the premium mentioned, and the performance on the part of the insured of the conditions and stipulations set forth in the policy.

A fire occurred April 17, 1909, at about 11:30 o'clock p. m., in a building not owned by or connected with the property of the insured, which rendered necessary the removal of their stock of goods. None of the goods were destroyed or damaged by fire or smoke, but were damaged, according to the claim made by the insured, 50 per cent. of their value, or to an amount somewhat exceeding \$2,000, by their removal from and back into the same building.

Among the almost innumerable provisions contained in the policy, and found in practically all like policies of insurance, is one which provides that in case of loss, if the assured and insurer differ as to the loss sustained, then an appraisal of the property is to determine the amount of the loss.

The policy contains these provisions also: "The loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by the company, including an award of appraisal where appraisal has been required."

"No suit or action on the policy for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements."

On the next day after the fire, to wit, April 18, 1909, the insured notified the in-



insurance company of the fire and the damage to their stock of goods; they also notified the agent of the company who resided at Appalachia, and who had issued the policy in question, countersigned it, and collected the premium thereon. The company nor its agents made any reply to the notices, and, on May 15, 1909, proof of the loss was forwarded by the insured, and was received by the insurance company on May 18, 1909. In the early part of June, 1909, the company sent one C. L. Garnett, an adjuster and an employé of the Virginia Adjustment Bureau, to Appalachia, to adjust the loss on the building which contained the stock of goods of plaintiffs insured, and also to adjust the loss of another insurance company which had issued a policy on the same stock of goods. After Garnett left Richmond for Appalachia, the insured (plaintiffs in error) employed also said Virginia Adjustment Bureau to adjust their loss; and all of the papers pertaining to the fire of April 17, 1909, were mailed from Richmond, addressed to Garnett at Appalachia, but Garnett never received them, and on returning to Richmond he so notified R. M. Friend, president of the Adjustment Bureau. Friend had the papers returned to Richmond, and, on June 29, 1911, he went to Appalachia to adjust the loss, but, after examining the stock of goods, getting such information as he could, and consulting Garnett, who had examined the stock of goods soon after the fire, demanded an appraisal in accordance with the conditions of the policy, which demand was made in writing, by letter of July 2, 1909, addressed to and received by the insured's counsel July 5, 1909, the said letter being as follows:

"Richmond, Va., July 2nd, 1909.

"Messrs. Morton & Parker, Attorneys, Appalachia, Va.—

"Dear Sirs: We are in receipt of papers purporting to be proofs of loss under policy No. 4962619 of the North British & Mercantile Insurance Company issued in the name of Robinett and Green.

"The amount of loss and damage named therein is excessive, and we respectfully demand an appraisal in accordance with the terms and conditions of the policy.

"Expressly reserving all rights of the company under the policy contract, we are

"Yours very truly,

"[Signed] Robert M. Friend,  
"President."

To this letter the insurance company received the following reply:

"Gate City, Va., July 6, 1909.

"Mr. Robert M. Friend, Richmond, Va.—

"Dear Sir: In your letter of July 2, and received on July 5, 1909, in reference to the Robinett and Green claim you used this expression: 'Expressly reserving all rights of the company under the policy contract, we are,' etc.

"Please explain what you mean by this statement so that we will know just how to answer you. You will recall that Mr. Parker asked you the direct question as to whether you wanted an appraisal and you at that time gave him no definite answer. That occurred more than one month ago. So please let us know by return mail what you mean and we will give you an answer.

"Yours truly [Signed] W. S. Cox."

Considering, doubtless, that the letter of July 2d, supra, required no explanation, the company made no reply to the letter of Attorney Cox, and thereafter, while there was some correspondence between counsel for the respective parties, practically nothing was done by either party towards an adjustment of the loss of the insured, and this suit was instituted on December 3, 1909.

At the trial of the cause, upon the defendant company's plea of nonassumpsit, the grounds of its defense stated in writing were:

(1) "No ascertainment or estimate was agreed upon as provided in said policy; the parties differed as to the amount of the loss or damage; the same has not been determined by appraisals as provided in the policy; the plaintiffs did not demand an appraisal as required by the policy. An appraisal was demanded by the defendant in accordance with the terms and conditions of the policy, and they failed, declined, and refused to have an appraisal, as required by the policy.

(2) "That the three-fourths value clause was attached to the policy, and was made one of the conditions and provisions of same.

(3) "That the policy sued on was for \$1,500, and \$2,000 concurrent insurance was permitted. Another company issued a policy for \$500, and appellees collected same; therefore if plaintiffs were entitled to recover anything, they were only entitled to recover three-fourths of the actual damage to said property, less \$500 heretofore paid them."

After the evidence of the respective parties had been introduced, and the court had instructed the jury as to the damages they were to assess, the defendant company demurred to the evidence, and the plaintiffs joined in the demurrer, which demurrer the court overruled and gave judgment on the verdict of the jury, assessing plaintiffs' damages at \$1,500, with interest, to which judgment this writ of error was awarded.

[1] There are two assignments of error, the first relating to the ruling of the court on the demurrer to the evidence, and the second to the instruction given by the court to the jury on the amount of damages to which the defendants in error were entitled under the policy sued on, if entitled to a recovery at all; but, in the view we take of the case, it will be only necessary for us to consider the first assignment, which presents the question whether or not this action has

been brought prematurely; the defendants in error having declined or failed to enter into an appraisal of their loss, as provided for in the policy sued on, and demanded. This question has not been directly passed on by this court, but has been by the Supreme Court of the United States and by the appellate courts of a number of the states.

In *Hamilton v. Liverpool, etc., Ins. Co.*, 138 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, it is said, in the opinion by Mr. Justice Gray, that a stipulation in a policy of insurance for appraisal is uniformly held in this country and England to be valid, and is a condition precedent to the right of recovery; and in *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, the opinion by the same learned judge holds that, if the contract of insurance further provides that no action upon it shall be maintained until after an award by arbitrators is made as to the amount due upon it, "then, as was adjudged in *Hamilton v. Liverpool, London & Globe Ins. Co.*, above cited, and many other cases therein referred to, the award is precedent to a right of action on the contract." See, also, *Carroll v. Girard Ins. Co.*, 72 Cal. 297, 13 Pac. 865; *Mosness v. German Am. Ins. Co.*, 50 Minn. 341, 52 N. W. 932, and *Graham v. German American Ins. Co.*, 75 Ohio, 374, 79 N. E. 930, 15 L. R. A. (N. S.) 1055; *Grady v. Home Ins. Co.*, 27 R. I. 435, 63 Atl. 173, 4 L. R. A. (N. S.) 292; *Dunton v. Westchester F. Ins. Co.*, 104 Me. 372, 71 Atl. 1037, 20 L. R. A. (N. S.) 1053.

In *Carroll v. Girard Ins. Co.*, supra, the opinion, referring to the view uniformly taken that stipulations for an appraisal are a condition precedent to the right of action on a policy of insurance, says: "The logical result of this view is that the award is a necessary element of the plaintiff's cause of action."

In *Grady v. Home F. Ins. Co.*, supra, it is held that: "Arbitration as to the amount of the loss is a condition precedent to an action on an insurance policy, where the policy expressly provides that no action shall be sustainable until full compliance with all conditions, one of which is that in case of dispute the amount of loss shall be fixed by arbitration. Failure of arbitration through no fault of the insurance company does not abrogate a provision in the policy that no action shall be brought until the amount of the loss has been settled by arbitration, and there is nothing to show that arbitration has become impossible"—citing *Hamilton v. Home Ins. Co.*, supra, and a large number of other cases.

The opinion in *Hamilton v. Home Ins. Co.*, supra, further says: "The manifest intention of the agreement of the parties to the contract of insurance was that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of

either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company. \* \* \* The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action. Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country"—citing a number of authorities.

"Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so."

[2] Contracts of insurance, as counsel for defendants in error agree and the authorities hold, are to be liberally construed in favor of the assured; but the policy is a contract, and it is just as much the duty of the assured to comply with the plain provisions of the policy, as it is the duty of the insurer to pay the amount of the loss, when that amount has been properly ascertained in accordance with the terms of the contract.

The case of *Tilley v. Insurance Co.*, 86 Va. 811, 11 S. E. 120, is cited in support of the contention that a stipulation in a policy of insurance for an appraisal is not a condition precedent to a right to recover on the policy; but, with respect to that case, we need only to say that it merely disposed of the question as to what should be alleged in a declaration on an insurance policy, in view of section 3251 of the Code of 1904, and what is there said has no sort of bearing upon the question here under consideration. Very true the opinion in the case cited does refer to the provision in the policy that suit thereon could only be brought within one year from date of a loss, and says that it would be an unreasonable construction of the policy that the award stipulated for in the policy could be asked for just before the expiration of the year, and thus defeat all recovery; but such is not the case here.

Nor does the case of *Summerfield v. North British, etc., Ins. Co. (C. C.)* 62 Fed. 249, which had under review a similar policy of insurance to that here in question, sustain the contention of defendants in error. In that case, Paul, J., did hold that the plaintiff had the right to bring and maintain an action

on her policy, although there had been no appraisalment of the loss sustained by her for which she claimed damages; but this ruling was upon the peculiar facts of that case, and could not have been intended to impair the force and controlling influence of the decisions of the Supreme Court of the United States referred to above. On the contrary, the case considered by Judge Paul was by him distinguished from those cases, upon the ground that the defendant company refused to submit to an appraisalment, except upon the terms of the form of submission proposed by it; whereby, says the opinion, "It placed itself in the attitude of the plaintiff, Hamilton, in the case of *Hamilton v. Liverpool, etc., Ins. Co.*, and under the authorities of the cases there cited judgment must be entered in this cause for the plaintiff.

The decisions of this court in *Liquid Carbonic Co. v. Norfolk & Western Ry. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A. (N. S.) 753, *Atlantic Coast Line R. Co. v. Bryan*, 109 Va. 582, 65 S. E. 30, and *Virginia Car. Co. v. Southern Ex. Co.*, 110 Va. 666, 66 S. E. 838, by analogy have an important bearing in the consideration of the issue we now have in hand.

In the first two of the cases just cited, it is held that a condition in a bill of lading that claims for loss or damage shall be made in writing to the carrier's agent at the point of delivery promptly after the arrival of the property, and, if delayed more than 30 days after the delivery of the property, or after due time for the delivery thereof, there shall be no liability upon a carrier, is a reasonable provision, and will be upheld; that such a provision contravenes no public policy and excuses no negligence, but is a reasonable regulation for the protection of the carrier from fraudulent imposition in the adjustment and payment of claims for goods alleged to have been lost or damaged; and that such a provision in the contract, unless waived, is enforceable by the carrier in bar of any action by the shipper for such loss or damage.

In the third case last cited, it was held that a provision in a receipt, given by an express company for the carriage of goods, that the company shall not be liable for any loss or damage, unless the claim therefor shall be presented in writing to it at the office of issue within 30 days from its date, is a reasonable and binding provision, which must be complied with according to its tenor; otherwise the company cannot be held liable.

Defendants in error in this case contend, however, that, notwithstanding the existence of the general rule with respect to the construction of a contract of insurance and the enforcement of its provisions in the cases we have cited, and the almost innumerable authorities cited in those cases, they escape the effect of the rule by invoking the doctrine of waiver. It is not claimed that there was any agreement on the part of plaintiff in error to waive the right it had to an appraisal un-

der the provisions of the policy sued on; but it is claimed that it is estopped by the conduct of its agents to claim the benefit of that provision in the policy.

There is practically no conflict in the evidence introduced in the case, and the facts appearing therefrom are as follows: Both defendants in error testify that notice was given promptly of the fire, which occurred on April 17, 1909, as required by the policy; that a month afterwards they forwarded proof of loss to plaintiff in error, which was received by the latter May 18, 1909; that no other communications were had between the parties until June 29, 1909, when Friend, agent of plaintiff in error, went to Appalachia, at which time he secured certain information in reference to the loss, and after returning to Richmond obtained further information from Garnett, who had examined the stock of goods a few days after the fire. When fully informed as to the actual loss, Friend, on July 2, 1909, wrote the letter of July 2d to Messrs. Morton & Parker, attorneys, saying that the amount of the loss, as claimed in the proof of loss—\$1,758.42—was excessive, and demanded an appraisal in accordance with the conditions of the policy.

[3] The policy provided that defendants in error should have 60 days from the date of the fire to make out and deliver the proof of loss, and that the loss should not become due until 60 days after the proof of loss had been delivered, including an award by appraisers, if an appraisal should be required. Equal rights were contemplated in the contract to each of the parties thereto, 60 days being given to furnish proof of loss on the part of insured, and 60 days after the proof of loss had been furnished the insured could demand payment; and, clearly, during all of the last-mentioned 60 days the insurer was to have the right to investigate the amount of the loss and its liability therefor. It is equally as clear that the insurer was given the right, at any time within the 60 days after the proof of loss was delivered, to demand an appraisal, which it did. May on Insurance (4th Ed.) § 479; Joyce on Insurance, § 8182.

[4, 5] It further appears from defendants' in error own testimony that the appraisal could have been had when the demand therefor was received, on July 5, 1909, and later; in fact, until defendants in error, without responding to the demand for an appraisal, or requiring one themselves, had sold off a part of the insured goods, and so intermingled the balance with other goods that a satisfactory appraisalment could not be had.

It will not do to say that there was no disagreement as to the loss, and therefore no reason for an appraisal, when the letter of July 2, 1909, demanding the appraisal, distinctly stated that the writer, as the agent of the insurer to adjust the loss, considered the claim made in the proof of loss furnished it was excessive. Nor is there any merit in the contention that plaintiff in error waived

its right to an appraisal when Friend, the adjuster, made no answer to an attorney for defendants in error when he asked Friend, on June 29, 1909, the question: "Mr. Friend, do you want an appraisal in this case? If you do, we will give it to you." Friend, testifying in this case, neither affirms nor denies the statement of said attorney (Parker) that he made no reply to the question asked him, but states that he, on the occasion referred to, had very little talk with Parker, and was not then ready to talk about an adjustment of the claim asserted by defendants in error. It also appears that Friend had gone to Appalachia for the purpose of investigating this loss, went to the store of defendants in error, and, after looking at the stock of goods, was not satisfied, but wanted to secure further information from Garnett, who had seen the goods in their original damaged condition; that it was after getting full information that Friend wrote the letter of July 2, 1909.

It is a well-settled principle with respect to the doctrine of waiver, applicable as well to insurance transactions as to other business dealings, that a waiver, to be effective against the party making it, must have occurred with full knowledge of all material facts, and must be distinctly made. And, in order for there to be an estoppel by conduct, the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which he would have occupied, except for that conduct. *Atlantic Coast Line v. Bryan*, supra; *Virginia-Carolina Co. v. Southern Express Co.*, supra, and authorities cited.

There is no proof whatever in the record to make available to defendants in error, either the doctrine of waiver or estoppel, and the loss of the right to institute and maintain this action is due to their dereliction alone.

For the foregoing reasons, the judgment of the circuit court against plaintiff in error upon its demurrer to evidence is erroneous, and will be reversed and judgment entered by this court for defendant in the court below, plaintiff in error here.

Reversed.

(112 Va. 767)

R. S. OGLESBY CO., Inc., v. LINDSEY et al.  
(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**1. PARTNERSHIP (§ 371\*)—SPECIAL PARTNERS—LIABILITY FOR DEBTS—EVIDENCE—ADMISSIBILITY.**

In a suit on a partnership debt, a defendant claiming to be a special partner was not entitled to show that he had lost the money put into the concern, and had received no dividends; the only issue being whether he had so complied with the statute as to avoid liability.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 848; Dec. Dig. § 371.\*]

**2. PARTNERSHIP (§ 362\*)—SPECIAL PARTNERS—LIABILITY—BURDEN OF PROOF.**

In a suit on a partnership debt, a defendant who claims limited liability as a special partner must show compliance with Code 1904, §§ 2863-2886, regulating limited partnerships.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 842; Dec. Dig. § 362.\*]

**3. PARTNERSHIP (§ 357\*)—LIMITED PARTNERSHIP—COMPLIANCE WITH STATUTE.**

In a suit on a partnership debt, a defendant cannot avoid liability on the theory that a limited partnership existed without showing that the articles were recorded in the county clerk's office in a separate book kept for that purpose, and indexed in the name of the concern as required by Code 1904, § 2866.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 835; Dec. Dig. § 357.\*]

**4. PARTNERSHIP (§ 357\*)—LIMITED PARTNERSHIP ORGANIZATION—RECORD OF STATEMENT—SUFFICIENCY.**

The requirement by Code 1904, § 2866, that limited partnership articles be recorded in a separate book kept for that purpose, is sufficiently met by the county clerk recording articles in a book labeled "Roads and Limited Partnerships," if a custom of keeping road records in the book has been discontinued.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 835; Dec. Dig. § 357.\*]

**5. PARTNERSHIP (§ 357\*)—LIMITED PARTNERS—FORMATION—INDEXING ARTICLES—SUFFICIENCY.**

The requirement of Code 1904, § 2866, that limited partnership articles be indexed in the name of such partnership in recording the same, is not met by indexing as "Limited Partnership," though there is but one limited partnership of record.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 835; Dec. Dig. § 357.\*]

**6. APPEAL AND ERROR (§ 877\*)—RIGHT TO COMPLAIN.**

Plaintiff in error cannot complain of an instruction refused to defendant in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.\*]

**7. PARTNERSHIP (§ 365\*)—SPECIAL PARTNERS—LIABILITY—KNOWLEDGE OF RELATION BY CREDITORS.**

That a creditor of a corporation knew who purported to be the general and the special partners of a firm does not prevent him from relying upon the invalidity of the formation of the partnership to defeat a defense that part of the defendants were special partners only.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 845; Dec. Dig. § 365.\*]

**8. PARTNERSHIP (§ 362\*)—SPECIAL PARTNERS—LIABILITY.**

Good faith and honest intention to comply with Code 1904, §§ 2863-2886, regulating the formation of limited partnerships, will not protect one as a special partner if there has not been substantial compliance.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 842; Dec. Dig. § 362.\*]

**9. PARTNERSHIP (§ 362\*)—LIMITED PARTNERSHIP—COMPLIANCE WITH STATUTE.**

In a suit on a partnership debt to avoid a defense that certain defendants are special partners, plaintiff need not show that he has been injured by defendants' noncompliance with

Code 1904, §§ 2863-2886, regulating the formation of limited partnerships.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 842; Dec. Dig. § 362.\*]

**10. PARTNERSHIP (§ 358\*)—LIMITED PARTNERSHIP—FORMATION—REQUISITES.**

Under Code 1904, § 2871, requiring the names of the members of a limited membership to appear conspicuously on the front of the place of business, there must be some sign or writing conveying such information; and the sign or writing must be in a conspicuous place, and must be easily read.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 836; Dec. Dig. § 358.\*]

**11. PARTNERSHIP (§ 358\*)—LIMITED PARTNERSHIPS—"APPEAR."**

"Appear," as used in Code 1904, § 2871, requiring the names of the members of a limited partnership to appear conspicuously upon the front of the place of business, means to be obvious and manifest.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 358.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 448-451.]

**12. PARTNERSHIP (§ 358\*)—LIMITED PARTNERSHIPS—"CONSPICUOUSLY."**

"Conspicuously," within Code 1904, § 2871, requiring that the names of the members of a limited partnership appear conspicuously upon the front of the place of business, means plain to the eye, and easily seen.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 358.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1454; vol. 8, p. 7613.]

**13. PARTNERSHIP (§ 358\*)—LIMITED PARTNERSHIPS—STATUTORY REQUIREMENTS.**

The requirement of Code 1904, § 2871, that the names of the members of a limited partnership appear conspicuously upon the front of the place of business, is not met by placing typewritten papers 8¼ feet from the floor, and illegible to one standing on the floor at the entrance of the doors of the place of business, or on the sidewalk adjacent thereto.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 358.\*]

Error to Circuit Court, Grayson County.

Action by the R. S. Oglesby Company, Incorporated, against C. L. Lindsey and others. From the judgment, plaintiff brings error. Reversed.

The following instructions requested by plaintiff were refused:

Instruction No. 1: "The court instructs the jury that if they believe from the evidence that the paper offered in proof in this case as the statement and affidavit under which the Lindsey Mercantile Company, Limited, was formed, has not been recorded in the clerk's office of Grayson county, Va., in a separate book kept for that purpose, or that the same has not been indexed in the name of the Lindsey Mercantile Company, Limited, then all the parties defendant are liable as general partners, and you shall find for the plaintiff."

Instruction No. 2: "The court instructs the jury that if they believe from the evidence that any material part of the capital contributed to this partnership by the special partners was, during the continuance of

the partnership, withdrawn or diminished otherwise than by losses or in the ordinary course of business, then all the defendants in this case are liable as general partners, and you shall find for the plaintiff."

Instruction No. 3: "The court instructs the jury that, in order that the special partners in this case may be relieved of the ordinary liability of general partners, the names of the partners of the Lindsey Mercantile Company, Limited, with a designation of which were general and which were special partners, must have appeared conspicuously upon the front of the place of business of said partnership during the time while said partnership was in business; and, if you shall believe from the evidence that this requirement was not complied with, you shall find for the plaintiff against all the defendants."

The court instructed for plaintiff as follows.

"No. 1. The court instructs the jury that, in order that the special partners in this case may be relieved of the ordinary liability of general partners, the names of the partners of the Lindsey Mercantile Company, Limited, with a designation of which were general and which were special partners, must have appeared conspicuously on the front of the place of business of said partnership during the time while said partnership was in business; and, if you shall believe from the evidence that this requirement was not substantially complied with, you shall find for the plaintiff against all the defendants.

"No. 2. The court instructs the jury that the word 'conspicuously' means plain to the eye, easily seen."

The following instructions requested by defendants were refused:

"No. 1. That if the jury shall believe from the evidence that at the time plaintiff sold the goods, wares, and merchandise shown by the account to have been bought, plaintiff or its officers and agents had knowledge as to who were the general and who were the special partners, and of the other facts connected with the formation of said firm, then they are estopped to deny such knowledge, and from insisting that defendants are liable to it, and the jury will find for the defendants.

"No. 2. That if the jury shall believe from the evidence that at the time the debt in the declaration mentioned was made and contracted the names of the partners, with a designation of which were general and which were special partners, appeared conspicuously upon the front of the place of business of the Lindsey Mercantile Company, Limited, then, with reference to the requirements of the statute, the court tells the jury defendants complied with the same, and if plaintiff relies on this failure of the defendants to comply with the statute for a recovery, and the

jury shall believe defendants have complied therewith, they shall find for the defendants.

"No. 3. That if the jury shall believe from the evidence that the names of the partners, with a designation of which were special and which were general partners, appeared conspicuously upon the front of the place of business of the Lindsey Mercantile Company, Limited, then, with reference to this requirement of the statute, the court tells the jury that defendants complied with the same, and if plaintiff relies on this failure to comply with the statute for a recovery, and the jury shall believe defendants have complied therewith, they will find for the defendants.

"No. 4. That if the jury shall believe from the evidence that defendants substantially complied with that requirement of section 2871 of the Code of 1904, with reference to having appeared conspicuously upon the front of the place of business of the Lindsey Mercantile Company, Limited, the names of the partners, with a designation of which were special and which were general partners, and the plaintiff relies upon their failure to do so for a recovery, then the court tells the jury plaintiff is not entitled to recover on this ground in this action, and the jury will find for the defendants.

"No. 5. That the burden of proof is upon the plaintiff to make out its case by a preponderance of the evidence, and to the satisfaction of the jury."

The court instructed for defendants as follows: "The jury are instructed that the evidence in this case shows that the special partners complied with the law in regard to recording and publishing the paper under which the defendant partnership was formed, as provided by statute, and the plaintiff cannot recover on this ground."

H. C. Gilmer and J. H. Rhudy, for plaintiff in error. W. S. Poage, R. L. Kirby, and W. D. Tompkins, for defendants in error.

KEITH, P. The Oglesby Company, Incorporated, sued C. L. Lindsey and others in assumpsit, claiming the sum of \$586.30 as due upon an account for goods sold and delivered. The defendants appeared, and pleaded that the cause of action mentioned in the declaration was contracted, if at all, by the Lindsey Mercantile Company, a limited partnership formed and doing business under the laws of the state of Virginia; that the defendants other than C. L. Lindsey were only special partners of the Lindsey Mercantile Company; that they were not interested or in any way connected with the Lindsey Mercantile Company except in their capacity as such special partners, and at a subsequent day the defendants appeared and filed a further plea, setting out in detail the fact that they were liable only as a limited partnership, and averring their compliance with the statute laws regulating the formation of such partnerships; that the plaintiff before the debt in the declaration mentioned was contracted had full knowledge of the organization of said limited

partnership, who composed the same, how they were bound, the amount of capital put in by each of said partners, and who were the general and who the special partners, and to what extent each of the members of the firm were bound for the debts and obligations of the partnership, and had full and complete knowledge of every fact to enable them to know to whom they were and how they were extending credit; and that by reason of the premises the plaintiffs were estopped from asserting the demand referred to in the declaration against them and upon which this action is founded.

Upon the trial the jury found a verdict against the general partner, C. L. Lindsey, and in favor of all of the other defendants, the special partners, referred to in the declaration, upon which judgment was entered, and to this judgment a writ of error was awarded.

"By the common law every member of an ordinary partnership is liable in solido for the debts and engagements of the firm. The law ignoring the firm as anything distinct from the persons composing it treats the debts and engagements of the firm as the debts and engagements of the partners, and holds each partner liable for them accordingly." George on Partnership, § 109.

"A limited partnership is one in which the liability of one or more, but not all, of the partners, is limited to the amount contributed by him or them to the firm capital at the time of the formation of the partnership. They are created only by statute, and exist and are controlled entirely by legislative enactments." Gilmore on Partnership, § 204.

The statutes regulating the formation of limited partnerships in this state are found in chapter 135, Code 1904.

Section 2865 provides that the persons forming a limited partnership "shall make and severally sign a paper, which shall state the name and place of residence of each partner, the name or firm name under which the partnership is to be conducted, who are general and who are special partners, the sum which each special partner contributes, and whether such contribution is made in cash or in other property at cash value, or to what extent in each, the general nature of the business to be transacted, the place or places of said business, the duration of the partnership. \* \* \* One or more of the general partners shall also make oath that each sum so stated to be contributed has been actually contributed in the form set forth in said paper."

By section 2866 it is provided that "no such partnership shall be deemed to be formed until such paper and a certificate of such oath, or a certified copy thereof, shall be admitted to record as to each person signing the same in each county and corporation in which the place or places of the said business may be. The said paper and certificate shall be recorded in a separate book to be kept for the

purpose, and be indexed in the name of such partnership."

By section 2867 it is provided that "the parties shall publish a copy of the said paper and certificate immediately after they are admitted to record once a week for four successive weeks in a newspaper (if such there be) published in every such county or corporation; and, if no newspaper be published in any such county or corporation, they shall post a copy of such paper and certificate for four successive weeks at the front door of the courthouse of such county or corporation. If such publication or posting be not made, the partnership shall be deemed general."

By section 2871 it is declared that "the names of the partners, with a designation of which are general and which are special partners, shall appear conspicuously upon the front of the place or places of business of the partnership. \* \* \*"

[1] The first assignment of error is to the ruling of the court as set out in plaintiff's bill of exceptions No. 1, from which it appears that T. L. Felts, one of the defendants, while testifying as a witness, was asked by his attorney whether or not he had made any money or received any dividends out of the business of the Lindsey Mercantile Company, to which plaintiff by counsel objected, but the court overruled the objection, and permitted the witness to answer the question. The witness in answering said question said that he had lost all the money he had put into the business of the Lindsey Mercantile Company, Limited, and had never received any dividends from said business. The plaintiff asked the court to strike out the answer, but the court refused to do so.

We think this ruling of the court erroneous. It was wholly immaterial to the issue whether T. L. Felts had or had not lost the money he had put into this company, or whether he had or had not received any dividends from the business. That the debt was due is shown by the verdict of the jury, which finds for the sum demanded against the general partner, and the sole question is whether there has been a compliance with the statute which exonerates the other defendants, among them T. L. Felts, from liability for this debt.

[2, 3] The plaintiff in error by proper bills of exceptions calls in question the propriety of the judgment of the circuit court in refusing certain instructions asked for by the plaintiff in error, and in giving certain other instructions at the instance of the defendants in error.

Instruction No. 1, asked for by the plaintiff and refused by the court, tells the jury that they must find for the plaintiff, unless the paper offered in proof as the statement and affidavit under which the Lindsey Mercantile Company was formed had been recorded in the clerk's office of Grayson county in a separate book kept for that purpose,

and been indexed in the name of the Lindsey Mercantile Company, Limited.

It appears from the evidence that there was a book in the clerk's office labeled "Roads" and "Limited Partnerships"; that the custom of keeping road records in this book was discontinued before the said articles were recorded, and it has never been used since for road purposes; that the articles are not indexed in the book in the name of the Lindsey Mercantile Company, Limited, but that the index shows "Limited Partnership"; and that this partnership is the only limited partnership which appears of record in Grayson county, Va.

It is a matter of contention between the parties whether or not the court should construe the statutes with respect to limited partnerships strictly or liberally, and upon this subject the courts seem somewhat at variance. On the one side it is contended that those who claim under a statute which derogates from the common law must show strict compliance with its terms; on the other hand, that the statutes are remedial in their nature and entitled to a liberal construction.

Perhaps the suggestion in Bates on Limited Partnerships, § 13, that "provisions for the protection of third persons are to be liberally construed in favor of such persons, which means strictly against the special partner; and provisions which cannot affect the rights of third persons will be liberally construed, so as not to forfeit the protection of the statute without reason," offers a satisfactory solution of the difficulty. It seems to us clear that as the liability of a general partner is in solido for all the debts of the firm, and that the statute law, by virtue of which alone a limited partnership exists, has provided that upon a compliance with its terms special partners shall come under a limited liability, there is no hardship in requiring a person seeking such limitation upon his liability to show a compliance upon his part with the terms of the statute upon which he relies—that the courts should adopt and enforce a reasonable construction of the statute which, on the one hand, will not defeat one of the objects of the law, which is to induce the investment of capital in business, and upon the other hand will not under cover of a substantial compliance with the requirements of the statute fritter away the protection which the law has thrown around those who deal with the firm.

To this effect is section 205 of Gilmore on Partnership, where it is said: "The better view, and the one toward which the courts are now tending, would seem to be that those provisions of the statute which are clearly for the protection of creditors should be strictly complied with, but that a mere formal defect or technical violation of the statute should not make the special partner liable as a general partner, unless it can be shown that creditors have been misled."

[4, 5] Plaintiff's instruction No. 1 we think very well illustrates what we conceive to be a just and reasonable construction of the law. We think that the requirement that the paper offered in evidence as the statement and affidavit under which the Lindsey Mercantile Company, Limited, was formed, should be recorded in a separate book kept for that purpose, was sufficiently complied with in this case, as shown by the facts to which we have alluded; but, on the other hand, the requirement of law that the statement be indexed in the name of the Lindsey Mercantile Company, Limited, is not answered by the proof that the index shows "Limited Partnership," and that this partnership is the only limited partnership which appears of record in Grayson county.

[6, 7] Instruction No. 1, asked for by the defendants in error, having been refused by the court, is not the subject of exception by the plaintiff in error, but the principle which it embodies is one of importance, and it will not be improper to discuss it. It proceeds upon the idea that knowledge upon the part of the plaintiff as to who were the general and who were the special partners, and of other facts connected with the firm, was sufficient to bring the defendants within the protection of the law as to special partners. We do not think that knowledge has anything to do with the question.

It was said by this court in *Hoge v. Turner*, 96 Va. 624, 32 S. E. 291, in speaking of section 2877 of the Code, which relates to doing business as a trader with the addition of the words, "factor," "agent" etc., that its provisions apply without regard to knowledge by the creditor of the principal, if principal there be, for "knowledge or want of knowledge does not affect the application of the statute. It is an immaterial matter."

In 19 Am. & Eng. Ency. L. (2d Ed.) p. 340, it is said: "The question is not one of good faith on the part of the members, nor of notice to creditors, nor whether the creditors had actual knowledge of the facts required to be set out in the recorded statement, but whether the members conformed to the law in their attempt to form a limited partnership."

In 30 Cyc., at page 762, it is said that "there is authority for the view that persons who deal with a firm as a limited partnership are estopped from denying the validity of its organization, but the better doctrine is that creditors are not thus estopped, unless they have advised the partners to carry on their business in this irregular manner or have expressly assented to the limited liability of the special partner."

[8, 9] Nor will good faith and an honest intention to comply with the statute protect the special partner; nor need a creditor

prove that he has been injured by a failure to comply with the statute. The statute must be actually complied with. *George on Partnership*, § 197.

[10] Instructions 3 and 4 deal with so much of section 2871 as provides that "the names of the partners, with a designation of which are general and which are special partners, shall appear conspicuously upon the front of the place or places of business of the partnership."

[11, 12] That we consider one of the most material provisions of the statute for the protection of creditors and means just what the language imports. It must "appear"—that is, be obvious and manifest—"conspicuously"; that is, plain to the eye, and easily seen. There must be some sign or writing conveying the information required by the statute appearing conspicuously upon the front of the place or places of business of the partnership. The place to which it is attached must be conspicuous, and it must also be conspicuous in the sense that it may be easily read.

[13] We do not think that the evidence in this case in these respects measures up to the requirements of the law. Two typewritten papers placed at a height of 8¼ feet from the floor, illegible to one standing on the floor at the entrance of the doors or on the sidewalk adjacent thereto, and almost illegible after being taken down from their position above the door, one of them written on a piece of paper 7¼ inches long and 2¾ inches wide, and the other 1 inch wide and about 4 inches long, upon which nothing was legible, exposed to the weather for months, are neither a literal nor a substantial compliance with the law upon that subject. It appears, indeed, that for a considerable period of time there were no notices such as the law required.

We are of opinion that the judgment should be reversed, and the case remanded for further proceedings to be had in accordance with this opinion.

Reversed.

(112 Va. 353)

#### WILKINSON v. DORSEY.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

#### 1. EQUITY (§ 348\*)—JURISDICTION—MISTAKE—EVIDENCE.

Equity will not relieve against an alleged mistake on proof of a possibility or even a probability of mistake; but the existence thereof must be established by the clearest and most satisfactory evidence.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 20; Dec. Dig. § 348.\*]

#### 2. REFORMATION OF INSTRUMENTS (§ 20\*)—GROUNDS.

Equity will reform a written instrument where there has been an innocent omission or insertion of a material stipulation, contrary

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



to the intention of both parties, and under a mutual mistake, and where there has been a mistake of one party, accompanied by fraud or other inequitable conduct of the remaining parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 80; Dec. Dig. § 20.\*]

**8. REFORMATION OF INSTRUMENTS (§ 45\*)—MISTAKE OR FRAUD—EVIDENCE.**

In a suit to compel performance of a contract to convey real estate, which defendant executed to her husband's creditor in payment of a debt, evidence held insufficient to establish that she was induced to execute the instrument by fraud or mistake as to her liability on the notes executed by her husband to secure the debt.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 159; Dec. Dig. § 45.\*]

Appeal from Corporation Court of City of Roanoke.

Bill by J. H. Wilkinson against E. E. Dorsey for specific performance. Decree for defendant, and complainant appeals. Reversed.

C. B. & H. M. Moomaw and Hall, Woods & Jackson, for appellant. Scott, Altizer & Watts, for appellee.

**KEITH, P.** The object of the bill in this case was to obtain the specific performance of a contract for the sale of land lying in the city of Roanoke, which is as follows:

"This contract, made this 21st day of September, 1908, by and between E. E. Dorsey, party of the first part, and J. H. Wilkinson, party of the second part:

"Whereas, the said E. E. Dorsey and her late husband, Joseph M. Dorsey, are indebted to the said J. H. Wilkinson in the sum of \$800, evidenced by the notes of the said Joseph M. Dorsey; and

"Whereas, the said party of the first part is anxious to provide for the payment of said debt and is willing to make provision therefor:

"Now, therefore, this contract witnesseth, that the said E. E. Dorsey agrees to sell to the said J. H. Wilkinson all that lot or parcel of land lying and being in the city of Roanoke, Va., and described as follows, to wit: \* \* \*

"And in consideration of the above agreement the said J. H. Wilkinson agrees to pay to the said E. E. Dorsey the sum of \$900 for said property.

"It is agreed between the parties that settlement and payment for the above property shall be made when the property which was owned by the said Joseph M. Dorsey, to wit, two lots of land, one lying on the west of the above described lot, and one on the east thereof; is sold by decree of court, and it is mutually agreed that so much of the proceeds of the sale of the said two lots belonging to the said Joseph M. Dorsey as is not required for the payment of the cost of the suit and other indebtedness of the

said Joseph M. Dorsey, shall be applied to the payment of the indebtedness of the said Joseph M. Dorsey and Ella E. Dorsey to J. H. Wilkinson; that the balance of the indebtedness to the said J. H. Wilkinson shall be deducted from the nine hundred dollars (\$900.00), the purchase price of the above described lot, and that any balance which may be due by the said J. H. Wilkinson upon said lot shall be paid by the said J. H. Wilkinson to the said Ella E. Dorsey.

"Witness the following signatures and seals the day and year first above written.

"Ella E. Dorsey. [Seal.]

"J. H. Wilkinson. [Seal.]"

This contract was acknowledged before a notary public on the day of its date, and was admitted to record on the 11th day of October following.

Mrs. Ella E. Dorsey filed an answer, in which she says that she was the wife of Joseph M. Dorsey, who died in the year 1908, owning the two vacant lots in the bill mentioned, and leaving her and her three children with no other means of support than the property mentioned in said contract, which was conveyed to her as her separate estate in the year 1890; that shortly after the death of her husband, she being utterly ignorant of business and wholly unadvised as to her rights, the complainant told her that he held notes of her husband, upon which her name appeared as indorser, to an amount of about \$800; that thereupon respondent informed the complainant that she had never indorsed said notes, and that if her name appeared upon them it was placed there without her knowledge or consent; that nevertheless the complainant insisted that respondent was liable on said notes, and said that they had been brought to him with her name on them by respondent's husband, and that she, or at least the property conveyed to her, was liable for their payment; that complainant then proposed that respondent should go with him to the office of the Honorable C. B. Moomaw, whom he represented to respondent as being a good lawyer, and one who would rightly advise her as to her liabilities in the premises; that, wishing to do what was right, she complied with this suggestion, and when she reached the office of Mr. Moomaw she was there again told that she and her property were liable for the debt; that, so believing, and in ignorance of the fact that Mr. Moomaw was then the attorney for the complainant, she entered into the contract in the bill mentioned, which was then and there prepared at the dictation of Mr. Moomaw and in his office; that she never would have entered into the contract, unless she had believed that she or her property was liable for the indebtedness; that she had full confidence that Judge Moomaw would advise her correctly, and does not now be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

lieve that he would have permitted her to sign the contract, unless he was satisfied that she was liable for the payment of said indebtedness. The facts with reference to the \$800 debt are stated to be: That her husband, Joseph M. Dorsey, was indebted to the complainant for materials furnished him some time previous to his death; that after said indebtedness had been incurred and was long past due her husband gave to Wilkinson certain notes covering the same, upon which he had placed her name as indorser, without her knowledge and consent; that the existence of these notes was unknown to respondent until she was advised thereof by Wilkinson after her husband's death. The answer further states and charges: That the contract is the result of a mutual mistake of the parties thereto, or, if complainant was not mistaken in the premises, it was the result of fraudulent and inequitable conduct on his part, and she prays, not only that specific performance may be denied, but that the court will proceed further and decree that the contract be annulled and set aside, and to that end that her answer may be taken and treated as a cross-bill, and that complainant may be required to answer the same, but not under oath, and that all other and general relief may be granted respondent as the nature of her case may require and to equity shall seem meet.

Wilkinson answered this cross-bill, denying its allegations, and giving his version of the transactions which led up to the execution of the contract set up in his bill. Upon the issues thus made, depositions were taken, and the case was submitted to the corporation court, which entered a decree, denying the specific execution of the contract in the bill mentioned, and decreeing its cancellation as prayed for in the cross-bill, and from that decree an appeal was allowed.

It appears from the proof that Joseph M. Dorsey was a contract plasterer in the city of Roanoke; that Wilkinson was a merchant dealing in building material; and that in the course of business Dorsey became indebted to him. In the month of January, 1908, Dorsey owed Wilkinson about \$800. He was unable to pay the whole of the debt at one time, and proposed to close the account by notes signed by himself and indorsed by his wife, the defendant in this suit, and accordingly eight notes for \$100 each were prepared, payable consecutively at from one to eight years. Dorsey executed these notes on his part, and was about to indorse them on behalf of his wife, when Wilkinson said to him: "I thought that you would have your wife indorse these notes?" to which Dorsey replied: "Well, she is. This is the way we do our business. If you doubt my word, call up Mrs. Dorsey." This Wilkinson declined to do, whereupon Dorsey went to the telephone and called up his wife and spoke to her about the matter, and

asked her if it would be all right for him to indorse her name. Wilkinson did not hear Mrs. Dorsey's reply, but he knew the number of the telephone of Dorsey's house, and knew that Dorsey called the right number. When the conversation over the telephone was finished, Dorsey remarked, "I told you it was all right," and proceeded to write his wife's name on the back of the notes. On the 1st of May, 1908, Dorsey died without having paid any of the eight notes; none of them at the time being due. Some time after the death of Dorsey, his widow, the defendant in this suit, went to Wilkinson's place of business, and stated that she wanted to make arrangements for the payment of these notes. She said that she could not pay the debt and continue to live on her property, and she wanted to go north and live with her husband's people, and asked Wilkinson to take charge of her house and rent it, and use the rents for the payment of the notes, but that she did not want to leave the city until the fall of the year. Some time in the month of September, she telephoned to Wilkinson and asked him to come down to her home. When he went there, she stated to him that she wanted to sell him the property—not only her property, but the two vacant lots belonging to her husband. She asked Wilkinson the sum of \$1,200 for the whole property, and out of the proceeds of this sale she proposed to pay to Wilkinson the notes above referred to, and let him pay her the difference. Wilkinson was of the opinion that the whole property was worth about \$1,300; the house and lot being worth \$900, and the vacant lots \$200 each. It developed that Mrs. Dorsey was not the owner of all the property, and that her late husband was the owner of the two vacant lots; whereupon Wilkinson stated that he doubted if she could make sale of her husband's property. A few days after this conversation, Mrs. Dorsey came up town, and telephoned to Wilkinson to meet her at the bank. When they met, she said that she wanted some money, and thereupon Wilkinson indorsed her note for \$75. At that time Wilkinson said to her that he had consulted an attorney with reference to her right to sell the property of her husband, and that the attorney was of the opinion that she could not do so, and suggested that they go to the office of Mr. Moomaw, an attorney in the city of Roanoke, which they did. On reaching the office of Mr. Moomaw, Mrs. Dorsey, after being introduced to him, proceeded to state the facts heretofore set forth—that her husband was dead; that he owned two vacant lots, and that she owned a house and lot situated between them; that Wilkinson held notes of Dorsey for \$800, upon which she was indorser, and that she wished to pay this debt by a sale of the property to Wilkinson, receiving from him the difference. In the conversation that ensued, it appeared that

in addition to the notes held by Wilkinson Dorsey was indebted to a number of other people in the city of Roanoke. Mrs. Dorsey also stated that she was willing to take \$1,200 for the whole property, but, being informed that she could not sell Dorsey's lots, she expressed her willingness to sell her individual property to Wilkinson for the sum of \$800 in discharge of his debt, and at that time Wilkinson said he was willing to pay her \$800 for it. Mr. Moomaw suggested to Mrs. Dorsey that such an arrangement would not be fair to her, as she was only the indorser on the notes and secondarily liable; that the property of Joseph M. Dorsey should be exhausted first; and that if she should pay the whole of that debt out of her property it would leave his property for his other creditors; whereas it should be applied to the debts which he owed ratably, and she should only be required to pay such balance of the notes as was left after the property of Dorsey was exhausted. Seeing the propriety of this suggestion, Mrs. Dorsey and Wilkinson thereupon entered into a contract, in which Mrs. Dorsey agreed to sell to Wilkinson her house and lot for the sum of \$900. The contract provided that a suit should be brought to settle the estate of Joseph M. Dorsey and subject his property to the payment of his debts; that such portion of the proceeds of said property as would be applicable to the payment of Wilkinson's debt should be credited on said debt; and that the balance of said debt should be deducted by Wilkinson from the purchase price he was to pay Mrs. Dorsey for her property. A creditor's bill was filed to subject Dorsey's property to the payment of his debts, and, the property being sold, Wilkinson received on his debt about \$124, and was then ready to make a settlement with Mrs. Dorsey for her property, and pay her what was coming to her and receive a deed to the property.

This recital of facts is taken in a large degree from the petition for appeal, and is fully sustained by the preponderance of the testimony. There is, indeed, but little contradiction between the testimony of Mrs. Dorsey and that of the witnesses for Wilkinson. The only material difference is that Mrs. Dorsey asserts that she never authorized her husband to indorse her name upon the notes; that she signed the contract in the bill mentioned, believing that she was bound to pay those notes; that she was not advised that she was not liable upon them; and that she had never seen the notes until they were shown to her at the time she gave her testimony.

In her testimony, in answer to questions, she said:

"Q. You placed the property you owned as being worth about \$800 at that time, didn't you? A. \$900 was what Mr. Wilkinson said.

"Q. I understand; but you placed the full

value of the property at \$1,200, and you said the two lots were worth \$200 apiece? A. Yes, sir.

"Q. And it was then that Mr. Wilkinson said he would give you \$900? A. Yes, sir.

"Q. You also remember, don't you, we were making a calculation as to the amount of your debts? A. Yes, sir.

"Q. That I stated to you if you sold your property that way you would not have much left? A. Yes, sir; after you brought in those notes of Mr. Dorsey.

"Q. After I calculated what you owed Mr. Wilkinson and the other debts which you named, and got what you valued the property at, I told you that if you would sell the property that way you would not have much left? A. Yes; you did; but you see I did not know anything about those notes when I was trying to sell Mr. Wilkinson the property.

"Q. You knew it before you came to my office? A. I do not remember that I knew anything about the notes until I came to the office. I knew Joe owed Mr. Wilkinson, but I did not know anything about the notes until I came to your office.

"Q. Didn't you say Mr. Wilkinson spoke to you about the notes at your house when you called him down there? A. He did not say anything to me about the notes, but I knew Joe owed Mr. Wilkinson the money; but there was nothing said to me about the notes.

"Q. Now, who spoke first about the debt at your house, you or Mr. Wilkinson? A. I must have spoken first about it.

"Q. You spoke about the debt coming off the price of the property? A. I thought, you know, that it would leave me—yes; I remember I spoke about that coming off the property. But, you see, I thought after Mr. Wilkinson got his money, why, there would be something coming to me. When I asked him about selling him the property, I did not know anything about the notes. I knew Joe owed this money, and I thought if I could sell him the property then there would be something coming to me.

"Q. And you offered to sell him the property and take Mr. Wilkinson's debt out of it, and then pay you the balance? A. Yes; after I sold him all this property. Then he said to me, after I proposed selling him all the property: 'Well, you cannot sell Mr. Dorsey's property. That will have to go through court.'

We think it appears, not only from the evidence of other witnesses, but from the testimony of Mrs. Dorsey herself, that she knew of this indebtedness on the part of her husband; that she intended to pay it out of the proceeds of the sale of her property; that she herself made the first proposal to that effect; and that her subsequent attitude is due to two causes: First, the fact that she found her husband's indebted-

ness, other than that to Mr. Wilkinson, would absorb the greater part of his property; and, secondly, to influences which will always exert themselves to a greater or less extent under similar conditions. Immediately upon the death of her husband, she felt a disposition to provide for his debts, which insensibly faded with time, while, on the other hand, the pressure of her situation was making itself felt each day with greater force. Here was a debt contracted by her husband in the ordinary course of business, for which he gave negotiable notes, placing her name upon them as indorser as he had before done without objection on her part. There was a strong motive to protect his good name, which prevailed with her in the first instance; but, ascertaining that there was perhaps no legal liability upon her, the pressure of conditions finally overcame the sentiment by which she had been at first influenced, and she determined to stand upon her legal rights.

There is nothing to indicate that Mrs. Dorsey is ignorant or incompetent. She says that she had frequently indorsed her husband's notes before, but carefully discriminates as to the character of the notes which it was her custom to indorse; and we think the reading of the exhibit filed with the bill of itself plainly sets forth and carefully protects her rights, and shows knowledge upon her part of every essential condition. That she executed that instrument is not denied, and she was bound by it, unless she maintains her position that it was obtained from her by fraudulent misrepresentation, or by mutual mistake.

[1] In *Solenberger v. Strickler*, 110 Va. 273, 65 S. E. 566, it is said that equity will not relieve against a mistake, unless it be established by the clearest and most satisfactory evidence. *Bibb v. Am. Coal & Iron Co.*, 109 Va. 261, 64 S. E. 32.

[2] It is not enough to show a possibility or even a probability of mistake. As was said by Lewis, P., in *Shenandoah Val. R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239: "The authorities all agree that equity has jurisdiction to reform written instruments in two well-defined classes of cases only, viz.: (1) Where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake; and (2) where there has been a mistake of one party, accompanied by fraud or other inequitable conduct of the remaining parties. But so great and obvious is the danger of permitting the solemn engagements of parties, when reduced to writing, to be varied by parol evidence, that in no case will relief be granted, except where there is a plain mistake, clearly made out by satisfactory and unquestionable proof. According to some of

the cases, there must be a certainty of the error. At all events, the party alleging the mistake must show by evidence which leaves no reasonable doubt upon the mind of the court, not only exactly in what the mistake, if any, consists, but the correction that should be made. \* \* \* A rule less rigid would be fraught with infinite mischief, since it would be destructive to the certainty and safety of written contracts." See, also, *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541; *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

[3] The evidence in this case not only fails to establish fraud or mistake by clear and satisfactory proof, but the preponderance of the proof maintains the fairness and integrity of the transaction.

We are of opinion that the decree of the corporation court should be reversed, and the cause remanded for further proceedings to be had, not in conflict with this opinion.

Reversed.

(112 Va. 731)

#### MARTIN v. MARTIN.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

1. PARTITION (§ 4\*)—NATURE OF "PARTITION." "Partition" is the division between two or more persons of lands which they jointly own as coparceners, joint tenants, or tenants in common, and before land purchased by one of them can be brought into a partition suit along with lands jointly owned, pursuant to a verbal agreement, a state of facts must be established which will authorize a specific performance of the verbal agreement.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 6-12; Dec. Dig. § 4.\*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5188-5190.]

2. SPECIFIC PERFORMANCE (§ 41\*)—VERBAL AGREEMENT FOR PARTITION—ENFORCEMENT—CONDITIONS PRECEDENT.

Under the statute of frauds (Code 1904, § 2840), a verbal agreement for partition is not enforceable, unless the agreement is certain and definite, and the acts of part performance refer to and result from the agreement; and the agreement must have been so far executed that a refusal of full execution will operate as a fraud on the party seeking enforcement.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 120-123; Dec. Dig. § 41.\*]

3. SPECIFIC PERFORMANCE (§ 43\*)—VERBAL AGREEMENT FOR PARTITION OF REAL ESTATE—PART PERFORMANCE.

Plaintiff and defendant purchased the interests of their brothers and sisters in land of their deceased father, pursuant to an oral agreement that adjacent land, previously purchased by defendant alone, should be considered a part of the father's land for partition between plaintiff and defendant. Plaintiff furnished his share of the money for the purchase of the interests, the cultivation of the land, and the raising of crops, the proceeds of which went to the support of plaintiff and defendant, the surplus being used to pay for the interests purchased, and the interests so purchased were paid wholly out of the crops raised

by the joint labor of plaintiff and defendant. *Held*, that the acts of performance by plaintiff did not take the agreement out of the statute of frauds (Code 1904, § 2840), and it was not enforceable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 134–139; Dec. Dig. § 43.\*]

**4. SPECIFIC PERFORMANCE (§ 41\*)—VERBAL AGREEMENT FOR PARTITION—ENFORCEMENT.**

The evidence did not show a state of facts justifying enforcement of the agreement, within the rule that, to justify the enforcement of a parol contract for partition, the contract must have been so far executed that a refusal of full execution will operate as fraud on the party seeking enforcement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 120–123; Dec. Dig. § 41.\*]

Appeal from Circuit Court, Roanoke County. Suit by Lewis J. Martin against Thomas H. Martin. From a decree for plaintiff, defendant appeals. Reversed and remanded.

A. E. King, for appellant. Horace M. Fox and Hall, Woods & Jackson, for appellees.

KEITH, P. Arabia Martin died in 1894, leaving 11 children. Among them were Lewis J. Martin and Thomas H. Martin, the parties to this litigation. Thomas H. Martin had spent four years of his life in the West, where he had saved some money, and upon his return to his home in Roanoke county he purchased 60 acres of land adjoining his father's farm, for which he paid the sum of \$1,000. The land was bought, paid for, and the deed executed to him before his father died. Arabia Martin, at the time of his death, was the owner of a farm containing about 204 acres, and Lewis and Thomas Martin agreed to purchase the interest of their brothers and sisters in the lands of their father. In execution of this arrangement, they succeeded in purchasing all of their father's real estate, except the interest of two of their sisters, paying for the interests thus purchased the sum of \$2,750. This money was obtained from sale of crops raised on the lands purchased by them, together with the crops raised on the 60 acres of land belonging to Thomas H. Martin.

During the progress of these transactions, Thomas and Lewis Martin lived together, and the proceeds of the crops, after deducting their living expenses, were used in paying for the land which they had jointly bought. From time to time temporary loans were negotiated to make payments as they fell due. Some of them were secured by deed of trust on the land jointly owned by Thomas and Lewis Martin, and some upon the individual land of Thomas Martin; but all were paid from the proceeds of the crops, and no money from any other source was used in making payments for the land. Thomas and Lewis Martin lived together in the same house until the latter part of April,

1908. About that time they undertook to partition the land which they had bought, and a disagreement arose between them which resulted in Lewis Martin bringing a suit for partition. In it he states that it was agreed between him and Thomas Martin that they would together purchase such interest of their coheirs as they could, and, as a part of the consideration inducing the complainant, Lewis Martin, to enter into this agreement and furnish certain moneys, the 60-acre tract of land, which was theretofore purchased by and deeded to Thomas Martin, should be considered as a part of the land to be enjoyed jointly and held by them, together with such lands as they had inherited from their father, Arabia Martin, and such as they might be able to purchase as aforesaid; that pursuant to this agreement complainant and Thomas H. Martin did make the aforesaid purchases, the complainant furnishing the money that he had agreed to furnish; and that they did thereafter hold and enjoy the lands thus purchased, and as a result of these proceedings the complainant and Thomas Martin were seised and possessed each of a one-half undivided interest in and to the 60-acre tract, as well as the interest of their father's estate which they had inherited, or had acquired by purchase from their coheirs. The bill further avers that there was a partition agreed upon between the complainant and his brother Thomas, by which all of their lands, including the 60 acres, were divided, and that the two brothers, Lewis and Thomas, had entered upon, used, cultivated, and enjoyed the parcels so allotted to each of them; Thomas Martin making numerous and valuable improvements upon the share allotted to him.

Thomas Martin answered the bill, and denied all the material allegations. Proof was taken, and the circuit court decreed that the "contract of partition heretofore made between Thomas H. Martin and Lewis J. Martin, as set out and alleged in said bill, be enforced by the conveyance as herein-after provided, to the said Lewis J. Martin, of the following described property, to wit," and from that decree Thomas Martin appealed.

[1] This case presents something more than a bill for the partition of lands. As is set forth in the petition for an appeal, "partition is the division between two or more persons of lands which they jointly own as coparceners, joint tenants, or tenants in common," and before the 60-acre tract which was purchased by Thomas Martin before his father's death, for which he paid, and to which he held title, can be brought into the partition suit along with the lands jointly owned by Thomas and Lewis Martin as purchasers from their brothers and sisters, a state of facts must be established

which will entitle Lewis Martin to a specific performance of the verbal contract between him and Thomas Martin that the 60-acre tract should be considered as belonging jointly to Thomas and Lewis Martin.

[2] "Agreements to make partition can only be enforced in equity, where a similar agreement to convey land could be enforced." 1 Minor on Real Property, § 901.

Under the statute of frauds (section 2840 of the Code), no action shall be brought upon a contract for the sale of real estate, unless some memorandum or note thereof be in writing, and signed by the party to be charged thereby, or his agent.

No such memorandum or note appears in this record, and none in fact existed. To maintain the decree of the circuit court, therefore, the case must be brought within the influence of *Wright v. Pucket*, 22 Grat. 370; *Plunkett v. Bryant*, 101 Va. 818, 45 S. E. 742; and *Reed v. Reed*, 108 Va. 790, 62 S. E. 792. Those cases are to the effect that, "in order to justify a court of equity in the enforcement of a parol contract for the sale of land on the ground of part performance, the contract must be certain and definite in its terms; the acts of part performance relied on must refer to, result from, or be made in pursuance of, the contract proved; and the contract must have been so far executed that a refusal of full execution would operate a fraud upon the party and place him in a situation which does not lie in compensation."

[3] Let it be admitted that such a contract is averred in the bill as should be specifically executed, if maintained by proof. We are clearly of opinion that the proof falls far short of that which is required by a court of equity for the enforcement of a parol contract for the sale of land. The only acts of performance upon the part of the plaintiff were the furnishing of his share of the money for the purchase of the interests of his coparceners, the cultivation of the land, and the raising of crops, the proceeds of which were devoted, first, to his own support and that of his brother, and the surplus constituted the source of payment of the purchase price of the land.

[4] It must be observed that Thomas Martin is making no objection to the partition of the shares purchased by him jointly with Lewis Martin from their brothers and sisters. Those purchases were the act of Lewis, as well as of Thomas. Thomas and Lewis agreed with their vendors upon what the interests purchased were fairly worth, and those interests have been paid for out of crops raised by their joint labor, belonging to them jointly, and that joint interest must be taken to compensate the joint purchasers for their outlay; and Lewis and Thomas must be considered to have had a sufficient quid pro quo for what each of

them has paid. If, in addition to an equal share with Thomas in the land jointly purchased, Lewis is to be held entitled to one-half of the 60-acre tract bought and paid for by Thomas, and which is shown to be worth about \$2,500, then the result would be that Lewis would be the owner of at least twice as much land in value as would fall to the share of his brother. If that were the result of a bargain fairly made, between people of sound mind and capable of contracting, and proved to the satisfaction of the court, there would be no choice but to enforce it; but the appellee is before the court asking the enforcement of what is substantially a verbal contract to convey land. To bring it within the influence of the equitable principle of part performance, he must show such a state of facts that a refusal of a full execution would be a fraud upon him, and place him in a situation which does not lie in compensation. In this the proof that he adduces wholly fails. There is no hardship upon him in refusing to enforce performance of the contract; for, without reference to the interest which he claims in the 60-acre tract, he had received a full equivalent for the labor performed and the money expended by him.

We are, for these reasons, of opinion that the decree of the circuit court should be reversed, and the cause remanded to the circuit court, with direction to exclude from the partition the 60-acre tract, the title to which is in Thomas Martin, and, as to the other lands mentioned in the bill and proceedings, to make partition of them between the plaintiff and the defendant.

Reversed.

(112 Va. 302)

#### SILLING v. TODD.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

#### 1. TRUSTS (§ 81\*)—RESULTING TRUSTS—PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER—HUSBAND AND WIFE.

Where property is bought and paid for by a married woman with her own means and for her own benefit, a conveyance to her husband creates a trust in favor of the wife, which a court of equity, in a proper proceeding, will enforce.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 115-118; Dec. Dig. § 81.\*]

#### 2. BANKRUPTCY (§ 303\*)—ACTION BY TRUSTEE—FRAUDULENT CONVEYANCE BY BANKRUPT—SUFFICIENCY OF EVIDENCE.

Evidence in a proceeding by a trustee in bankruptcy to set aside a conveyance by the bankrupt to his wife, acknowledged and delivered within a month of his involuntary bankruptcy, on the ground that a transfer was made with intent to hinder, delay, and defraud the bankrupt's creditors, held insufficient to sustain a decree for the trustee.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 303.\*]

Appeal from Circuit Court, Augusta County.

Bill by R. A. Todd, trustee of the bankrupt estate of John H. Silling, against Annie E. Silling. Decree for plaintiff, and defendant appeals. Decree reversed, and bill dismissed.

Bumgardner & Bumgardner and Robertson & Robertson, for appellant. J. M. Perry, for appellee.

**HARRISON, J.** This record shows that by deed recorded January 23, 1908, John H. Silling made a general assignment for the benefit of his creditors, and that four days later he was, upon the petition of his creditors, thrown into bankruptcy. The bill in this proceeding was filed in the circuit court of Augusta county by R. A. Todd, trustee in bankruptcy of Silling, assailing the validity of a deed from John H. Silling to his wife, the appellant, dated February 15, 1906, but not acknowledged and delivered until January 9, 1908, conveying to her a storehouse and lot at Stokesville, in Augusta county, and asking to have the same set aside upon the ground that the transfer was made with intent to hinder, delay, and defraud the creditors of John H. Silling within the purview of the bankrupt act, and also because within the purview of that act it constituted a preferential payment of a bond of Silling to his wife, and, further, because the transfer was fraudulent and void under the laws of Virginia, and therefore void under the bankrupt act.

The answer filed by the defendant, Annie E. Silling, denies every charge of fraud made in the bill against herself or her husband, and asserts that the utmost good faith characterized the conveyance to her which is assailed; that the lot upon which the storehouse was built at Stokesville was bought for \$100 by her and paid for with her own means, and that the building thereon was erected entirely with means furnished by her for that purpose; that the whole was an investment made by her for her own benefit; that through a mistake of the scrivener who prepared the deed the property was conveyed to her husband, instead of herself, and that this mistake was intended to be corrected by the conveyance sought to be set aside; and that her husband never at any time had any beneficial interest in the property, and never claimed any.

Both the husband and wife were introduced as witnesses to sustain the bona fides of the deed assailed; but their testimony was objected to upon the ground that, under the Virginia statute (Code 1904, § 3346), neither husband nor wife is competent to testify in any proceeding by a creditor to avoid or impeach any conveyance, gift, or sale from one to the other on the ground of fraud or want of consideration.

There is much force in the contention of the learned counsel for the appellant that this suit is not based upon the Virginia statute of fraudulent and voluntary conveyances, but is

based upon a federal act, and that the validity of the deed in controversy is to be tested alone by the rules of federal procedure as fixed by federal statutes and decisions, and that the disability imposed upon husband and wife by the Virginia statute cannot by legal intendment be stretched to extend that disability to a proceeding under a federal statute to set aside a paper declared void by a federal statute. See *Samuels' Case*, 110 Va. 901, 66 S. E. 222.

This question, however, need not be decided, because the evidence in this case, other than that given by the appellant and her husband, shows that the transaction in question was bona fide and without prejudice to the rights of the appellee or the creditors represented by him.

John H. Silling, the husband of appellant, was called as a witness by the appellee in the bankrupt proceeding, and there testified at length. That deposition is quoted from by the appellee in his bill in this case, and the whole deposition is filed by the appellant as part of her answer to the bill. This deposition of John H. Silling, taken in the bankrupt proceeding, is conceded to be proper evidence in this case; and it, together with other competent evidence herein, abundantly shows that the appellant was amply able to buy the Stokesville lot and pay for the building erected thereon, and that she did in fact buy the lot and pay for it and the improvements put thereon with her own means, as an investment for her own benefit, and that her husband never at any time had any interest therein. The scrivener who prepared the deed conveying the lot to John H. Silling testifies that neither Mrs. Silling nor her husband ever saw that deed until after it was prepared, executed, and delivered; that as soon as they saw it, and found that the lot was conveyed to the husband, instead of to the wife, they both protested, and at once insisted that it was a mistake which must be corrected, and that he advised them that the correction could be made by the husband conveying the title to Mrs. Silling, and that he would prepare the deed for that purpose free of charge, as he had made the mistake; that it was his fault that this deed was not made until January, 1908; that every time Mrs. Silling saw him, from the time the mistake was discovered until the transfer from the husband was made, she urged upon him the preparation of the deed conveying the property to her, but that he procrastinated without cause until January, 1908, when the deed from the husband was finally made and executed. In the meantime, and until the deed was made, Mrs. Silling took from her husband, as a protection, his bond for \$500, the total cost of the house and lot, which she surrendered as soon as she received the deed. The deed which had by mistake been made to the husband was never recorded until the deed from him to his wife was made, when

both were recorded within a few days of each other.

[1] It being satisfactorily established that the property in controversy was bought and paid for by the appellant with her own means and for her own benefit, and that her husband did not have and was never intended to have any interest therein, it follows that, when the deed was made conveying the property to John H. Silling, a trust was thereby created by operation of law in favor of Mrs. Silling, the party paying the purchase money, and, when Silling subsequently transferred to his wife the legal title held by him for her benefit, he did no more than a court of equity in a proper proceeding would have compelled him to do. That under such circumstances a trust resulted in favor of Mrs. Silling, the party paying the purchase money, is a familiar doctrine. *Cox v. Cox*, 95 Va. 173, 27 S. E. 834.

[2] In the case at bar, the charges of fraud are wholly unsustained, and the good faith of the transaction assailed is fully established. The decree complained of must therefore be reversed, and this court will enter such decree as the circuit court ought to have entered, dismissing the bill filed by the appellee, with costs.

Reversed.

(112 Va. 798)

**SHOEMAKER v. SHOEMAKER et al.**  
(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**1. BONDS (§ 128\*)—ACTION—BURDEN OF PROOF.**

On plea of non est factum in a suit on a bond, plaintiff has the burden of showing genuineness of the signature.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 205-217; Dec. Dig. § 128.\*]

**2. EQUITY (§ 378\*)—ISSUES OF FACT—JURY TRIAL.**

Where suit on a bond involved the credibility of witnesses, and the proof was very conflicting as to the genuineness of the bond, it was error not to order a jury trial on the trial court's own motion.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 794-799; Dec. Dig. § 378.\*]

Appeal from Circuit Court, Russell County.

Bill by B. H. Shoemaker, assignee, against A. D. Shoemaker, administrator, and others. From a decree dismissing the bill, plaintiff appeals. Reversed.

W. W. Bird, for appellant. Finney & Wilson, for appellees.

**CARDWELL, J.** The controversy involved in this appeal is with respect to a bond alleged to have been executed on the 1st day of August, 1908, by James M. Shoemaker, who it appears resided in Russell county, Va., was never married, and had accumulated some property. His nearest relatives and heirs at law were four brothers, one

sister, and two nephews, children of a deceased brother; one of the brothers, Isaac Shoemaker, being a resident of Scott county, Va., whom James M. Shoemaker had been in the habit of visiting at irregular intervals, his visits being sometimes prolonged as much as two weeks or more. It is claimed by appellant that, while on a visit to his brother Isaac, the bond here in question for \$1,077, payable one day after its date, was executed by James M. Shoemaker to B. H. H. Shoemaker, a son of Isaac Shoemaker, and by B. H. H. Shoemaker assigned to appellant, another son of Isaac Shoemaker.

James M. Shoemaker died intestate at his home in Russell county in September, 1908, but a short time after the date of said bond, and A. D. Shoemaker was duly appointed and qualified as his administrator. Some time after the death of James M. Shoemaker, appellant presented the said bond to said administrator for payment, which was refused, although the bond had been approved and allowed by the commissioner of accounts for Russell county as a debt against the estate of James M. Shoemaker, deceased; but whether payment was refused because of the want of sufficient personal assets of said decedent's estate to pay it, or for what reason, does not appear and is not material. Payment of the bond having been refused, appellant filed his bill in this cause against the administrator and heirs at law of James M. Shoemaker, deceased, the purpose of which was to enforce its payment out of the personal assets in the administrator's hands, if sufficient, and, if not, out of the proceeds of the sale of the real estate owned by James M. Shoemaker at his death.

To the bill the administrator filed a separate answer, some of the other defendants their joint and several answers, and at the same term of the court two of the defendants filed their plea of non est factum, verified by their affidavits. The answers set up as a defense want of consideration and the incompetency of James M. Shoemaker to dispose of his estate at the time the said bond purports to have been executed; but defendants offered no evidence in support of either of those defenses, and the case was litigated and finally determined by the circuit court upon the plea of non est factum interposed by two of the defendants, the decree of the court being adverse to appellant, and his bill was dismissed.

[1] There was some evidence, brought out by appellees in the conduct of the case upon their cross-examination of witnesses for appellant, tending to show that there was no consideration for the execution of the bond in controversy; but it is conceded here that the plea of non est factum presents the only defense relied upon by appellees. The



question, therefore, presented on this appeal, is whether or not the appellant has successfully carried the burden, cast upon him by the plea of non est factum, of proving the genuineness of the signature of James M. Shoemaker to the disputed bond.

[2] We shall not go into a discussion of the evidence, further than to say that it involves not only the credibility of witnesses, but the charge of both forgery and perjury on the part of some of the witnesses who have testified in the case; and the proof is not, in our opinion, sufficiently definite and certain to satisfy us that the ends of justice have been attained by the decree complained of. With the strong circumstances, both favorable and adverse to the genuineness of the bond, appearing from the depositions taken and considered at the hearing of the case, it is one peculiarly for a jury, and the error of the court was in not ordering of its own motion an issue out of chancery. Wherefore, in order that the subject may be more fully investigated, the decree of the circuit court will be reversed, and the cause remanded, with directions that a jury be impaneled to try and determine at the bar of the court the issue of fact involved, viz., whether or not the signature of James M. Shoemaker to the disputed bond is genuine; and upon the trial of that issue before the jury, the burden of proving the genuineness of the signature in question shall be upon the appellant.

Reversed.

(113 Va. 694)

CHURCH et al. v. GOSHEN IRON CO.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**1. LANDLORD AND TENANT (§ 265\*)—DISTRESS.**  
Distress for rent will not lie, unless the relation of landlord and tenant exists.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1062-1074; Dec. Dig. § 265.\*]

**2. LICENSES (§ 44\*)—DISTINGUISHED FROM LEASE.**

Defendant and plaintiff executed an agreement providing that plaintiff allow defendant to remove ballast rock from its limestone quarry upon the following terms, to wit: Defendant to furnish all necessary machinery and to pay plaintiff a royalty of 10 cents a yard and remove at least 100 tons each day, the royalties for each week to be paid on the succeeding Thursdays, and in default of payment all operations to cease until royalties were paid. It was further provided that the minimum royalty should begin to accrue on the day defendant started the machinery, and that the contract should terminate on a certain date, when defendant should turn over the premises to plaintiff. *Held*, that the relation of landlord and tenant did not exist between the parties; defendant merely having a license to work the quarry.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 97-99; Dec. Dig. § 44.\*]

Error to Circuit Court, Augusta County.

Proceedings by the Goshen Iron Company against E. W. Church and another. Judgment for plaintiff, and defendants bring error. Reversed.

H. J. Taylor and Blease & McCoy, for plaintiffs in error. R. L. Parrish and J. M. Perry, for defendant in error.

WHITTLE, J. This writ of error is to a final order upon a distress warrant for rent, under Code Va. 1904, c. 127. Upon the hearing the plaintiff in error, Church, the alleged tenant, resisted the demand on several grounds, while his coplaintiff in error, the Good Roads Machinery Company, set up its ownership of the property levied on by interpleader. A jury was waived, and the whole matter was submitted to the court, which held the property liable to distress, and, ascertaining the rent due to be \$510, gave judgment for that sum, and likewise ordered a sale of so much of the property distrained as might be necessary to discharge the rent.

[1] The principle is elementary that distress for rent will not lie unless the relation of landlord and tenant exists between the parties. The right is not only incident to that relation, but is dependent upon it. The controlling question in this case, therefore, is whether the relation of landlord and tenant arises out of the contract upon which the proceeding is based.

The agreement between the Goshen Iron Company and Church stipulates that the first party allows the second party to get and remove ballast rock from its limestone quarry upon the following terms: The second party to furnish all machinery necessary for such quarrying, and to pay the first party a royalty of 10 cents a yard, of 2,500 pounds, and to remove at least 100 tons of ballast rock each and every working day that the contract is in force. The royalties for each week were to be due and payable on the succeeding Thursday at noon; and in default of payment all operations were to cease until such royalty was paid. The minimum royalty was to begin to accrue on the day the second party started his machinery, which should be not later than October 1, 1907, and the contract was to terminate on January 31, 1908, at which time the second party was to turn over the premises occupied by him to the first party. The remaining stipulations do not affect the character of the agreement.

In 27 Cyc. 690, it is said: "There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property, and a license to work the same mine. In the latter case the licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, and in such pro-

ceeds, not as realty, but as personal property, and his possession is the possession of the owner. A contract simply giving a right to take ore from a mine, no interest or estate being granted, confers a mere license, and the licensee acquires no right to the ore until he separates it from the freehold. But an instrument that demises and leases certain lands for mining purposes only, for a designated term of years, at a fixed rent, and giving the right to erect all necessary buildings, etc., is a lease, and not merely a mining license."

So in the leading case of *Funk v. Holderman*, 53 Pa. 229, it was held that "a grant of the free and uninterrupted privilege to go upon a tract of land to prospect, bore, erect engines, and take any ore, oil, etc., out of the earth, does not amount to a lease, nor a sale of the land or the minerals, but is a mere grant of an incorporeal hereditament—a license to work the land for minerals, and one coupled with an interest not revocable at the pleasure of the licensor."

Bainbridge on the Law of Mines and Minerals (Ed. 1841), at page 162, observes: "There is a great distinction between a lease of mines and a license to work mines. The former is a distinct conveyance of an actual interest or estate in lands, while the latter is only a mere right or incorporeal hereditament to be exercised in the lands of others."

\* \* \* In order to ascertain whether an instrument must be construed as a lease or a license, it is only necessary to determine whether the grantee has acquired by it any estate in the land in respect of which he might bring an action of ejectment. If the land is still to be considered in the possession of the grantor, the instrument will only amount to a license, and though the grantee of the license will certainly be entitled to search and dig for mines according to the terms of his grant, and appropriate the produce to his own use, on payment of the stipulated rent or proportion, yet he will acquire no property in the minerals till they are severed from the land, and have thus become liable to be recovered in an action of trover."

This well-defined distinction between a mining lease and a license is observed by our own decisions.

In *Barksdale v. Hairston*, 81 Va. 764, the court held that an agreement which conferred the right to "have and possess the exclusive use and privilege of digging, hauling off, and working any ore now found, or which may hereafter be found, anywhere on the said John A. Hairston's land," was the grant of a mere license to dig ore on the premises, not coupled with any estate or interest in the lands.

In the later case of *Young v. Ellis*, 91 Va. 297, 21 S. E. 480, the court construed the agreement to be, not a mere license, but a

mining lease. But the agreement there was essentially different from the one under consideration. The indenture in that instance granted to Ellis the right to enter upon Young's land for the purpose of examining, testing, and searching for minerals of all kinds, to erect and maintain such buildings and machinery and fixtures as might be necessary to work the mines, with the use of timber lands and water necessary and requisite in working the same, and the right of ingress and egress to such mines, for which Ellis agreed to pay "\$25 per year, in the event the said minerals are not mined, said rental of \$25 to be credited on the royalty herein specified whenever actual mining commences." Ellis furthermore agreed to pay Young "ten cents per gross ton for all ores mined and shipped from said lands quarterly \* \* \* for the use and rent of said lands." The lease was for 99 years, with the privilege of buying the land leased within 5 years at \$1,000, and contained a clause of forfeiture for nonpayment of rent, with the right to the lessor to re-enter. The court held this agreement to constitute a lease. But it declared that a parol agreement or written contract, where the licensee does not promise or undertake anything more than to pay a royalty on the ore raised from the mine, is a revocable license, and not a lease. See, also, 1 *Minor on Real Property*, § 51; *Taylor's Landlord & Tenant* (6th Ed.) § 251.

[2] Tested by these authorities, it would seem clear that the relation of landlord and tenant did not exist between the Goshen Iron Company and Church, and, consequently, the issuance and levy of the distress warrant was without authority of law.

It follows that the order must be reversed, and judgment entered in accordance with the foregoing opinion.

Reversed.

(112 Va. 715)

KEMP v. MCGUIRE et al.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

WILLS ( § 603\*)—ESTATES CREATED—CONDITIONAL FEE.

A will provided that testatrix's husband should have the property during his lifetime, and that on his death it should go to a daughter, and that if the daughter should outlive the husband, and die "without a husband or issue," the property should go to certain persons. *Held*, that the daughter, who survived her father, took a conditional fee, so that, if at her death she had a husband or issue, one or both, her estate would become absolute; a contention that she must die without a husband and also without issue to defeat her fee, and that as she had a husband, although he might predecease her, she could not die without a husband, being without merit.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1351-1359; Dec. Dig. § 603.\*]

Appeal from Circuit Court, Rockingham County.

Action by Edward McGuire and others against Lula V. Kemp. From a decree for plaintiffs, defendant appeals. Affirmed.

Ed. C. Martz, for appellant.

KEITH, P. This suit was brought by Edward McGuire and others, judgment creditors of Lula V. Kemp, who before her marriage was Lula V. Miller, to subject certain real estate to the payment of her debts. Lula V. Kemp takes title to the property in question under the will of her mother, Sarah J. Miller, which the circuit court held was an estate in fee, liable to be divested at her death upon certain conditions. From that decree this appeal was allowed.

The will is as follows:

"This is to certify that I, Sarah J. Miller, the wife of Thomas H. Miller, do will and bequeath to my husband, Thomas H. Miller, all of my real estate and personal property to have and to hold during his lifetime, and at his decease said property to go to our daughter, Lula V. Miller.

"(2) Should Lula V. Miller decease before her father's death I bequeath all that may be left after her father's death to my brother Wm. Lambert, my sister Laura V. Dinkle and Eliza Lambert, or in case of their death to their children.

"(3) In case my daughter, Lula V. Miller, should outlive her father and die without a husband or issue, then the property to go as above stated."

Lula V. Miller survived her father, Thomas H. Miller, and therefore the bequest to him conditioned upon his surviving his daughter fails, and Thomas H. Miller disappears from the case. The question to be decided is the effect of the language in the third clause of the will: "In case my daughter, Lula V. Miller, should outlive her father and die without a husband or issue, then the property to go as above stated." She has survived her father and that condition is fulfilled.

The decision of the circuit court was that "Lula V. Kemp has an estate in fee in the house and lot of land mentioned and described in these proceedings, liable, however, to be divested upon her dying without a husband or issue living at the time of her death; and should she so die without a husband or issue surviving, then said house and lot is to vest in fee in the remaindermen named in said will."

The appellant contends that the word "or" should be construed as "and," relying upon *Goldsborough v. Washington*, 70 S. E. 525; that Lula V. Miller must die without a husband and without issue in order to defeat her estate; and that as she has a husband, although he may predecease her, she cannot be said to have died without a husband,

relying upon the decision of this court in *Jennings v. Commonwealth*, 109 Va., 821, 63 S. E. 1080, 21 L. R. A. (N. S.) 265, 132 Am. St. Rep. 946, where it was held that a woman who has been married and divorced is not an "unmarried female," within the intentment of section 3677 of the Code, providing punishment for the seduction of any unmarried female of previous chaste character. But that case we do not think by any means conclusive of this. While in a criminal prosecution the court was justified, under the authorities, in holding that the terms of a penal statute were not to be extended, and that the phrase "unmarried female," as used in the statute, had reference to one who had never been married, the language of this will is altogether different. A woman who has married and whose husband has died is without doubt a woman "without a husband"; but she may die without a husband and still have issue of her marriage living at her death, and it cannot be supposed that the testatrix intended to defeat the estate of her daughter because she died without a husband, though issue of the marriage were living.

We think, therefore, that the phrase should be construed as though the testatrix had said, "die without a husband *and* issue," thus requiring the absence of both conditions to defeat the estate of her daughter. Lula V. Miller may die without a husband and without living issue, in which event the property would go under the will "as above stated"—that is to say, to the brother and sisters of the testatrix; or she may die leaving a husband and issue, in which case all the conditions of her title are fulfilled and she takes a fee simple; or she may die leaving issue, in which case she would also take a fee simple; or she may die leaving a husband, without issue, and in that case, also, she would take a fee simple.

It will be observed that in the first clause of the will the husband of the testatrix and father of Lula V. Miller is given a life estate, and if he survived his daughter his life estate, of course, under the first clause of the will, would still continue, and only that which was left after his death would pass to the brother and sisters of the testatrix, and it might well be urged, under those conditions, that he took a fee simple; but, as he predeceased his daughter, that inquiry need not be pressed. The objects of the bounty of the testatrix were her husband, to whom she gave a life estate, her daughter, who took a conditional fee if she survived her father, with a conditional remainder to the brother and sisters of the testatrix. Now by the terms of the third clause of the will exactly the same situation may arise as to the estate given the daughter which confronted the testatrix when she came to make a will. If the daughter has a husband living at the time of her death, or issue living at the time of her death, she

takes a fee simple, which upon her death without a will would pass to her heirs, or if she saw fit, and her husband survived her, he might become the beneficiary of her will, just as the father and husband might have taken in the will under consideration.

We are therefore of opinion that the appellant took an estate in fee under her mother's will, liable to be divested upon her dying without a husband or issue living; in other words, it requires the absence or failure of presence of both conditions, a husband and issue, to defeat the estate, and if at the time of her death she has a living husband or issue, one or both, her estate becomes an absolute fee simple.

The decree of the circuit court must be affirmed.

(112 Va. 636)

**CAMPBELL v. DOTSON.**

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**PARTITION (§ 8\*)—BY ACT OF PARTIES—DEED—VALIDITY.**

A partition deed is not invalidated as to the parties signing it because it was not signed by all the parties to it, where all the shares were verbally agreed upon, and the allottees entered upon their respective allotments and made improvements, and one of the parties had conveyed his interest according to the metes and bounds agreed upon.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 19; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Buchanan County.

Bill by Shade Dotson against A. W. Campbell. From the decree, defendant appeals. Affirmed.

E. S. Finney, for appellant. Chase & Daughterty and A. S. Skeen, for appellee.

KEITH, P. Shade Dotson filed his bill in the circuit court of Buchanan county, from which it appears that he is tenant in common with Rhoda Dotson and A. W. Campbell in certain lands in the bill mentioned; he owning one-half, Rhoda Dotson one-fourth, and A. W. Campbell one-fourth. There is filed with the bill a deed, marked "Exhibit F," dated November 11, 1907, between A. W. Campbell, of Pike county, Ky., Rhoda Dotson and John S. Dotson, her husband, John H. Dotson and Mary Dotson, his wife, of the first part, and Shade Dotson, of Buchanan county, Va., of the second part. This deed is only executed by A. W. Campbell, John H. Dotson, and Mary Dotson, and Campbell in his answer avers that it is not binding upon him because of an error contained in it, growing out of the false and fraudulent representations of Shade Dotson, and that the facts are as follows: That he and Shade Dotson "agreed to partition said land in the deed mentioned, and Dotson for that pur-

pose had a deed prepared, and represented to respondent that said deed called for a line agreed on between Pricy Fuller, John H. Dotson, and respondent, when in fact the line put in said deed was not the line agreed on at all, but a different line, which begins at a different point and runs to a different point from that agreed on, and to that which respondent intended to convey to, and is not the true division line as agreed on, and that there is error in the description of the division line; that respondent did not know when he signed said deed that there was an error and mistake in it as to the location of the division line; that Shade Dotson represented to him that the division line in the deed was the line that had been agreed on, and respondent signed said deed, believing it to be the line agreed on as represented by Shade Dotson.

This was the sole issue tried in the circuit court. Upon it evidence was taken, and the circuit court rendered a decree partitioning the land in the bill mentioned in accordance with the lines set out in the deed, and from that decree A. W. Campbell has appealed.

In his petition before this court he relies in large measure upon the fact that the partition deed was not signed by all of the parties to it; that it was an incomplete instrument, and therefore a nullity; that, it being an agreed fact that the land mentioned in the bill was of uniform value, he was entitled to one-fourth of the entire area, which was 153.24 acres, instead of 127.35 acres, as allotted to him by the decree.

The record shows that a partition of these lands had been verbally agreed upon between the parties; that they had entered upon the shares so allotted to them, and had made improvements; and that one of the tenants in common had conveyed his interest in accordance with the metes and bounds agreed upon between the parties. It further appears that no issue is presented by the pleadings in this cause, with respect to the incompleteness and consequent nullity of Exhibit F. The answer of Campbell sets out the alleged misrepresentation and fraud upon which he relies with much amplification, and at the conclusion of his charge he denies that the deed is binding on him; but it is obvious that this general denial has relation to the specific allegation of fraud as releasing him from the obligation of the deed, and not to the fact that the deed was wholly void.

When we come to consider the evidence upon the charge of fraud, we find it to be wholly insufficient and that it falls far short of that clear proof of fraud which the law requires.

Upon the whole case, we are of opinion that the decree complained of should be affirmed.

Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

(112 Va. 719)

## LEE v. LEE.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**DIVORCE (§ 37\*)—GROUNDS—DESERTION—ACTS CONSTITUTING.**

A wife, who without cause abandoned her husband continuously for more than three years, and who during that time did not live with him and declared her purpose never to return to his home, though he had tried to induce her to do so, deserted her husband for three years, within Code 1904, § 2257, authorizing the husband to procure a divorce on that ground.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 107-132; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Rockingham County.

Suit by Thomas H. Lee against Eveline Lee for divorce. From a decree denying relief, plaintiff appeals. Reversed and remanded.

Geo. C. Grattan, for appellant. E. D. Ott, for appellee.

**PER CURIAM.** This bill was filed by Thomas H. Lee to obtain a divorce from his wife, Eveline Lee, on the ground of desertion.

The statute (Code 1904, § 2257) provides that a divorce from the bond of matrimony may be decreed where either party willfully deserts or abandons the other for three years.

The uncontradicted evidence shows that without cause the defendant has abandoned her husband continuously for more than three years, that during that time she has not lived with him, and has declared her purpose never to return to his home, though he has tried to induce her to do so. These facts constitute such proof of desertion as entitles the appellant to a decree of divorce from the bond of matrimony. Washington v. Washington, 111 Va. 524, 69 S. E. 322.

The circuit court having denied the divorce, its decree must be reversed, and the cause remanded for a decree to be entered in conformity with this opinion.

Reversed.

(112 Va. 706)

## HURLEY v. CHARLES.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**1. DEEDS (§ 38\*)—DESCRIPTION—SUFFICIENCY.**

A description in a deed which identifies the land is sufficient.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65-79; Dec. Dig. § 38.\*]

**2. WILLS (§ 433\*)—PROBATE—EVIDENCE—RECORDS—CERTIFICATES.**

Code 1904, § 817, authorizes the clerk of the circuit court, with the consent of the court, to appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office, unless the duty be one which a deputy is expressly forbidden to perform by law. Section 3334 declares that a copy of a record or paper in the

clerk's office of any court, attested by the officer in whose office the same is, may be admitted in evidence in lieu of the original; no special form of certificate being required. A paper writing, offered in evidence as the will of D., was attested only by "A. B. Buchanan, D. Clerk," without stating for whom or of what county he was deputy clerk. The certificate of probate showed that the will was probated in the T. county court, and was from the clerk's office of the T. circuit court, and was attested by "A. B. Buchanan, Deputy Clerk for S. M. Graham, Clerk of the Circuit Court of Tazewell County, Virginia." Held, that the certificate to the will, when construed in connection with the certificate of probate, was sufficient.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 924-936; Dec. Dig. § 433.\* Evidence, Cent. Dig. §§ 1321, 1414, 1415.]

**3. ESTOPPEL (§ 38\*)—ESTOPPEL BY DEED—AFTER-ACQUIRED TITLE—COVENANTS.**

An after-acquired title by a grantor, who conveys with covenants of special warranty and quiet possession, inures to the benefit of his grantee.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 99-107; Dec. Dig. § 38.\*]

**4. JUDICIAL SALES (§ 50\*)—TITLE OF PURCHASER—UNRECORDED DEED.**

An unrecorded deed from a judgment debtor is ineffective against the purchaser of the land at a judicial sale, in a creditor's suit to procure a sale of the lands.

[Ed. Note.—For other cases, see Judicial Sales Dec. Dig. § 50.\*]

**5. JUDICIAL SALES (§ 50\*)—UNRECORDED CONVEYANCES BY DEBTOR.**

Since an unrecorded deed by a judgment debtor is void as to his creditors, an instruction in ejectment that, if the jury believed that the debtor conveyed the land in dispute to defendant, the jury should find for him was properly refused, where it appeared that such conveyance, if made, was unrecorded, and it was therefore invalid as against plaintiff purchasing the land at a judicial sale.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 50.\*]

**6. BOUNDARIES (§ 41\*)—NATURAL AND ARTIFICIAL MONUMENTS—INSTRUCTIONS.**

Where in ejectment involving a disputed boundary line the deeds in evidence called for natural and artificial monuments, the court properly refused to charge that courses and distances must give way to calls for lines of adjoining, and charged that courses and distances must give way to calls for marked lines and natural objects.

[Ed. Note.—For other cases, see Boundaries, Dec. Dig. § 41.\*]

**7. ESTOPPEL (§ 19\*)—INVALID DEED.**

An unrecorded deed by a judgment debtor to defendant, which was void as to the grantor's creditors and the purchaser at a judicial sale, was insufficient to create an estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 25; Dec. Dig. § 19.\*]

Error to Circuit Court, Buchanan County. Ejectment by H. G. Charles against EH Hurley. Verdict for plaintiff, and defendant brings error. Affirmed.

Chase & Daughterty, for plaintiff in error. Ayers & Smithdeal, A. A. Skeen, and C. C. Burns, for defendant in error.

KEITH, P. Charles brought an action of ejectment to recover 2,200 acres of land from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the defendant, Eli Hurley, but the controversy finally became one with respect to the title to 80.9 acres. There was a verdict for the plaintiff, and Hurley brought the case to this court upon a writ of error.

During the progress of the trial, 18 bills of exceptions were taken to the rulings of the court with respect to the admission of evidence, instructions to the jury, and the motion to set aside the verdict as contrary to the evidence.

[1] Bills of exceptions Nos. 2, 3, 5, 6, 7, 8, 9, 10, 11, and 12 are to the admission in evidence of certain deeds, and may be considered together. The objection to their admission was a general one—that they insufficiently described the land conveyed. We shall content ourselves with the statement that an inspection of the deeds shows very plainly that each of them refers to the 2,200-acre tract which is described in the declaration, or to some part of or interest therein, and gives such a description thereof as is sufficient for its identification.

Assignment of error No. 4 is as to the admissibility of the will of M. G. B. Davis. The first objection was that the will was not properly probated.

The printed record does not contain the certificate of probate, but counsel agreed that the certificate might be inserted in the record at page 42, immediately after the signature to the will, and that has been done. The certificate appears to be in all respects formal and sufficient.

[2] The second objection to its admission is that it was not properly certified. Bearing upon that question, the facts upon the record, as amended, are: That the will was duly admitted to probate in the county court of Tazewell county, and the certificate from the clerk's office of Tazewell circuit court, attested by "A. B. Buchanan, Deputy Clerk for S. M. Graham, Clerk of the Circuit Court of Tazewell County, Virginia," is in proper form and is sufficient.

But that formal attestation applies only to the certificate of probate of the will. The paper writing appearing in the record as the will of M. G. B. Davis is attested by "A. B. Buchanan, D. Clerk." It does not say for whom or of what county he is the deputy clerk, conceding that we are authorized to say that "D. Clerk" is the equivalent of "Deputy Clerk."

Section 817 of the Code of 1904 authorizes the clerk of a circuit court, with the consent of the court of which he is clerk, or of the judge thereof in vacation, to appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law.

Section 8334 of the Code provides that "A copy of any record or paper in the clerk's office of any court, \* \* \* attested by the officer in whose office the same is \* \* \* may be admitted as evidence in lieu of the

original." The form of certificate is not prescribed by the statute.

As was said in *Wynn v. Harman's Devisees*, 5 Grat. 165, "There is no statutory provision regulating the manner in which the records of the proceedings of a court in our state are to be authenticated, so as to make them evidence in any other court in the state." In that case it is held that a will, certified as "a true copy. John Hunter, C. L. C."—was a sufficient certificate that Hunter was the clerk of the court, and the copy of the paper so certified was held to be competent evidence, upon the authority of cases there cited.

In *Morgan v. Haley*, 107 Va. 331, 58 S. E. 564, 13 L. R. A. (N. S.) 732, 122 Am. St. Rep. 846, the paper offered in evidence was attested as follows: "A copy Teste: H. C. T. Ewing, Clerk." Judge Buchanan, delivering the opinion of the court, said: "If the certificate had stated that the person making it was clerk of the court, in whose office the deed was recorded, or had used initials to show that fact, under the decisions of *Gibson v. Commonwealth*, 2 Va. Cas. 111, 120, *Wynn v. Harman*, 5 Grat. 157, 165, 166, and *Usher v. Pride*, 15 Grat. 190, 195, 196, it would clearly have been prima facie sufficient. But whether in its present form it was admissible in evidence it is unnecessary to decide, as the judgment complained of will have to be reversed on other grounds, and the case remanded for a new trial, when this question is not likely to arise again, as the defect in the certificate, if it be one, can easily be cured."

If in aid of the certificate signed "A. B. Buchanan, D. Clerk," we are permitted to look to the certificate of probate, the difficulty disappears; for that certificate shows that A. B. Buchanan is the deputy clerk for S. M. Graham, clerk of the circuit court of Tazewell county, Va., which answers every requirement of the law. It will be observed that the agreement of counsel is that the certificate of probate is to be inserted in the record immediately after the signature to the will. The certificate does not state that the person making it is the clerk of the court, nor in whose office the will was recorded; nor does it use initials to show that fact, unless we are permitted to look to the certificate of probate, by which all of these defects are supplied.

After a careful consideration of the facts, we are reluctant to hold that it was error to admit the copy of the will in evidence. It was duly probated, and the transcript of the probate is attested by "A. B. Buchanan, Deputy Clerk for S. M. Graham, Clerk Circuit Court, Tazewell County, Va.," and the copy of the will is attested by "A. B. Buchanan, D. Clerk," and under these circumstances it would be technical in the extreme to reverse the judgment of the circuit court when it plainly can be gathered from the certificate of probate and attestation of the

copy of the will that A. B. Buchanan is the deputy clerk of Tazewell county, authorized by law to act in place of his principal.

[3] The twelfth assignment of error is as to the effect of the deed from Frank Phillips to Daniel Hurley, which the court told the jury they might consider only for the purpose of locating the boundary lines of the 2,200-acre tract of land, and for no other purpose. This assignment presents the question whether an after-acquired title by a grantor, who conveys with covenants of special warranty and quiet possession, inures to the benefit of his grantee.

In *Reynolds v. Cook*, 83 Va. 821, 3 S. E. 712, 5 Am. St. Rep. 317, Judge Lewis, speaking for the court, says: "The general rule undoubtedly is that, where land is conveyed without warranty, the grantor is not estopped from setting up an after-acquired title. On the other hand, a covenant of warranty works an estoppel, and the reason usually given is that the estoppel prevents circuity of action"—citing *Doswell v. Buchanan's Ex'rs*, 3 Leigh, 385, 23 Am. Dec. 280; *Gregory v. Peoples*, 80 Va. 355. "But this is not the only ground upon which an estoppel arises. The rule is well established that, where the deed recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate, which the deed purports to convey, and upon the faith of which the bargain was made, he will be thereafter estopped to deny that such an estate was passed to his vendee, although the deed contains no covenant of warranty at all. And the rule accords with common honesty and fair dealing"—citing, among other cases, *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703.

In *Reynolds v. Cook*, there was a sale of a tract of land with a covenant of general warranty, and after execution of the deed the parties entered into a supplemental contract under seal, in which it was recited, among other things, that Reynolds "grants unto the said Cook the right to quarry and remove all the limestone (free of charge for royalty) that may be required for furnace and agricultural purposes, in connection with the aforesaid Mt. Airy tract of land, from the said Reynolds' land on the opposite side of the river;" and it was with reference to the right to remove the limestone, as to which there was no warranty, that the language quoted from the opinion of Judge Lewis was used.

In *Flanary v. Kane*, 102 Va. 568, 46 S. E. 312, 681, Judge Buchanan cites *Reynolds v. Cook* with approval; and in *Nye v. Lovitt*, 92 Va. 717, 24 S. E. 348, this court said, that, "In order to avoid circuity of action, it has long been the rule that a vendor of land was estopped from setting up an after-acquired title against his vendee, where there was a warranty or covenant for title, if the eviction of his vendee would result in an action upon the covenants."

In *Reynolds v. Cook* and *Flanary v. Kane*, there were no covenants of warranty; but in the case before us there were the covenant of special warranty and the covenant of quiet possession, both of which would be broken, should the plaintiff be permitted to assert claim to the land in controversy, either by adverse possession or any after-acquired title. See Va. Code 1904, § 2447, as to the effect of a covenant of special warranty.

[4] There is no error in the ruling of the court as to the effect of the deed alleged to have been made from Frank Phillips to Daniel Hurley. It was never recorded, and was therefore void as to the creditors of Frank Phillips, the grantor. There was a suit instituted by the creditors of Frank Phillips, and in that suit the 2,200-acre tract of land was sold and purchased by Charles, the defendant in error, and a deed was made to him, pursuant to the decrees of the court. It is manifest, therefore, that an unrecorded deed from the judgment debtor could not affect the purchaser at that judicial sale.

The following instruction was given to the jury at the instance of the plaintiff in the court below: "The court instructs the jury that if they believe by a preponderance of the evidence that the land in controversy is embraced in the 2,200-acre patent issued from the commonwealth of Virginia to Samuel L. Graham and others, on August 28, 1885, then they should find for the plaintiff the land described in the declaration."

Having held the evidence upon which this instruction was predicated to have been properly introduced, it follows, of course, that it was the duty of the jury to render a verdict in accordance with it.

[5] The defendant in the court below asked for the following instruction: "The court further instructs the jury that, although you may believe from the evidence in this case that the correct location of the line of the 2,200-acre grant from the 30-acre N. Hurley tract at point '17' on map is as shown by the white lines by the way of letters S, T, U, V, W, X, Y, Z, to ZZ, yet, if you should believe from the evidence, by a preponderance thereof, that Frank Phillips by deed conveyed the land in dispute to Daniel Hurley, you will find for the defendant."

As we understand the instruction, the first part of it would give to the defendant in error the land in controversy, unless the jury should believe from the evidence, by a preponderance thereof, that Frank Phillips conveyed the land to Daniel Hurley. But we have just seen that this deed, not having been recorded, was void as to the creditors of Frank Phillips, and the instruction was properly refused.

[6] The plaintiff in error asked the court to instruct the jury that "courses and distances must give way to calls for lines of adjoiners." The court refused to give this

instruction as asked, and, over the objection of plaintiff in error, instructed the jury as follows: "The court further instructs the jury that courses and distances must give way for calls for marked lines and natural objects."

That the instruction given by the court is good law cannot be controverted.

Both plaintiff in error and defendant in error, with reference to this instruction, rely upon the law as stated in 5 Cyc. p. 925, where the following statement is made: "In the absence of calls for natural or artificial monuments, calls for adjoiners will, as a rule, control other and conflicting calls."

The deeds in evidence in this case do call for natural and artificial monuments. The condition, therefore, upon which calls for adjoiners will prevail does not arise, and the ruling of the circuit court with respect to this instruction must be approved.

Plaintiff in error contends that, if he was estopped by his deed to Frank Phillips, then Frank Phillips and those who claim under him are estopped by the deed made by Phillips to Daniel Hurley, and there would be an estoppel against an estoppel, which would set the whole matter at large.

[7] Without going into the learning upon that subject, it is sufficient to say that the unrecorded deed from Frank Phillips to Daniel Hurley was void as to the creditors of Phillips and the purchaser under the judicial sale, and therefore cannot work an estoppel in this controversy.

Upon the whole case, we are of opinion that the judgment of the circuit court should be affirmed.

Affirmed.

(112 Va. 749)

**McDONALD et al. v. ROTHGEB et al.**

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**1. ESTOPPEL (§ 38\*)—BY DEED—COVENANTS—CONVEYANCE OF WIFE'S SEPARATE PROPERTY—LIABILITY OF HUSBAND.**

A husband, who unites with his wife in executing a deed of her life estate, covenanting that he and wife have good right to sell the property, and that they will warrant generally the title thereto, is not estopped from claiming his share in remainder as heir of his daughter, who dies unmarried and without issue; his liability on the covenant, if any, being personal, and not operating to enlarge the estate granted.

[Ed. Note.—For other cases, see *Estoppel*, Dec. Dig. § 38.\*]

**2. IMPROVEMENTS (§ 4\*) — COMPENSATION — GOOD FAITH OF CLAIMANT.**

Under Code, § 2763, authorizing the recovery of improvements on land made by a claimant having reason to believe that his title is good, a purchaser may not close his eyes to his record title, and recover for improvements on the theory that there was reason to believe that his title is good; but his belief must be founded in ignorance of facts which

cannot be predicated of a purchaser affected with constructive notice.

[Ed. Note.—For other cases, see *Improvements*, Cent. Dig. §§ 4-26; Dec. Dig. § 4.\*]

Error to Circuit Court, Page County.

Ejectment by Ethel McDonald and others against U. G. Rothgeb and others. There was a judgment granting insufficient relief, and plaintiffs bring error. Reversed and rendered.

H. W. Bertram, C. A. Hammer, O. B. Roller, and Ed. C. Martz, for plaintiffs in error. R. F. Parks and Walton & Walton, for defendants in error.

**WHITTLE, J.** The defendants in error acquired title, by remote purchase, to the life estate of Jennie Powell in certain lots located in the town of Shenandoah, in Page county, Va., and after her death the plaintiffs in error, holders of the fee-simple title to the lots in remainder, instituted an action of ejectment for their recovery.

A jury having been waived, and all matters of law and fact submitted to the court, judgment was rendered in favor of the plaintiffs, other than Robert Powell, for an undivided two-thirds interest in the lots. But the court found for the defendants as to the one-third undivided interest to which Powell asserted title. The court, moreover, allowed the defendants for the value of improvements made by them upon the lots in excess of the damages awarded the plaintiffs.

The grounds of error assigned involve the ruling of the court in giving judgment for the defendants for the one-third undivided share of Robert Powell, and also to the allowance for improvements.

[1] Robert Powell was the husband of Jennie Powell, and united with his wife in a deed conveying her estate in the lots to Fritz. Rachael Powell died subsequent to the execution of this deed, unmarried and without issue, and her father, Robert Powell, who was her sole heir at law, inherited her vested remainder, an undivided one-third interest in the property, after the expiration of the life estate of her mother, Jennie Powell. The deed to Fritz contained the following covenant: "And the said Robert Powell and Jennie, his wife, covenant that they have good right to sell and convey said property aforesaid, and that they will warrant generally the title to the same."

The trial court was of opinion that the covenant on the part of Robert Powell ran with the land, and estopped him from asserting his after-acquired title as heir to Rachael. The husband was a stranger to his wife's title to the property, and had no interest in her life estate therein. The recitals of the deed show this, and that it was conveyed by Coverstone to the wife alone. The life estate in the wife, therefore, was all that she had power to convey; and if, in the circumstances detailed, there was any li-



ability on the husband upon his warranty, it was a personal liability merely to the grantee in the deed, incident to and coextensive with the life estate of the wife. Certainly such warranty could not operate to enlarge the estate granted.

In *Bull v. Belseker*, 16 N. D. 290, 113 N. W. 870, 14 L. R. A. (N. S.) 514, it was held that, "where a covenantor has neither title nor possession, the covenants do not run with the land, so as to transfer the cause of action for the breach thereof to remote grantees by operation of assumed conveyances of the property by the execution and delivery of deeds purporting to convey the same." The court declares that the foregoing principle is supported by the overwhelming weight of authority, and cites a number of cases to sustain it.

Among the citations will be found the leading case of *Mygatt v. Coe*, 152 N. Y. 457, 46 N. E. 949, 57 Am. St. Rep. 521, which is strongly in point. There a married woman had purchased real estate, which was conveyed to her for her sole and separate use, free from the control of her husband. The wife, supposing that she had good title, sold and conveyed the property, with covenants of warranty in which her husband joined. It was afterwards discovered that the grantors had no title, and in a suit by a remote grantee, who had been evicted by title paramount, to recover on the warranty, it was held that the husband was not liable. The court there laid down the principles that "if a husband joins with his wife in a conveyance of her separate estate, and covenants that she has good right to convey the premises, and the deed also contains the usual covenants of warranty and for quiet enjoyment, such covenants, as against the wife, pass with the land, because she has possession of it and delivers such possession to her grantee; but as the husband had no possession in his own right, and therefore delivered none to the grantee, his covenant is personal, and does not run with the land, and a subsequent grantee cannot recover against the husband thereon, unless he can prove its assignment to him."

"Though a husband lives with his wife and family on her lands, pays taxes thereon, and keeps them in repair, this does not impair her title to the possession, nor give him the possession of the property, or any right to the possession thereof." *Mygatt v. Coe*, supra.

Our conclusion, therefore, on this branch of the case, is that the husband, being a stranger to the wife's title, without either possession or beneficial interest in her estate, and uniting with her in the conveyance to Fritz merely for the sake of conformity under the statute, was not estopped by his warranty to claim his share in remainder in the property as heir to his daughter Rachael.

[2] With respect to the matter of allowance for improvements, we are of opinion that the question involved is ruled by the conclusion reached by this court in the analogous case of *Nixdorf v. Blount*, 111 Va. 127, 68 S. E. 258, and cases cited in the opinion.

It seems to us that to hold that a purchaser can close his eyes to his record title and recover for improvements, on the theory that "there was reason to believe the title good" (Code Va. 1904, § 2763), would be to set a premium on negligence and nullify our registry statutes.

It was said in *Bodkin v. Arnold*, 48 W. Va. 108, 109, 35 S. E. 980, 981, that "belief, to be bona fide, must be founded in ignorance of facts, and not ignorance of law." And ignorance of fact cannot be predicated of a case where the purchaser is affected with constructive notice.

These views are decisive of the case, and render the consideration of subordinate questions unnecessary.

The judgment complained of must be reversed, and this court will retain the case and render such judgment for the plaintiffs in error as the circuit court ought to have entered.

Reversed.

(112 Va. 688)

CHESAPEAKE & O. RY. CO. v. BARGER.  
(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

1. CARRIERS (§ 320\*)—INJURY TO PASSENGERS—ACTIONS—EVIDENCE.

In an action by a female passenger for injuries alleged to have been received while alighting from defendant's train, evidence as to the cause of the injury held to be conflicting, and to raise a question for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1244; Dec. Dig. § 320.\*]

2. EVIDENCE (§ 571\*)—WEIGHT—UNCONTROLLED EVIDENCE.

The jury may disregard the testimony of an unimpeached medical expert, even though he was the only one who saw the case, and his testimony has not been directly controverted.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2395-2398; Dec. Dig. § 571.\*]

3. CARRIERS (§ 315\*)—EVIDENCE—VARIANCE—USE OF VIDELICET.

In an action against a carrier by a passenger for injury while alighting from a train, where the declaration alleged that the passenger "was compelled to step down from the car a great distance to the ground, to wit, two feet," evidence that the distance was between 26 and 34 inches was not so different from the allegation as to require the court to strike it out on the ground of variance.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1281; Dec. Dig. § 315.\*]

4. CARRIERS (§ 317\*)—INJURIES TO PASSENGERS—ACTIONS—EVIDENCE—ADMISSIBILITY.

In an action for injuries received by a passenger in alighting from a train at a station where there was no platform, evidence tending to show how the accommodations at

this station compared as to safety with other stations, and thus show lack of care on the part of the carrier in failing to furnish proper accommodations, was admissible.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1295-1306; Dec. Dig. § 317.\*]

**5. EVIDENCE (§ 155\*)—EVIDENCE ADMISSIBLE BECAUSE OF THE ADMISSION OF OTHER EVIDENCE.**

In an action by a passenger for injuries received while alighting from a train at a station, where there was no platform, the defendant having introduced evidence comparing the accommodations at this station with those of other stations cannot complain that the passenger introduced other evidence along the same line.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 445-458; Dec. Dig. § 155.\*]

**Error to Circuit Court, Botetourt County.**

Action by Maggie E. Barger against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

R. L. Parrish, for plaintiff in error. R. Haden Penn, A. P. Staples, Jr., and A. B. Hunt, for defendant in error.

**HARRISON, J.** This action was brought by Maggie E. Barger to recover damages for injuries alleged to have been suffered by her as a result of the negligence of the defendant railway company. There was a verdict and judgment in her favor, which we are asked to review and reverse.

It appears that the plaintiff, a woman 44 years of age, the mother of eleven children, nine of whom were living, most of them being solely dependent upon her for their care and attention, left her home in Botetourt county, with her youngest child, to go to her daughter, who was ill and needed her attention. She bought a ticket at Buchanan for Haden, a station about 35 miles distant, where her daughter lived, and became a passenger on one of the regular trains of the defendant company. The evidence tends to show that at Haden station no platform or other convenience was provided for passengers entering or leaving the train, and that on her arrival there, in order to alight, she had to step down from the lower car step, a distance of some 26 to 34 inches to the ground, the place where she alighted being between the main track and the side track, with the ground at that point forming a rough depression and in bad condition. At the time the plaintiff was about four months in pregnancy, and was carrying her baby, about three years of age, in her left arm. The only assistance rendered her was the taking of her hand by the brakeman, which she says was worse than no assistance. When she stepped down, her foot slipped in a hole, turning her ankle, which, together with the high step, caused a severe wrench of her back. She complained at the time to the conductor of the high step she had been compelled to take, and told

those who met her at the station of the pain she was suffering as the result of the step. The evidence further tends to show that the plaintiff suffered continually from the time she took the step until the next afternoon, when she had several hemorrhages, which continued until the following morning, when she had a miscarriage. Since then she has suffered greatly and been unable to discharge her usual duties, her physician attributing her condition to the injury she received in alighting from the train, which he says resulted in displacing the womb and other organs, from which no relief can be had except possibly by an operation.

[1, 2] The first assignment of error is to the action of the court in refusing to set aside the verdict as contrary to the evidence. The chief contention in support of this assignment is that Dr. Givens, a witness introduced on behalf of the defendant company, who saw the fetus after it was delivered, testified as an expert and expressed the opinion that the fetus had been dead for a week before it was delivered; that Dr. Givens being the only expert who saw the fetus, and knew the facts to be derived from its inspection, his evidence could not be disregarded by the jury, but must be accepted by them as showing conclusively that the miscarriage was not the result of alighting from the train, but that it resulted from causes existing before the plaintiff left her home.

This position cannot be sustained. No one can read the testimony of this witness without seeing that the jury might well have regarded Dr. Givens as a prejudiced and biased witness. In addition, his view is in direct conflict with other expert testimony and circumstances adduced by the plaintiff. Whether or not the miscarriage resulted from the injury sustained in alighting from the train was a question for the jury, to be determined upon due consideration of all the evidence bearing upon the issue. The testimony of the plaintiff is that she felt "completely torn to pieces" by the step from the train, especially through her side and the right side of her back, and that it was with great difficulty that she walked 100 yards to her daughter's house, and that she continued to suffer until the miscarriage occurred. She stated that she had been in her usual good health up to the accident, had borne 11 children, and had never been threatened with an abortion; but that on the day after she stepped from the train she knew from her suffering and general physical condition that an abortion was threatened. Dr. Godwin, an expert witness for the defendant, says that a woman can almost always tell anything unusual when she is pregnant; that, if the fetus is dead, she can very often tell by her feelings. Dr. Dodd, the attending physician of the plaintiff, testifies that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the abortion occurring 36 hours after an injury of the kind received by the plaintiff is the natural and probable result of such injury; that from the displaced condition of the uterus, as disclosed by his examination, in the absence of any other physical disturbance, he would attribute the abortion and subsequent illness to the step from the train. This witness further says that from his examination of the plaintiff he found nothing to suggest that the womb had been in any way infected by carrying a dead fetus.

It is not necessary to recite other testimony and other circumstances furnished by the record in support of the plaintiff's view that the abortion resulted from the injury sustained by her in alighting from the train. We have said enough to show that the evidence on that issue was conflicting. The question was submitted to the jury by the defendant's instruction No. 4, which told them that, if they believed the fetus to have been dead for two days or more prior to the happening of the abortion, they must find for the defendant. The verdict shows that the jury disregarded, as they had the right to do, the expert opinion of Dr. Givens, and rested their finding upon the other evidence tending to sustain the plaintiff's theory. A jury is not bound to accept as conclusive the testimony even of an unimpeached witness.

In *Clopton's Case*, 109 Va. 813, 63 S. E. 1022, this court, quoting from high authority, says: "The mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantitative and impersonal measure to testimony. \* \* \* The jury have the power to refuse their credit to parol testimony, and no action of the court should control the exercise of their admitted right to weigh its credibility."

Especially is it true that a jury is not generally bound to accept the opinion of expert witnesses as conclusive. It considers the facts upon which the opinions are based, and determines from all the evidence in the case whether the conclusions given by the witness are sound and substantial. 1 Moore on Facts, §§ 105, 107.

[3] It is further assigned as error that the court erred in refusing to strike out all evidence tending to show that the distance from the bottom of the step of the coach to the ground was more than two feet. The declaration alleges that the plaintiff "was compelled to step down from the car a great distance to the ground, to wit, two feet."

The plaintiff's evidence shows that the distance was between 26 and 34 inches, and it is contended that this constitutes such

a difference between the allegation and the proof as requires the court to strike out the evidence on the ground of variance.

This position is without merit. The videlicet, namely, "a great distance, to wit, two feet," employed in the declaration, is intended to avoid a positive averment which must be strictly proved.

"The office of the videlicet is to mark that the party does not undertake to prove the precise circumstances alleged; and in such cases he is not required to prove them." 2 Bouv. L. Dict. p. 786.

[4, 5] It is further assigned as error that the court permitted the plaintiff to be questioned as to the kind of landings the defendant had at other stations than the Haden station.

These questions were confined to a comparison with two stations on the same line and a short distance from Haden station. The evidence tended to show how the accommodations at Haden compared as to safety with other stations of the defendant which the witness had observed, and thereby to show the lack of care observed by the company in furnishing reasonably safe accommodations for passengers at Haden. If, however, the few questions asked along this line had been irrelevant, the defendant could not complain, as it introduced like evidence with respect to other stations.

There was no reversible error in the matter of giving and refusing instructions. The alleged negligence of the defendant in not providing a reasonably safe and convenient means of alighting from its train, and in not rendering the plaintiff reasonable assistance when alighting, as well as all other questions of fact arising in the case, were submitted to the determination of the jury under instructions which were free from prejudice to the rights of the defendant. The verdict of the jury was sustained by the evidence, and therefore cannot be disturbed.

The judgment complained of must be affirmed.

Affirmed.

(112 Va. 788)

RUNKLE'S ADM'R v. RUNKLE'S ADM'R  
et al.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

1. INTERPLEADER (§ 37\*)—GROUNDS OF RELIEF—STATUTORY PROVISIONS.

Code 1904, § 2998, providing for a summary proceeding by interpleader in a pending action, does not enlarge the rule governing bills of interpleader, but merely furnishes a special cumulative and concurrent remedy without limiting or affecting the equitable jurisdiction by bill of interpleader.

[Ed. Note.—For other cases, see Interpleader, Dec. Dig. § 37.\*]

## 2. INTERPLEADER (§ 6\*)—RIGHT TO MAINTAIN BILL OF INTERPLEADER.

A bill coming into possession of money as debtor to or bailee of the estate of a deceased wife may not maintain a bill of interpleader against her administrator and against the administrator of the deceased husband, both claiming the money, because of its independent liability as debtor or bailee, and because of want of privity between the two claimants under the rule that the equitable remedy of interpleader independent of statute is dependent on the existence of four elements: The same debt or duty must be claimed by all the parties against whom the relief is demanded; all their adverse claims must be dependent on or derived from a common source; the person asking the relief must not have any interest in the subject-matter; and he must not have incurred an independent liability to either of the claimants.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 6; Dec. Dig. § 6.\*]

Appeal from Circuit Court, Rockingham County.

Bill of interpleader by the Bank of Elkton against Rebecca M. Runkle's administrator and against William J. Runkle's administrator to determine rights to a fund in possession of the bank. From a decree adjudging that William J. Runkle's administrator is entitled to the fund, Rebecca M. Runkle's administrator appeals. Reversed and rendered, dismissing the bill for want of jurisdiction.

H. W. Bertram, for appellant. Grattan & Grattan, Ed. C. Martz, and Charles A. Hammer, for appellees.

**BUCHANAN, J.** This is a bill of interpleader filed by the Bank of Elkton, in which the personal representatives, respectively, of the estates of Rebecca M. Runkle, deceased, and of William J. Runkle, deceased, were made parties defendant. The trial court held that, upon the evidence, the bill of interpleader could be maintained, and that as between the parties claiming the fund the personal representative of William J. Runkle was entitled to it, and so decreed. From that decree this appeal was taken.

The first question to be determined here is whether or not upon the facts disclosed by the record the bank could maintain its bill.

The record shows that William J. Runkle died on the 4th day of January, 1908, and his wife, Rebecca M., on the 12th day of the same month. After the husband's death and a few days before the wife's she took from her bed and about her person pocket-books and parcels containing money, which she directed her sister, Mrs. Louisa C. Davis, to place in her (Mrs. Runkle's) trunk, lock it, and keep the key. The day after the burial of Mrs. Runkle, I. L. Flory, the cashier of the Bank of Elkton, by request, came to the home of the deceased, counted the money placed in the trunk by Mrs. Davis, and carried it to his bank. At the time he received the money from Mrs. Davis he

gave her a receipt or deposit slip in the following words:

"Received from the estate of Rebecca M. Runkle, by Louisa C. Davis, \$2,668.20.

"I. L. Flory, Cashier."

He requested Mrs. Davis to come to the bank on the next morning, which she did, and he took up the receipt or deposit slip he had given her the day before and gave her a book with the following entry therein:

The Bank of Elkton, Elkton, Va.

In Account with Mrs. Rebecca M. Runkle.  
Dr. 1908. Cr.

Jany. 16, To Dep...\$2,668.20

A few days afterwards Mr. Flory, the cashier of the bank, qualified as the administrator of the husband's estate, and A. U. Lewis as administrator of the wife's estate, each claiming the money deposited in bank as the property of his decedent.

If there were no evidence in the case but the deposit slip and the entry in the bank book handed to Mrs. Davis when she delivered the money to the cashier of the bank, as to the circumstances under which the bank came into the possession of the money, it is clear that the bank had no sufficient ground upon which to maintain its bill. But it is claimed by the bank that the parol evidence in the case shows that the money was delivered to it as a stakeholder, or as a joint deposit of both the husband's and the wife's estates, to be held by it until it was determined to which estate it did belong.

There is no question that after the death of the wife and before the money was delivered to the bank there was a controversy between Mrs. Long, one of the distributees of the husband's estate, and Mrs. Davis, one of the distributees of the wife's estate, as to the ownership of the money. Besides these two, four other persons testify as to the circumstances under which the money was delivered to the cashier of the bank. Mrs. Davis, who had been put in possession of the money by her sister and had consulted counsel and been advised to put the money in bank in her own name, testified that, after the cashier had counted the money which she took out of Mrs. Runkle's trunk and handed him, he asked in whose name it was to be deposited, and she told him in her name until there was an administrator appointed for the wife's estate. She denied emphatically when asked the question that she ever agreed that the money should be placed in the bank to see whose money it was. Mrs. Davis' son testified that after the cashier had counted the money, and inquired of his mother what he must do with it, "she told him that she wanted it put in the bank for safe-keeping until there was an administrator appointed for Aunt Becca's estate," and that the cashier thereupon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

wrote the receipt or deposit slip which he gave the witness' mother. Mrs. Smith states that, when the cashier had counted the money, Mrs. Davis told him that it would have to go in bank in her name. Mrs. Dean states that, when the cashier asked in whose name the money should be placed in bank, "Mrs. Davis told him 'herself, of course.'" Neither Mrs. Long nor the cashier Mr. Flory, the other two witnesses who testified to what was said and done when the money was delivered to the cashier, denied these statements of the other witnesses as to how it was to be deposited in bank. On the contrary, Mrs. Long testified, among other things, as to what took place on that occasion as follows:

"Q. Did you hear what took place and what was said between Mrs. Louisa C. Davis and Mr. Flory? A. She told him to put the money in her name in the bank.

"Q. What else was said about it? A. I turned away and said, 'That is my brother's money.' \* \* \*

"Q. And what did she say then? A. She said put it in her name, and I said no more."

Mr. Flory's evidence is very vague and indefinite as to what took place when the money was delivered to him. He not only does not contradict the statement of the other witnesses as to what Mrs. Davis said when she transferred the money from her possession to his, but says he does not remember precisely what the conversation was along that line. When asked if it was not agreed then and there that it should remain at his bank until the title was settled, he replied: "There was no agreement as to how long it should remain there or anything of the kind, as I understood it, but in my own mind it was put there until the matter was settled." While he states from what occurred on that occasion that he got the impression that the money was placed in the bank to be held by it until it was determined to whom it belonged, he does not state facts which would justify such a conclusion, and his conduct in entering it as a general deposit to the credit of Mrs. Runkle's estate, subject of course to the check of her personal representative when appointed, and using the money as the bank's own, as in the case of other general deposits, sustains the other witnesses as to the character of the deposit made and the circumstances under which the bank came into the possession of the money.

After a careful examination and consideration of all the evidence, written and oral, as to the manner in which the bank came into the possession of the money, it does not appear that the money was delivered to the bank as a joint deposit of the estates of the husband and wife, or upon any agreement that the bank should hold it as a stakeholder until it was determined to which estate the money belonged. But, on the contrary, it does appear that, when Mrs.

Davis delivered the money to the cashier of the bank, she intended that it should either be placed or deposited in the bank in her name until a personal representative of her sister's estate had been appointed, or to the credit of her sister's estate, and that in fact as well as in form it was so delivered to or deposited with the cashier of the bank.

The right to file a bill of interpleader does not lie in every case where two or more persons claim the same thing, debt, or duty from a third person, and he is in doubt as to which of them he ought to render the debt or duty or deliver the thing; but the jurisdiction of a court of equity to grant that remedy independent of statute is confined in much narrower limits.

Mr. Justice Story says in his work on Equity Jurisdiction, § 823: "That the remedy by bill of interpleader, although it has cured many defects in the proceedings at law, has yet left many cases of hardship unprovided for."

Again, in section 820, he says: "Whether it might not have been more wise and more consistent with the principles of equity originally to have held that in all cases whatsoever, where the bailee was innocent and without fault, he should have had the right to a bill of interpleader, is a point into which it is now too late to inquire."

[1] Section 2998 of the Code makes provision for a summary proceeding by interpleader in a pending action, but there was no action pending when this bill was filed, and it is not a proceeding under that section. The statute can have no effect upon the question we are now considering, for, as Mr. Pomeroy says (section 1329), such statutes (except where they enlarge the rule governing bills of interpleader, and our statute does not) it is universally held do not at all limit or affect the equitable jurisdiction by suit. They merely furnish another special cumulative and concurrent remedy.

[2] The right of the complainant to file its bill in this case must therefore be determined without reference to our statute by the principles or rules which govern courts of equity in granting the remedy of interpleader.

The general principles which govern a court of equity in administering relief in such cases seem to be pretty well settled.

In 4 Pomeroy's Equity Jurisprudence, § 1320, it is said that "where two or more persons, whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt or duty by different or separate interests, from a third person, and he not knowing to which of the claimants he ought of right to render the debt or duty or to deliver the thing, fears he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader." Substantially to

the same effect is section 806 of Story's Eq. Jur.

In section 1322 of Pomeroy it is said: "That from the description in a previous paragraph and from the whole course of authorities it is clear that the equitable remedy of interpleader, independent of recent statutory regulations, depends upon and requires the existence of the four following elements, which may be regarded as its essential conditions: (1) The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded. (2) All their adverse titles or claims must be dependent upon or derived from a common source. (3) The person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter. (4) He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them in the position, merely of a stakeholder."

Applying these principles to the facts of this case, it is clear that the right of the bank to file a bill of interpleader was lacking in both the second and fourth essential requirements, as laid down by Mr. Pomeroy. The second essential, that there must be privity between the opposing claimants, does not exist. The claims of the defendants were not dependent upon or derived from a common source. Their claim of title is independent of each other. One derives his title from the husband, and the other from the wife.

Mr. Pomeroy, § 1324, in discussing this essential, says: "Where there is no privity between the claimants, where their titles are independent, not derived from a common source, but each asserted as wholly paramount to the other, the stakeholder is obliged in the language of the authorities to defend himself as well as he can against each separate demand. A court of equity will not grant him an interpleader."

Upon this requirement, Mr. Justice Story says: "The true doctrine supported by the authorities would seem to be that in cases of adverse, independent titles the party holding the property must defend himself as well as he can at law; and he is not entitled to the assistance of a court of equity, for that would be to assume the right to try merely legal titles upon a controversy between different parties where there is no privity of contract between them and the third person who calls for an interpleader." 2 Story's Eq. Jur. (11th Ed.) § 820. See, also, *Northwestern Mutual Life Ins. Co. v. Kidder*, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89, 1 Am. & Eng. Ann. Cas. 509, and note p. 513, in which many cases are cited sustaining the rule as laid down by Pomeroy and Story.

The fourth essential condition to filing such a bill, as stated by Mr. Pomeroy, is that the complainant must be under no independent liability to either claimant. Upon

that question he says: Such an independent liability may be incurred in two classes of cases: "(1) In the first place, the agent, depositary, bailee, or other party demanding an interpleader in his dealings with one of the claimants may have expressly acknowledged the latter's title, or he may have bound himself by contract, so as to render himself liable upon such independent undertaking, without reference to his possible liability to the rival claimant upon the general nature of the entire transaction. Under these circumstances, as the plaintiff is liable at all events to one of the defendants, whatever may be their own respective claims upon the subject-matter as between themselves, he cannot call upon them to interplead. He does not stand indifferent between the claimants, since one of them has a valid legal demand against him at all events. Even if the acknowledgment or promise has been obtained by fraud or mistake, the right of the party thus deceived to be relieved in equity from his liability cannot be considered and sustained in an interpleader suit. (2) In the second class of cases, the independent liability of the plaintiff to one of the defendants arises from the very nature of the original relation subsisting between them, without reference to any collateral acknowledgment of title or promise to be bound. The most important examples of such relations are those subsisting between bailee and his bailor, or agent or attorney and his principal, a tenant and his landlord, and the like. In pursuance of the doctrine above stated, if a bailee is sued by his bailor or an agent by his principal, or a tenant by his landlord, and at the same time a third person asserts a claim of title adverse and paramount to that of the bailor, principal, or landlord, a suit of interpleader cannot in general be maintained against the two conflicting elements, since from the very nature of the relation there is an independent personal liability with respect to the subject-matter of the bailee to the bailor, of the agent to his principal, and of the tenant to his landlord." 4 Pomeroy's Eq. Jur. § 1326. See, also, 2 Story's Eq. Jur. §§ 817, 817a, 817b.

There are some exceptions to the general rule as above stated, as where the title of one of the adverse claimants is derivative and not antagonistic and paramount to the bailor, principal, or landlord. 2 Pom. Eq. Jur. § 1327; 2 Story's Eq. Jur. § 817.

This case is not within any of the exceptions. The bank, as we have seen, came into the possession of the money either as debtor to or bailee of Mrs. Runkle's estate, and whether it holds it as debtor or bailee it is under an independent liability to her estate, and upon that ground as well as upon the ground of the want of privity between the opposing elements, the bank was not entitled to maintain its bill of interpleader.

The decree complained of must be reversed, and this court will enter such decree as the circuit court ought to have entered, dismissing the bill for want of jurisdiction.

Reversed.

(112 Va. 397)

**FERRIMER v. COMMONWEALTH.**

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**1. INDICTMENT AND INFORMATION (§ 110\*)—FOLLOWING STATUTE—SUFFICIENCY—INTOXICATING LIQUORS.**

The indictment alleged that accused, on a certain date, upon the order of V., did unlawfully sell, in the town and county named, to said V. a quantity of ardent spirits, not exceeding 4½ gallons, and that said spirits was unlawfully sold, not to be delivered at the place of purchase, or within the town, or within one mile outside of the corporate limits thereof, but that accused unlawfully shipped such ardent spirits by express to V., without then and there having a license to do so. *Held*, that the indictment was sufficient, being laid in the language of the statute.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 110.\*]

**2. INTOXICATING LIQUORS (§ 6\*)—REGULATION—POLICE POWER.**

Under its police power to enact laws to promote the public safety, health, and morals, the Legislature may regulate and control traffic in intoxicating liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. § 6.\*]

**3. COMMERCE (§ 64\*)—INTOXICATING LIQUORS—REGULATIONS.**

Acts 1910, c. 190, authorized the issuance of a retail license and a retail and shipper's license, for the sale of intoxicants, and provides that a retail license shall permit the sale of intoxicants to any individual, to be delivered at the place of purchase, or to any place within the city, town, county, or district, or within one mile outside of where the license is granted, and nowhere else within the state, and that the retail and shipper's license shall confer the additional privilege of shipping by express or otherwise. *Held*, that the Legislature had power to regulate the sale of liquor by the imposition of a reasonable license, even though it be intended for shipment without the state, and the statute was valid though construed as prohibiting one merely having a retail license from shipping liquor without the state.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 64.\*]

Error to Circuit Court, Tazewell County.

H. J. Ferrimer was convicted of unlawfully selling intoxicants, and brings error. Affirmed.

The indictment was as follows:

"The jurors of the grand jury, in and for the county aforesaid, impaneled and sworn at the term hereof commencing on the 22d day of August, 1910, and now attending said court, upon their oath present that H. J. Ferrimer, on the ——— day of June, 1910, in the said county, did unlawfully ship by express ardent spirits, without then and there having a license so to do, against the peace

and dignity of the commonwealth of Virginia.

"And the jurors aforesaid, upon their oaths aforesaid, do further present that H. J. Ferrimer, on the ——— day of June, 1910, in the said county, did unlawfully ship, by express, ardent spirits, in a quantity of not more than 4½ gallons, to Vincent Volscent, upon the order of such Vincent Volscent, without then and there having a license so to do, against the peace and dignity of the commonwealth of Virginia.

"And the jurors aforesaid, upon their oaths aforesaid, do further present that H. J. Ferrimer, on the ——— day of June, 1910, in the said county, did unlawfully sell and ship ardent spirits, by express, in a quantity of not more than 4½ gallons, to Vincent Volscent, upon the order of such Vincent Volscent, without then and there having a license so to do, against the peace and dignity of the commonwealth of Virginia.

"And the jurors aforesaid, upon their oaths aforesaid, do further present, that H. J. Ferrimer, on the ——— day of June, 1910, in the said county, at one time, upon the order of Vincent Volscent, unlawfully did sell, in the town of Pocahontas, in said county, to said Vincent Volscent, a quantity of ardent spirits, not exceeding 4½ gallons; that said ardent spirits was so unlawfully sold by the said H. J. Ferrimer, not to be delivered to the said Vincent Volscent at the said place of purchase; that said ardent spirits was so unlawfully sold by the said H. J. Ferrimer, not to be delivered to the said Vincent Volscent within the said town of Pocahontas; that said ardent spirits was so unlawfully sold by the said H. J. Ferrimer, not to be delivered to the said Vincent Volscent within one mile outside of the corporate limits of the said town of Pocahontas; and that said H. J. Ferrimer did then and there unlawfully ship said ardent spirits, by express, to said Vincent Volscent, upon the order of said Vincent Volscent, without then and there having a license so to do, against the peace and dignity of the commonwealth of Virginia."

Sexton & Roberts, for plaintiff in error. Samuel W. Williams, Atty. Gen., for the Commonwealth.

KEITH, P. Ferrimer was indicted in the circuit court of Tazewell county for shipping by express ardent spirits without having a license so to do. When the case was called for trial, with the consent of the attorney for the commonwealth and of the accused in person, the court heard the evidence and determined the case without a jury, upon an agreed statement of facts, which was as follows:

"It is agreed between the attorney for the commonwealth and the defendant, by his attorneys, that the defendant, H. J. Ferri-

mer, is a resident of the town of Pocahontas, in Tazewell county, Va.; that on the 25th day of March, 1910, there was granted to him a 'retail license' to sell ardent spirits in the said town of Pocahontas, from the 1st day of May, 1910, until the 30th day of April, 1911, as provided by an act of the General Assembly of Virginia, approved 16th day of March, 1910 (Acts of Assembly 1910, page 290), which said license is in the words and figures following, to wit:

"State of Virginia, Tazewell County—to wit:

"At a circuit court held for said county at the courthouse thereof, on the 25th day of March, 1910.

"A license was this day granted to H. J. Ferrimer to sell at his place of business in the town of Pocahontas in this county, to any individual, beer, malt liquors, whisky, wine, brandy, or any mixture thereof, fruits preserved in ardent spirits, alcoholic bitters, and all other mixtures, preparations and liquids which will produce intoxication, in quantities not exceeding four gallons and a half, in jugs, bottle and demijohns, or to be drunk where sold, to be delivered at the place of purchase, or to any place within the city, town, county, or district or within one mile outside where the license is granted, and nowhere else in the state, for the period beginning on the first day of May, 1910, and expiring on the thirtieth day of April, 1911.

"Teste: A. B. Buchanan, Clerk."

"That under said license the defendant now is and has been, since the 1st day of May, 1910, retailing ardent spirits in the said town of Pocahontas.

"That on the ——— day of June, 1910, the said defendant, in said Tazewell county, state of Virginia, did ship ardent spirits, by express, in a quantity of not more than 4½ gallons, to one Vincent Volscent; that the said Vincent Volscent resided at Mora, in the state of West Virginia; that said defendant packed said ardent spirits at his place of business in said town of Pocahontas, and delivered said package to the Southern Express Company, at its office in said town of Pocahontas, consigned by the defendant to the said Vincent Volscent, to be delivered to said Vincent Volscent by the said express company at said Mora, W. Va., all express charges being prepaid by the said defendant; and that said ardent spirits were carried by said express company from said town of Pocahontas and delivered to said Vincent Volscent at said Mora, W. Va.

"That the said shipment of ardent spirits was made through said express company over the Norfolk & Western Railway, which railway passes immediately out of the corporate limits of the said town of Pocahontas into the said state of West Virginia.

"That said defendant, at the time of making the shipment aforesaid, did not have a retail and shipper's license, as provided by the above-mentioned act of the General Assembly of Virginia."

And the court certifies that this was all of the evidence.

The defendant demurred to the indictment and pleaded not guilty, and moved the court to dismiss the charge against him, "because said offense, if any there was, was for the shipping of whisky from the town of Pocahontas, Va., to Vincent Volscent, to be delivered to the said Vincent Volscent at a point in the state of West Virginia, and therefore was interstate commerce, and could not be affected by any act of the General Assembly of the state of Virginia, from which point said shipments were made." But the court overruled said motion and refused to discharge the defendant, overruled the demurrer to the indictment and found the prisoner guilty, and rendered judgment against him for the sum of \$50 and costs, to which judgment the defendant, Ferrimer, obtained a writ of error.

The first error assigned is to the action of the court in overruling the demurrer to the indictment.

[1] The indictment is for a statutory offense, is laid in the language of the statute, and, in our judgment, is clearly sufficient. See *Smith v. Commonwealth*, 85 Va. 924, 9 S. E. 148; *Fletcher's Case*, 106 Va. 840, 56 S. E. 149; *White's Case*, 107 Va. 901, 59 S. E. 1101; *Runde's Case*, 108 Va. 873, 61 S. E. 792; *Dix v. Commonwealth*, 110 Va. 907, 67 S. E. 344.

The second assignment of error is the one chiefly relied upon, and is that this was an interstate shipment, and that the statute of Virginia, in so far as it applies to the facts of this case, was a regulation of interstate commerce, and therefore void.

[2] The state of Virginia, in the exercise of its police power, may pass laws for the promotion of the safety, health, and morals of the people, and the regulation and control of the traffic in ardent spirits is within the discretion of the Legislature, under the police power of the state. *Farmville v. Walker*, 101 Va. 323, 43 S. E. 558, 61 L. R. A. 125, 99 Am. St. Rep. 870.

In the case of *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346, a statute of the state of Iowa was brought under review, which had been construed by the Supreme Court of that state as "meaning that intoxicating liquors might be manufactured and sold within the state for mechanical, medicinal, culinary, and sacramental purposes, but for no other—not even for the purpose of transportation beyond the limits of the state"; and the Supreme Court of the United States held (Justice Lamar delivering its unanimous opinion), that the statute thus construed raised no conflict with the Constitution of the United States, and was therefore valid. The principle thus announced seems to be conclusive of the question under consideration. See, also, *Mugler v. State of Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

[3] In passing the law in question, the state surely never intended any interference



with interstate commerce; nor do we think that it tends in any way to regulate or control interstate commerce. It operates equally upon all citizens engaged in the sale of ardent spirits—a traffic which the good order and well-being of society renders it imperatively necessary that the Legislature should strictly limit and control. It provides for licenses of various kinds which carry with them certain privileges. There is the retail liquor license which was issued to Ferrimer, and under which he was entitled to enjoy certain specific and designated rights. The statute provides for another license, known as the "retail and shipper's license," which is issued to proper persons upon the payment of a reasonable license fee. Upon obtaining that license, the dealer could exercise the privilege which it conferred, to ship, by express, within the state or without the state; the law making no discrimination along that line. If the contention of plaintiff in error can be maintained, then any citizen may anywhere within the limits of this commonwealth sell and ship intoxicating liquors without a license. It is the sale, as well as the shipping, of the liquor which comes within the operation of the statute, and which cannot lawfully be made without first obtaining a license for that purpose, for which the plaintiff in error was indicted and found guilty. If a state may lawfully prohibit the manufacture and sale within the state, "even for the purpose of transportation beyond the limits of the state," surely it may regulate the sale of liquor, even though its transportation beyond the limits of the state be intended by the imposition of a reasonable license, which operates without discrimination upon all of its inhabitants.

We are of opinion that there is no error in the judgment complained of, and it is affirmed.

**Affirmed.**

(112 Va. 816)

**STULL et al. v. HARVEY et al.**

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**1. APPEAL AND ERROR (§ 81\*)—JUDGMENTS APPEALABLE—"FINAL DECREE."**

In a suit to restrain a sale of property under a trust deed, a decree directing the clerk to pay the trustee's attorneys a fee out of certain funds belonging to the grantor on the motion to dissolve the injunction, and referring the case to the master to take an account showing what part of the expenses claimed by the trustee other than counsel fees should be allowed as a charge against the trust estate, was not a "final decree" from which an appeal would lie, under the rule that a final decree is one which disposes of the whole subject, giving all the relief that is competent, and leaves nothing to be done by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 510-516; Dec. Dig. § 81.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2774-2798; vol. 8, p. 7663.]

**2. TRUSTS (§ 227\*)—TRUSTEE—PROTECTION OF TRUST ESTATE—EMPLOYMENT OF COUNSEL—AUTHORITY.**

It being the duty of a trustee to protect the trust estate from waste, invasion, or trespass, and to defend suits against him with respect to the trust subject, he has implied power to employ counsel therefor at the expense of the trust fund.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 824; Dec. Dig. § 227.\*]

**3. TRUSTS (§ 227\*)—TRUSTEE—POWERS—EMPLOYMENT OF COUNSEL.**

Where grantors in a deed of trust filed a bill to enjoin the trustee from making a sale thereunder, to which the beneficiary, who was sui juris, was also a party, the trustee had no interest in the litigation, and could not therefor employ counsel at the expense of the trust to defend the suit.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 824; Dec. Dig. § 227.\*]

**Appeal from Circuit Court, Augusta County.**

Suit by A. M. Stull and another to restrain O. B. Harvey and others from the foreclosure of a trust deed. From a decree awarding certain costs and expenses to the trustee, complainants appeal. Reversed and remanded.

John T. Delaney, for appellants. Timberlake & Nelson and O. B. Harvey, for appellees.

**KEITH, P.** By deed of trust dated December 12, 1902, A. M. Stull and A. W. Persinger conveyed to R. L. Parrish, Jr., trustee, a tract of land to secure to the Longdale Iron Company a debt of \$8,000; on November 15, 1904, this debt was assigned to the Clifton Forge Light & Water Company; and on December 15, 1904, O. B. Harvey was substituted by decree of the circuit court of Alleghany county as trustee in the said deed, in the place and stead of R. L. Parrish, Jr., who had resigned. By deed bearing date September 25, 1905, Persinger conveyed his interest in this land to J. C. Stull, subject to the lien of the deed of trust. In February, 1908, default then existing in the payment of the debt, the Clifton Forge Light & Water Company directed Harvey, the substituted trustee, to enforce the deed of trust, and he thereupon caused to be published in the Clifton Forge Review, a newspaper published in the city of Clifton Forge, a notice to the effect that on March 6, 1908, he would make sale of the tract of land aforesaid, or so much thereof as might be necessary. This notice did not specify certain of the valuable rights and privileges which were subject to the lien of the deed of trust, nor did it specify what part of the land would be sold, should it be unnecessary to make sale of the whole.

On March 4, 1908, A. M. and J. C. Stull were awarded an injunction against the trustee and the Clifton Forge Light & Water Company. This injunction was dissolved

on March 19, 1908, on the motion of the defendants. At the hearing of this motion, the Clifton Forge Light & Water Company was not represented by counsel. Harvey, trustee, who is himself an attorney at law, appeared and argued the motion in his own behalf, and in addition the law firm of Timberlake & Nelson, who were employed by the substituted trustee, appeared in support of the motion to dissolve the injunction. From this decree dissolving the injunction no appeal was applied for by the appellants, an agreement having been made with the trustee that he would make sale of the property covered by the deed of trust in such parcels as appellants would specify in writing. In pursuance of this agreement A. M. and J. C. Stull caused to be prepared and forwarded to the trustee a notice of sale of the land, rights, and privileges aforesaid; but the trustee declined and refused to cause said sale notice to be published, and in lieu thereof adopted and published a notice which was substantially different. Prior to the date specified in this second notice A. M. and J. C. Stull, on an amended bill, applied for and obtained an injunction enjoining and restraining the trustee from making sale under the second notice, and by decree of April 28, 1908, upon said amended bill and upon the answers of Harvey, substituted trustee, and the Clifton Forge Light & Water Company, all matters in controversy in the cause were settled, except the question of the liability of A. M. and J. C. Stull for the amount of counsel fees claimed by Timberlake & Nelson, and certain amounts claimed by O. B. Harvey, substituted trustee, as compensation for services alleged to have been rendered by him and in reimbursement of certain expenses which he alleged he had incurred as trustee.

By decree of May 19, 1908, the clerk of the circuit court of Augusta county was directed to and did pay to Timberlake & Nelson, out of funds which had been deposited with him, the sum of \$200 for their fee for the services which they had rendered at the request of Harvey, trustee, upon the motion to dissolve the injunction which had been awarded upon the original bill. By this decree, after passing upon the fee claimed by Timberlake & Nelson, it was further adjudged and ordered that the cause be referred to one of the master commissioners in chancery, to take, state and settle an account showing what part of the expenses claimed by Harvey, trustee, other than counsel fees, should be allowed as a charge against the trust estate. On May 14, 1909, the Stulls filed in the clerk's office a paper styled a "bill of review," in which they prayed that the said decree of May 19, 1908, be reviewed and reversed. Timberlake & Nelson were made parties defendant, together with O. B. Harvey, substituted trustee, and the Clifton Forge Light & Water Company. On the ——— day of ———, 1909,

Master Commissioner Gordon filed his report in accordance with the directions of the decree of May 19th. By that report Harvey, trustee, was found to be entitled to recover from the trust estate the further sum of \$163.40 as compensation for services alleged to have been rendered by him and reimbursement of certain expenses said to have been incurred. To this report A. M. and J. C. Stull filed exceptions, which were, by decree of October 25, 1910, overruled, and the bill of review, as it is called, dismissed, and the clerk was directed to pay out of the funds in the control of the court in the cause the sum of \$163.40, together with a fee of \$200, making a total of \$363.40, which by the decree complained of was made a charge against the trust fund under the control of the court. From that decree the Stulls applied for and obtained an appeal.

The first question which we have to consider relates to the jurisdiction of this court.

[1] It is insisted upon the part of appellees that the decree of May 19, 1908, is a final decree; that, being a final decree, Timberlake & Nelson could not be made parties to this suit by bill of review; that the fee allowed Timberlake & Nelson was a separate and distinct transaction, and the expenses and costs of \$163.40 allowed to the trustee was another separate and distinct transaction; and that neither of them are sufficient to give this court jurisdiction.

In this view we cannot concur. The decree of May 19, 1908, is not a final decree. As was said by this court in *Sims v. Sims*, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772: "A decree which disposes of the whole subject, gives all the relief that is contemplated, and leaves nothing to be done by the court, is to be regarded as final; and, on the other hand, every decree which leaves anything to be done by the court in the cause is interlocutory as between the parties remaining in the court"—citing *Cocke's Adm'r v. Gilpin*, 1 Rob. 20; *Ryan v. Mcleod*, 32 Grat. 367; *Rawlings v. Rawlings*, 75 Va. 76; *Wright v. Strother*, 76 Va. 857.

The object of the petition, improperly called a bill of review, was to reopen certain questions which were disposed of by the decree of May 19, 1908. It does settle the question at issue with respect to the attorney's fee allowed to Timberlake & Nelson; but it referred other questions at issue between the parties to a commissioner for report, so that it is manifest that all the relief contemplated by the pleadings had not been given. The final decree of October 25, 1910, disposes of property greater in amount than the minimum sum necessary to confer jurisdiction upon this court.

[2] The principal question presented by the appeal is whether or not, under the circumstances of this case, the substituted trustee was justified in the employment of counsel, whose fees were to constitute a charge

upon and be paid out of the trust fund. No question is raised, involving the good faith of any party to this record. That the trustee believed that he had the right to employ counsel, that he did employ counsel, that counsel rendered the service, and that the compensation allowed is reasonable, there is no ground to controvert. The sole question is whether, under the existing facts and circumstances, the fee allowed should have been a charge upon the trust fund; and that is a question of law which we must now answer.

The trust deed makes no provision for the compensation of the trustee. The trustee made no sale, so as to be entitled to the compensation provided for by section 2442 of the Code of 1904 of 5 per cent. upon the first \$300 and 2 per cent. upon the residue of the proceeds.

In *Perry on Trusts* (6th Ed.) § 910, it is said: "Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably and properly incur in the execution of the trust, and it is immaterial that there are no provisions for such expenses in the instrument of trust. If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty, and for losses that may accrue to himself in the proper administration of the trust. Thus a trustee will be reimbursed all his necessary traveling expenses, and all reasonable fees paid for legal advice in the discharge of his duties. And this rule will be applied, although the trust may subsequently be declared void, if the trustees were without blame in the matter. So trustees will be allowed all the expenses of litigation concerning the fund, and all costs which they are ordered to pay to strangers, if the litigation was forced upon them, or was necessary for the protection of the estate. \* \* \* A trustee can receive pay only for such services and expenses as are within the line of the duties imposed on him by the instrument creating the trust."

In *Rossett v. Fisher*, 11 Grat. 492, 498, Judge Moncure said: "A trustee in a deed of trust is the agent of both parties, and bound to act impartially between them; nor ought he to permit the urgency of creditors to force the sale under circumstances injurious to the debtor at an inadequate price. He is 'bound to bring the estate to the hammer,' as has been said by Lord Eldon, 'under every possible advantage to his cestui que trusts,' and he should use all reasonable diligence to obtain the best price. He may and ought, of his own motion, to apply to a court of equity to remove impediments to a fair execution of his trust, to remove any cloud hanging over the title, and to adjust accounts, if necessary, in order to ascertain the actual debt which ought to be raised by the sale, or the amount of prior incumbrances."

It is the duty of the trustee to protect the trust estate from waste, invasion, or tres-

pass, and, of course, it would be his duty to defend all suits brought against him with respect to the trust subject. In the performance of these duties a trustee would be justified in employing counsel and charging their compensation to the trust fund.

This court held in *Cochran v. Richmond, etc., R. Co.*, 91 Va. 339, 21 S. E. 664, that "trustees who in good faith engage the services of counsel to aid them in the duties, even where not expressly authorized, are entitled to pay them out of the trust fund, or to be reimbursed out of that fund for all the expenses which they have incurred, including reasonable fees to attorneys." We have again examined that case and are satisfied with the decision. But something more than good faith is necessary to justify the trustee in the employment of counsel. There must be some reasonable ground to justify the trustee and to render the employment of counsel reasonably necessary to aid in the discharge of the duties of the trustee and the protection of the trust property; and such was the case in *Cochran v. Richmond, etc., supra*. There was, indeed, in that case no dispute as to the right of counsel to receive compensation. There were liens by deed of trust upon the franchises and property of the James River & Kanawha Canal, which had been acquired by the Richmond & Alleghany Railroad Company subject to those liens. There were a great number of beneficiaries who were not before the court, and their interests were represented only by the trustees, as is usually the case in trusts of that character, and the trustees employed counsel to protect the creditors, and their fees were properly allowed as a charge upon the fund.

There is an instructive criticism of this case in the opinion of the corporation court of Lynchburg, adopted by this court in *Wilson v. Langhorne*, 105 Va. 68, 52 S. E. 842:

"It is undoubtedly well settled that a trustee, where there are doubts and difficulties attending the execution of his trust, may appeal to the court for guidance, and as incident to this right, or when legal advice is necessary, or when maintaining or defending the deed of trust in suits in which the cestui que trust is not a party, may employ counsel, and out of the fund pay reasonable counsel fees. The cases of *Cochran v. Richmond & Alleghany R. Co.*, 91 Va. 339 [21 S. E. 664], and *Berkeley & Harrison v. Green*, 102 Va. 378 [46 S. E. 387], certainly fall under the above rule. In the first case the trustees only were parties to the suit, and not the bondholders, except in answer to the petition of Cabell & Smith for more fee. *Cochran* and all the bondholders in 1891 agreed upon the fee, but *Cochran* contended no part thereof should come out of the fund from which he was to be paid. In that case the trustees alone were asserting the rights of the bondholders, and, of course, were entitled to have counsel fees allowed. In the latter case, *Green*, trustee, filed a bill asking the aid of the court in

the execution of his trust, and therefore had the right to retain counsel for that purpose and pay them a fee out of the fund. But these cases are not analogous to the one at bar. Wilson, trustee, in this case, was only a formal party holding the legal title, and all the creditors interested in the deed of trust were sui juris and before the court."

In *Berkeley & Harrison v. Green*, 102 Va. 378, 46 S. E. 387, the trust deed in express terms provided that the trustee "shall be authorized and empowered to employ counsel and compensate them for their services out of the trust funds." And the court found as a fact that the administration of the trust necessitated the institution and prosecution of a litigation, and involved debts and assets to the amount of several hundred thousand dollars.

The trustee, as we have seen, is the agent of the grantor and of the grantee, of the debtor and of the creditor, and is bound to stand neutral and impartial between them. We have enumerated cases in which the trustee has the right, and it would be his duty, to employ counsel; but in every case there must exist some reasonable necessity for such employment. We shall not attempt an exclusive enumeration of the conditions under which such employment would be proper, but will leave each case to be determined upon its merits.

[3] In the case before us, the grantors in the deed of trust, for reasons satisfactory to themselves, filed a bill to enjoin the trustee from making sale under the deed of trust. To that bill the trustee and the beneficiary were made parties. The beneficiary was sui juris and capable of protecting its own interests. The trustee had no interest whatever in that litigation, unless it be that in every case where a trustee is a formal party he has the right to employ counsel and charge his fees against the trust fund. That such is not the case in Virginia is shown by the careful manner in which each case is discriminated by the court, and the precise fact pointed out which in the opinion of the court justifies the allowance. The cases in which trustees have been enjoined in this state from the execution of the trust are innumerable, but in none of them, so far as we are advised, has the proposition been maintained, that a trustee, under facts such as appear in this case, is entitled to employ counsel and to charge the payment of his fee upon the trust estate. The effect of such a proceeding would be to make the debtor pay the counsel fees of the creditors, and this we have held cannot be done, even though the debtor expressly enters into a contract to that effect. See *Watts v. Newberry*, 107 Va. 233, 57 S. E. 657; *German National Ins. Co. v. Va. State Ins. Co.*, 108 Va. 393, 61 S. E. 870; *Stuart v. Hoffman*, 108 Va. 307, 61 S. E. 757.

We are of opinion that it was error, under the facts of this case, to allow the fee of \$200 as a charge upon the trust fund. We are further of opinion that the fees paid to the clerk for copies of certain papers, the cost of two advertisements of sale, and the surveyor's fee, aggregating \$119.30, and the sum of \$100 allowed by the commissioner to the trustee for services in the execution of the trust, should be allowed as a charge upon the trust fund, and that all other charges be disallowed and denied.

The decree complained of is reversed, and the cause remanded to the circuit court, for further proceedings to be had therein not in conflict with this opinion.

Reversed.

(112 Va. 678)

### BIXLER v. MODERN WOODMEN OF AMERICA.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

#### 1. INSURANCE (§§ 716, 718\*)—MUTUAL BENEFIT SOCIETIES—BY-LAWS—BINDING EFFECT ON MEMBERS.

One who takes out a policy in a mutual benefit society becomes a member thereof, and is bound by its charter and by-laws made in pursuance thereof, and is chargeable with knowledge of limitations on the powers of agents of the society found in the by-laws.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1854, 1855; Dec. Dig. §§ 716, 718.\*]

#### 2. INSURANCE (§ 761\*) — MUTUAL BENEFIT INSURANCE—SUSPENSION FOR NONPAYMENT OF ASSESSMENTS—REINSTATEMENT—VALIDITY.

The by-laws of a mutual benefit society provided for the reinstatement of a suspended member by his payment of assessments, if he was at the time of payment in good health; that otherwise the receipt and retention of the assessments should not reinstate him and prohibited the clerk of any local camp from knowingly receiving assessments from a suspended member, if at the time of tender of payment the member was in impaired health. A member who had been suspended for nonpayment paid arrearages while ill, and the clerk of the local camp who received the money had knowledge thereof. None of the directors or other officers of the society knew of the member's payment until after his death. Held, that the payment and the reception thereof by the clerk of the local camp did not reinstate the member, and the society did not waive the forfeiture, and was not estopped from setting it up as a defense.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1924; Dec. Dig. § 761.\*]

Error to Circuit Court, Augusta County.

Action by Savannah Bixler against the Modern Woodmen of America. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Carter Braxton, for plaintiff in error. Timberlake & Nelson, for defendant in error.

BUCHANAN, J. This action was brought by Mrs. Savannah Bixler against the Mod-

ern Woodmen of America, a beneficial organization, upon a policy of insurance or benefit certificate issued to her husband, W. A. Bixler, and payable to her on his death.

The principal question involved in the case is whether or not the insured, who had been suspended for the nonpayment of his dues, had been reinstated by the payment of such dues to the clerk of the local camp.

Upon a demurrer to the evidence by the defendant, there was a judgment in its favor. To that judgment this writ of error was awarded.

It appears that in the year 1907 the husband, who was at that time in good health, became a member of the defendant company and obtained a benefit certificate therein payable to his wife at his death. He paid his dues and assessments until the levy for the month of March, 1910, became due and payable, when he defaulted and on that account was regularly suspended in accordance with the by-laws of the defendant company. On the 23d day of April following Bixler inquired by phone of Todd, the clerk of the local camp of which he was a member, what was due from him, and was informed that he owed for the months of March and April, whereupon he paid the same to Todd without anything being said by either as to the condition of Bixler's health. On the 26th of April Bixler received notice from the defendant company's home office, calling his attention to the fact that he had been reported by the clerk of his local camp as suspended for the nonpayment of his March dues, that his suspension had been recorded, and that from April 1st his certificate was null and void, but stated that, if he had been reinstated since that date, the notice of his suspension might be disregarded. On the 6th of May, Bixler, who had been suffering from chronic diabetes for two years or more, a fact known to both the insured and Todd, the clerk of the local camp, died suddenly of "diabetic coma." None of the directors or other officers of the defendant knew anything about Bixler's payment of his arrearages until after his death. The clerk of the local camp was instructed not to receive the May dues from Bixler's estate, and the defendant after this action was instituted (which was, as claimed by the defendant, before it had finally passed upon the validity of the claim) offered to return the amount of the March and April dues, but the tender was refused.

The provisions of the by-laws of the defendant company bearing upon the reinstatement of a suspended member and the powers and duties of the clerk of the local camp, so far as applicable to the facts of this case, are found in sections 39, 56, 278, 287, and 291, which are as follows:

"Sec. 39. No Waiver of Any By-Law.—No officer of this society, except as provided in section 108 hereof, nor any local camp officer, is authorized or permitted to waive

any of the provisions of the by-laws of this society which relate to the contract between the member and the society, whether the same be now in force or hereafter enacted."

"Sec. 56. Reinstatement Within Sixty Days After Suspension for Nonpayment of Assessments, Fines, or Dues.—Any member suspended for the nonpayment of assessments, fines, or dues, if not engaged in any of the prohibited occupations mentioned in section 12 hereof, may be reinstated by payment, within sixty days from the date of suspension, of all arrearages of every kind, including current assessment and all fines, dues, and assessments for which he would have been liable had he remained in good standing; provided, however, that he be in good health at the time of reinstatement; provided, further, that the receipt and retention of such assessments or dues in case the suspended neighbor is not in good health, or is engaged in any such prohibited occupation, shall not have the effect of reinstating said member or entitling him or his beneficiaries to any rights under his benefit certificate."

"Sec. 278. Shall Receipt for Moneys and Pay to Banker. The clerk shall receive and receipt for all moneys paid in accordance with the provisions of those by-laws, and shall pay over all moneys by him so received to the banker as often as each regular meeting of his camp, taking the receipt of the banker therefor."

"Sec. 287. Clerk Declared to be Agent of Local Camp.—The clerk of a local camp is hereby made and declared to be the agent of such camp, and not the agent of the society, and no act or omission on his part shall have the effect of creating a liability on the part of this society, or of waiving any right or immunity belonging to it."

"Sec. 291. Shall Not Collect or Receive Assessments from a Suspended Beneficial Member.—The clerk shall not knowingly collect or receive either assessments or dues from a beneficial member who has become suspended for nonpayment thereof, if at the time tender was made the member was in impaired health. The receipt of assessments or dues contrary to the provisions of this section shall be unavailing in favor of the defaulting member, and such clerk shall forfeit his membership in the society for such violation."

[1] A person who takes out a policy in a mutual benefit society becomes a member of the society, and is bound by the rules and provisions of its charter and the by-laws lawfully made in pursuance thereof, and is conclusively presumed to have knowledge of them all. *Knights of Columbus v. Burroughs*, 107 Va. 671, 60 S. E. 40, 17 L. R. A. (N. S.) 246, and authorities cited.

This being so, the insured is charged with knowledge of the limitation upon the powers of the agents of such company found in its

by-laws. *Knights of Columbus v. Burroughs*, supra, and authorities there cited.

[2] Under the by-laws Bixler was entitled to be reinstated within 60 days from the date of his suspension by the payment to the clerk of the local camp of all fines, dues, and assessments for which he would have been liable had he remained in good standing, provided he was at the time of such payment in good health.

By section 56 of the by-laws it is provided that the receipt and retention of such arrearages "in case the suspended member is not in good health \* \* \* shall not have the effect of reinstating such member or entitle him or his beneficiary to any rights under his benefit certificate"; and by section 291 the clerk of the local camp is expressly prohibited from knowingly collecting or receiving either assessments or dues from a member who has been suspended for non-payment thereof, "if at the time the tender was made the member was in impaired health," and declares that the receipt of such dues contrary to the provisions of the section "shall be unavailing in favor of the defaulting member, and such clerk shall forfeit his membership in the society for such violation."

Bixler being, as we have seen, conclusively presumed to have knowledge of these provisions, knew when he paid the arrearages in his then condition of health that he had no right to make such payment, and that the clerk of the local camp had no right to accept it, and that such payment could not have the effect of reinstating him as a member of the society.

It is further provided by the by-laws (sections 39 and 287) that the clerk of the local camp is not authorized or permitted to waive any of the provisions of the by-laws of the society which relate to the contract between the member and the society, and that no act or omission of such clerk shall have the effect of waiving any right or immunity belonging to the society.

In *Knights of Columbus v. Burroughs*, supra, the effect of by-laws limiting the power of a local council of a beneficial association was very carefully considered. In that case the member had failed to pay his assessments as required by its constitution and by-laws and had ipso facto forfeited his membership. The subordinate or local council undertook to make good his delinquencies without complying with the by-laws of the society. It was held in that case, upon careful consideration and the examination of many authorities, that the local council in its undertaking to make good the delinquencies of

its members was acting without authority: that in so doing it was the agent of its members, and not of the society; and that the society, having received the money in ignorance of the facts, had not waived the forfeiture, and was not by its conduct estopped to set it up as a defense to the action.

In *Modern Woodmen of America* (the defendant in the case under consideration) v. Tevis, 117 Fed. 369, 54 C. C. A. 293, the powers and duties of the clerk of a local camp in receiving arrearages from a suspended member and the effect of his action in receiving such arrearages in violation of the by-laws upon the rights of the society or head camp were considered. In that case, which is quoted from in the opinion of the court in *Knights of Columbus v. Burroughs*, supra, it was held in passing upon the same by-laws as are involved in this case that the clerk of the local camp is the agent of the head camp to collect and remit the benefit assessments in accordance with the terms of the by-laws; that his authority is limited by the by-laws and the members and beneficiaries are charged with knowledge of those limitations, because they are a part of their contracts; and that the clerk of the local camp has no authority by contract, estoppel, or waiver to bind the society to its members or beneficiaries, either by extending the time of payment of a benefit assessment or by waiving default in its payment or by reinstating a suspended member without a warranty of good health, "in the absence of notice or knowledge of such acts and acquiescence therein by some of the principal officers of the head camp."

The conclusion reached in that case upon the validity and effect of the same by-laws that are involved in this case is in accord with the principles of our own decisions and with the decisions of courts of other states. See *Knights of Columbus v. Burroughs*, supra, and authorities cited. See, also, *Lyon v. Supreme Assembly*, etc., 153 Mass. 83, 26 N. E. 236; *Kennedy v. Grand Fraternity*, 36 Mont. 325, 92 Pac. 971, 25 L. R. A. (N. S.) 78.

Under these authorities, it is clear, we think, that upon the facts of this case the payment of his arrearages by Bixler and their reception by the clerk of the local camp did not have the effect of reinstating the insured as a member of the defendant company, and that the defendant or head camp, having received the said arrearages in ignorance of the facts, did not waive the forfeiture, and was not by its conduct estopped from setting it up as defense to this action.

The judgment complained of must be affirmed.

Affirmed.

(112 Va. 787)

## MOON et al. v. CHILDREN'S HOME SOCIETY OF VIRGINIA.

(Supreme Court of Appeals of Virginia.  
Nov. 16, 1911.)INFANTS (§ 17\*)—CUSTODY—GUARDIANSHIP—  
"COLORED PERSON."

Acts 1901-02, c. 137, § 29, provides that when any minor child under 14, by reason of neglect, crime, or other vice of the parents, is growing up without education or salutary control, and in circumstances exposing it to a vicious life, the child may be committed to the care of the Children's Home Society. *Held*, that where minor daughters of a mother of gentle birth were not neglected, but were comfortably cared and provided for by their mother, and their stepfather, and it did not appear that from neglect or any vice of the mother or her husband the children were growing up without education or salutary control, and in circumstances exposing them to a vicious life, the mere fact that their mother married for her second husband one who had less than one-fourth negro blood in his veins, and was therefore not a "colored person," within Code 1904, §§ 2252, 2253, 3783, 3788, defining a colored person as one having one-fourth or more colored blood in his veins, and prohibiting such a person from intermarrying with a white woman, was insufficient to justify the commitment of the children to the custody of the society.

[Ed. Note.—For other cases, see *Infants*, Dec. Dig. § 17.\*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1274, 1275.]

Error to Circuit Court, Albemarle County.

Madeline Grasty and Ruby Grasty, minor children of Lucy Moon, having been committed to the Children's Home Society of Virginia, she brings error. Reversed and rendered.

George E. Walker, for plaintiff in error.  
S. S. P. Patteson, for defendant in error.

BUCHANAN, J. Madeline Grasty, aged 12 years, and Ruby Grasty, aged 10 years, were taken from the custody of their mother, Lucy Moon, one of the plaintiffs in error, and committed to the care, custody, and control of the Children's Home Society of Virginia, the defendant in error, by an order of the circuit court for Albemarle county, affirming the action of a justice of the peace in and for said county in a proceeding instituted under an act approved March 10, 1902, amending and re-enacting an act incorporating the defendant in error. Acts of Assembly 1901-02, c. 137, pp. 125-127.

Section 9 of that act is as follows: "Whenever any child under the age of fourteen years, by reason of orphanage or of neglect, crime, drunkenness, or other vice of the parents or other persons having custody of such child, is growing up without education or salutary control, and in circumstances exposing such child to a dissolute and vicious life, or is an inmate of any public poorhouse or almshouse in this state, any officer, agent, or member of said society may make complaint thereof to any justice of the peace or police

justice, and it shall be the duty of such justice of the peace or police justice to issue his process, commanding that said child be brought before him as soon as practicable. The person having custody of such child shall also be summoned to appear at the time and place of hearing said complaint, and any witnesses he or she may desire shall also be summoned and heard in his or her behalf. If, upon such hearing, it appear that the complaint is well founded, and that the interests of such child demand that it should be relieved from such vicious or unsalutary surroundings, or should be removed from such poorhouse or almshouse, such child shall by order in writing be committed by such justice of the peace or police justice to such society until he or she shall attain the age of twenty-one years."

The question involved in the case is whether or not, upon the facts before the court, the act authorized it to deprive the mother of the custody of her children.

The evidence as certified by the court and the reason upon which it based its action are as follows:

"Be it remembered that on the trial of this cause the following facts were proven:

"That Lucy Moon, whose maiden name was Lucy May, and who was a granddaughter of George Christopher Gilmer, one of the most prominent citizens of this county, was prior to her marriage to John Moon the widow of one I. B. Grasty, by whom she had two children, the infant defendants, Madeline, being now 12 years of age, and Ruby, 10 years of age; that Mr. Grasty, the former husband of Lucy Moon, died leaving her in destitute circumstances; that she, with her two infant children, was offered a home with her brother, Lee May, who married one Bessie Moon, the sister of her present husband, John Moon; that she continued to live with her brother, and was given no assistance from her parents or husband's people; that, although both she and her husband were residents of this county, they went to Washington, D. C., and were married; that since her marriage to her present husband, John Moon, he has comfortably provided for her and her two children by her former husband; that these two infant defendants are not neglected as far as physical comforts are concerned, and no drunkenness or vice of their adults was proven. It was proven, however, that John Moon has negro blood in his veins; that his mother, Margaret Moon, of whom he is the illegitimate son, has according to her statement one-eighth of colored blood in her veins. The said Margaret Moon appearing upon the witness stand, it was plainly apparent to the court and to counsel and to spectators that she would pass anywhere as a mulatto woman. John Moon, Sr., the father of John, who married

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Lucy Moon, had a large family of children by the said Margaret, and left each of them a tract of land upon which they now reside; but on account of having colored blood they are recognized as colored people in the county, one of his children having married a colored man at Scottsville, Wash Lewis, though some of the others had intermarried with white people, all of the marriages, however, taking place out of this state, and white citizens visited their homes and took meals with them, but this was not a general custom.

"It was proven further that Madeline and Ruby Grasty were properly clothed and physically well taken care of; that they had been sent to a public school, but after their mother's marriage with John Moon they left the public school; that since her marriage with the said John Moon the mother applied for the admission of the children at the Miller Manual Labor School in Albemarle county, and in the statement filed with the application for their admission into the school, which is a part of the defense in this case and will be filed with the record, she stated that these children were the children of her husband, the said I. B. Grasty; that after the children had been at school some time she made repeated efforts to get them away from the school, and on being refused finally made an application for their withdrawal in writing, in which she certified that they were not the children of Grasty, but the children of the said John Moon, although they had been born, one during the lifetime of Grasty, and one but a short time after his death; that the children were thereupon surrendered to her by the school—children with colored blood in their veins not being allowed to enter the school and even with the suspicion of such blood their condition would be unendurable at the school; that these two infant children had not been cruelly treated and were controlled and looked after; that there were no dissolute characters permitted at the house of John Moon, nor was there any drinking or improper conduct there; that the said John Moon was not a man of means, but had a farm and comfortable home, and was able and willing to care for the two infant defendants; that the said children had never attended the public school since their return from the Miller school, but were taught by their mother or some of the Moon connection.

"It was also proven that the said Moons, because of their color, did not associate on terms of equality with the people in their neighborhood, but formed a coterie to themselves and had few associates outside; that several of the Moon children had married white people out of the state, but that they all then returned to go upon the farms which had been given them by John Moon, the elder, who was a white man.

"It was also proven that the said Lucy Moon alleged that the children were badly treated at the Miller school, and that their

persons were neglected; but it was proven by the superintendent of the school that the children were carefully looked after, that there was a resident physician at the school, and that both their physical and moral well-being were cared for.

"After the above facts were proven, the court entered an order giving the custody of the infant defendants to the Children's Home Society of Virginia, stating that it did so because their mother had married a person with colored blood, who was only recognized as a colored man, and that the associations of these children, who were of pure blood and gentle ancestors would be with persons of mixed blood, and that they would be deterred from association with gentle people of white blood."

It is clear from the facts certified that the act of the General Assembly furnished no authority for the action of the court in depriving the mother of the custody and control of her children. The children were not neglected, but were comfortably cared and provided for by their mother and their stepfather. It does not appear that either from neglect or crime, or drunkenness, or other vice of the mother or her husband, the children were growing up without education or salutary control and in circumstances exposing them to a dissolute and vicious life. On the contrary, it appears that dissolute persons were not permitted at their home, and neither drinking nor improper conduct were allowed there. It further appears that, while the children had not gone to the public schools since their return from the Miller school, they were taught by their mother or some of the Moon connection.

The act of assembly furnishes no authority for depriving a mother of the care and custody of her children merely because she has married into a family lower in the social scale than that in which she was reared, even though her husband has negro blood in his veins, unless he has one-fourth or more of such blood and is therefore a "colored person," within the meaning of section 49 of the Code, and prohibited under our laws from intermarrying with a white woman. Code, §§ 2252, 2253, 3783, 3788. It is not pretended in this case that the stepfather was a colored person within the meaning of our statute, or that he and the mother of the children were guilty of any crime in intermarrying, or were not persons of good character.

The mother, the father of the children being dead, however poor and humble she may be, being of good moral character and able alone, or with the assistance of their stepfather (also of good moral character), to properly support and care for her children, and who is so supporting and caring for them, cannot be deprived of that privilege by the defendant in error under the provisions of its charter.

We are of opinion, therefore, to reverse the



order of the circuit court, and enter such order as it ought to have entered, dismissing the proceeding commenced before the justice of the peace, and restoring the said children to the custody of their mother, the plaintiff in error.

Reversed.

(112 Va. 725)

**LURAY CAVERNS CO., Inc., v.  
KAUFFMAN.**

(Supreme Court of Appeals of Virginia.  
Nov. 16, 1911.)

**1. COVENANTS (§ 29\*)—COVENANTS RUNNING  
WITH THE LAND—PERSONS ENTITLED TO EN-  
FORCE.**

A contract between an owner of real estate, containing caverns which are a great natural curiosity, and a photographer, which gives the photographer the privilege of taking photographs of the premises as he may choose, is a personal one between the parties, and not a covenant running with the land; and a successor in title of the owner, without obtaining an assignment of the contract, may not enforce its conditions and restrictions.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 29; Dec. Dig. § 29.\*]

**2. INJUNCTION (§ 46\*)—RESTRAINING TRES-  
PASS.**

Though equity will not, as a general rule, prevent a mere trespass, yet where the act done or threatened will be destructive of the substance of the estate, or if repeated acts of wrong are done or threatened, or the injury will be irreparable, equity will enjoin the perpetration of the wrong and prevent the injury.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 98, 99, 107; Dec. Dig. § 46.\*]

**3. INJUNCTION (§ 57\*)—SALE OF PICTURES OF  
PLAINTIFF'S PROPERTY.**

An owner of real estate, containing caverns which are a natural curiosity, who has expended large sums in opening up the property, so as to make it attractive to visitors, and who has procured pictures and paintings of the curiosities, which it sells as souvenirs to tourists and the public generally, thereby making them a valuable advertisement of the property, inducing visitors to inspect the natural beauties, cannot restrain defendant from selling copies of other photographs, of which his assignor was a rightful owner, taken by permission of a former owner of the real estate, in the absence of any showing of conditions imposed as to the use of such photographs, or an assignment to the plaintiff of the contract between the former owner of the land and defendant's assignor.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111-113; Dec. Dig. § 57.\*]

Appeal from Circuit Court. Page County.

Suit by the Luray Caverns Company, Incorporated, against D. L. Kauffman. From a decree of dismissal, plaintiff appeals. Affirmed.

R. S. Parks and Leedy & Berry, for appellant. M. McCormick and Wm. F. Keyser, for appellee.

KEITH, P. The Luray Caverns Company filed its bill, stating that it is the owner in fee of very valuable property in Page county, Va., known as the Luray Caverns, a great natural curiosity, ranking as one of

the wonders of the world, and visited annually by thousands of persons; that it has expended large sums of money in opening up the property, lighting it with electricity, laying walks, and constructing bridges over chasms, so as to make it safe for visitors; that experienced guides are kept to accompany visitors through the caverns, explain the formations, and point out their beauty; that as a source of revenue and a mode of advertising the property the company has had pictures taken of the many formations and painted by an artist from actual inspection, thus securing the coloring, lights, and shadows which can only be secured by actual inspection; that these paintings are sold as souvenir cards to tourists and the public generally, and thus scattered over the land, constituting a valuable advertisement of the property, which invites and induces visitors to come and see the natural objects for themselves; that one D. L. Kauffman has secured a considerable quantity of painted cards, purporting to be correct pictures of scenes within the caverns, which he keeps in stock and on exhibition, and sells to all who choose to purchase; that in thus acting Kauffman is trespassing upon the rights of the Luray Caverns Company and injuring its business and property, in this: That he has no right to make, or have made, or exhibit and sell, pictures of the property of the Luray Caverns Company for remuneration, and in addition said pictures are not correct, but are gross misrepresentations of the objects and formations in said caverns, and are not painted from actual sight and close inspection; and that by the sale of the pictures aforesaid the public are being deceived. The bill then states "that many years ago, before the caverns property came into the possession of its present owner, a man by the name of James, whose residence is unknown, visited the caverns and got from the then owner of the property the privilege to take carbon photographs of such of the formations in said caverns as he chose, and your orator is informed that he did take such photos and secured a copy-right thereon from the government, and the said Kauffman claims to have purchased all the right of James thus secured; that the cards said Kauffman is selling are not photographs, but painted pictures, and, as before stated, are incorrect, and such misrepresentations of the property of your orator that they are doing, and will continue to do, incalculable injury to the business of your orator and grossly deceive the public. Your orator further says that said James had only the right to take carbon photographs of such formations, and said Kauffman could have no other or greater right than said James; that said James, having only the right to take carbon photos, would not himself have

the right to take colored photos, nor have carbon photos painted, and he, said James, could not confer upon said Kauffman any right or privilege he had not himself acquired. Your orator further says that, though he is thus being wronged and damaged, he is without an adequate remedy at law; that the sale of each of these picture cards by said Kauffman is a separate wrong and constitutes a ground of action, and as such is a continuing wrong occurring daily, and perhaps many times each day; that it would be impossible for your orator to ascertain the number of sales made, to whom sold, the names or the number of persons to whom such cards were exhibited, and who were deceived thereby, and, therefore, to attempt to get at the amount of damage could not be done, even if it were allowable to go into the field of conjecture and speculation, and, in addition, your orator would be compelled to institute numberless suits, which would be an aggravation and annoyance, as well as contrary to the sound principles of the law;" that, being thus without remedy at law, the bill prays that the said Kauffman may be made a party defendant and required to answer the bill, but answer under oath is waived; and that he and his agents and employes may be enjoined and restrained from exhibiting or selling the painted picture cards hereinbefore described, and that further and general relief may be granted.

There was a demurrer to this bill, which was not passed upon by the court. The defendant answered, depositions were taken, and such proceedings were had as resulted in a decree dissolving the injunction and dismissing the bill; and from that decree the Luray Caverns Company has appealed.

It will be observed that the bill does not aver that Kauffman has ever been within the Luray Caverns, or that he has ever put his foot upon the property of the Luray Caverns Company; and that his trespass, if trespass there be, consists of the reproduction and coloring of certain photographs representing scenes and formations within the caverns. It appears from the bill that a man by the name of James, who is not made a party to the bill, visited the caverns and obtained from the then owner of the property the privilege of taking carbon photographs of such of the formations in the cavern as he saw fit. James took photographs and secured a copyright of them from the government, and from James Kauffman purchased the rights which James had acquired from the predecessor in title of the Luray Caverns Company.

[1] The contract between James and the owner of the Luray Caverns was a purely personal one between the parties to it. It in no sense affects the title to the Luray Caverns, and is not a covenant running with the property; nor does the Luray Caverns Company appear to be the assignee in any

way or in any sense of the benefits of this contract. When James got from the then owner of the property the privilege to take carbon photographs, the carbon photographs were his property, subject, of course, to any limitations or conditions imposed upon him by the contract under which his rights were acquired. If there were any limitations or conditions restraining or limiting his use of the photographs made by him, they are not stated in the bill, and for the purposes of this litigation do not exist. But, even though there were limitations, conditions, and restrictions in the contract between the former owner of the caverns and James, it nowhere appears in what way the appellant, the Luray Caverns Company, could enforce such limitations, conditions, or restrictions. As we have said, it nowhere appears from the bill that the appellant is the assignee of the contract with James, and it certainly cannot maintain any right under that contract by force of the fact that it is the successor in title of the owner with whom James contracted.

[2] As was said in *Miller v. Wills*, 95 Va. 337, 28 S. E. 337: "Although a court of equity will not, as a general rule, interpose to prevent a mere trespass, yet if the act done or threatened would be destructive of the substance of the estate, or if repeated acts of wrong are done or threatened, or the injury is or would be irreparable—in fine, whenever the remedy at law is or would be inadequate—a court of equity will enjoin the perpetration of the wrong, and prevent the injury."

[3] In no sense is any trespass alleged in this bill. There is no invasion of the premises of appellant. There is no act done or threatened which would destroy, or in the least degree affect, the substance of the estate. The whole case made is that there is an invasion of and injury to the rights of appellant, because the appellee goes upon the market with colored photographs of the property of appellant, which he offers to sell in competition with pictures of the same objects offered for sale by the appellant. What the appellee offers for sale are copies of photographs of which his assignor, James, was the rightful owner by permission of the predecessor in title of the appellant. The bill fails to show that there were any limitations or conditions imposed upon James as to the use of these photographs which he was authorized to make, and fails to show in what way the appellant is the beneficiary of the purely personal contract between its predecessor in title and James, with all of whose rights Kauffman is now clothed.

Upon the whole case, we are of opinion that there is no equity in the bill, that the demurrer should have been sustained, and that the decree of the circuit court should be affirmed.

Affirmed.

(112 Va. 699)

**CRAWFORD v. FLOYD.**

(Supreme Court of Appeals of Virginia. Nov. 18, 1911.)

**1. TAXATION (§ 788\*)—TAX DEED—RECITALS—EFFECT—STATUTES.**

Code 1904, § 661, provides that when a tax deed has been recorded the title shall vest in the grantee, subject to defeat only by proof that the taxes or levies for which the land was sold were not properly chargeable thereon, or, if properly chargeable, had been paid, or that notice of the application to purchase had not been duly given, or that payment or redemption was prevented by fraud or concealment of the purchaser. *Held*, that the Legislature did not intend to make the deed conclusive evidence of a compliance with the essential requirements of a valid tax sale, to wit, the listing, assessment, and levy of the taxes, the owner's liability, the notice of tax sale, and the actual public sale of the land without fraud; but it did intend to make the deed conclusive of the performance of all other steps required by the statute preliminary to the sale, and to the execution of the deed in pursuance thereof.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1557; Dec. Dig. § 788.\*]

**2. TAXATION (§ 788\*)—TAX DEEDS—RECITALS—STATUTES—LEGISLATIVE POWER.**

The Legislature has power to make the recitals of a tax deed prima facie evidence of their correctness.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 788.\*]

**3. TAXATION (§ 788\*)—TAX DEED—RECITALS.**

Code 1904, § 666, declares that an applicant to purchase land, sold to the commonwealth for taxes and unredeemed, shall pay to the clerk to whom the application is addressed, 10 per cent. of the amount of the proposed purchase price, provided that the deposit, which shall be first for the purchase price and then for costs, shall in no case be less than \$1. Section 661 provides that when a tax deed has been recorded the title shall vest in the grantee, subject to defeat only by proof that the taxes or levies for which the real estate was sold were not properly chargeable thereon, or had been paid, or that notice of the application to purchase had not been duly given, or that payment or redemption had been prevented by fraud or concealment of the purchaser. *Held* that, where a tax deed recited that at the time of the application to purchase the applicant paid to the clerk 10 per cent. of the amount of the proposed purchase price, it was not avoided on the theory that no sufficient deposit was made, because of proof that the full amount necessary to purchase the land was only \$7.64; the statute requiring a minimum of \$1.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 788.\*]

**Appeal from Corporation Court of Roanoke City.**

Bill by M. L. Floyd against A. S. Crawford, to cancel a tax deed as a cloud on title. From a decree for complainant, defendant appeals. Reversed and rendered.

Hart & Hart, for appellant. H. C. Featherston and John G. Haythe, for appellee.

**CARDWELL, J.** The appellee, Mrs. M. L. Floyd, filed her original and amended bill in this cause against appellant, A. S. Craw-

ford, seeking to have canceled as a cloud upon her title to a certain vacant lot of land, described as lot 9, sec. 8, of the Oak Ridge addition to the city of Roanoke, Va., a tax deed from S. S. Brooke, clerk of the corporation court of said city, to the appellant.

The trial court overruled appellant's demurrer to the original and amended bill, and, at a hearing of the cause upon the amended bill, the exhibits therewith filed, the answer of appellant to the bill, and appellee's general replication to said answer, made the decree appealed from, canceling and annulling said tax deed, giving in the decree the reasons for so doing as follows: "It further appearing from the recitals of the tax deed in question and the affidavit of the said Haythe that the defendant failed to deposit with his application to purchase the said land from the commonwealth the amount required by law to be deposited, and the court being of the opinion that by reason of said failure the said tax deed is void."

It appears that the lot of land in question was returned delinquent and sold to the commonwealth on December 6, 1897, for state taxes assessed thereon against the appellee as the owner of the lot for the year 1896, and the owner failing to redeem the lot an application to purchase the same, under section 666 of the Code, as amended, was filed by appellant on February 17, 1902. Appellee, being a nonresident of the state, notice of the application was published in a newspaper, and she still failing to redeem within the time prescribed by the statute, the deed here in question, conveying the lot to the applicant (appellant), was made by the clerk on June 13, 1903, which deed is exhibited with the amended bill in this cause.

In *Wright v. Carson*, 110 Va. 504, 66 S. E. 39, the court had under consideration a deed containing the identical recitals which are contained in the deed now before us, and in passing upon its sufficiency said: "It recites, step by step, in careful detail, every act which the law requires."

It was in the case just cited held, that the Legislature intended to make the deed conclusive evidence of its recitals, so far as it was able to do so. And in *Minor on Tax Titles*, 131, it is stated that the steps which are jurisdictional, and, therefore, essential, in the assessment of the taxes are: (1) The listing of the property for taxation; (2) the assessment or valuation thereof; (3) the levy of the taxes thereon; (4) the liability of the owner for the taxes; (5) the notice of tax sale, including a sufficient description of the land; and (6) the actual sale of the land publicly and without fraud.

[1,2] Of course, the Legislature did not intend to make the deed conclusive evidence of the compliance with these essential requisites, but it would seem equally as clear that it did intend to dispense with all other steps

required by the statute preliminary to the sale and to the execution of the tax deed in pursuance thereof, or to make such steps merely directory. There is no doubt as to the power of the Legislature to make the recitals in the deed from the clerk *prima facie* correct, and to be accepted as true, in the absence of any evidence to the contrary (*Wright v. Carson*, *supra*), and for the purposes of this case we may so construe the statute; for there is no pretense that any of the recitals in the deed of the essential prerequisites to the sale of the lot of land to the commonwealth are untrue. In other words, none of the alleged omissions from the recitals of the tax deed which the law requires are such as were not in the power of the Legislature to dispense with or make merely directory, and therefore not essential to the validity of the sale to the commonwealth.

[3] The attack upon the deed here is made, and it was set aside by the lower court, as we have seen, solely upon the ground that the initial deposit required of appellant by the statute, to be made when his application to purchase the lot from the commonwealth was filed, was not in fact made. It is very true that appellant contends that no notice of the tax sale and of appellant's application to purchase was given to her; but in her original bill in this cause it is alleged that she is a nonresident, and the deed to appellant recites that notice was given to her by order of publication in the *Evening News*, a paper published in Roanoke city, and in the brief of her counsel it is admitted that said recital in the tax deed is true; but it is insisted that as the initial deposit was not made the clerk had not the right to issue the notice, and that such notice amounts to no notice at all. This, in effect, is to say that the making of the initial deposit was an essential element in the whole transaction; that this omission is not cured by statute; and that it was not within the power of the Legislature, which required this deposit, to cure by the deed itself the failure to make the deposit.

Section 666 of the Code of 1904, as amended by an act of the Legislature (Acts 1899-1900, p. 852), does contain, along with many others, the provision that an applicant, to purchase land sold to the commonwealth and unredeemed, shall pay to the clerk (to whom the application is addressed) "ten per centum of the amount of the proposed purchase price of the said land; provided that this deposit, which shall be first for purchase price and then for costs, shall in no case be less than one dollar \* \* \*;" but section 661 of the Code was left unamended, and that section provides that when a deed has been recorded the title shall stand vested in the grantee, subject to be defeated only by proof that the taxes or levies for which the real estate was sold were not properly chargeable thereon, or that the taxes and levies proper-

ly chargeable thereon have been paid; or that notice of the application to purchase has not been duly given; or that the payment or redemption of said real estate was prevented by fraud or concealment on the part of the purchaser.

As we have seen, there is no pretext that the deed here in question can be attacked on any of the grounds just stated, other than that the notice of the application to purchase was not given; and that the amount paid by the appellant when he obtained his deed was the exact amount which appellee would have been required to pay, had she redeemed the property, is not called in question, so that, as has been observed, the failure to deposit with the clerk the 10 per cent. of the amount of the proposed purchase price of the property, which deposit was in no event to be less in amount than \$1, is the only reason assigned, or which could, under the facts appearing in the record, be assigned, why the tax deed attacked is void and should be annulled.

The tax deed recites that "at the time of the filing said application the said A. S. Crawford paid to the clerk 10 per cent. of the amount of the proposed purchase price of said real estate," and the affidavit of John G. Haythe, so much relied on by appellee, and referred to by the court below in its decree annulling the deed, does not show whether or not the deposit was made. This affidavit was only intended to supply the loss from the record of the original receipt given by the clerk to appellant for taxes, costs, etc., incident to the filing and perfecting of his application to purchase the lot of land. It appears from said affidavit that these receipts bore date October 21, 1902, and from this it is argued that, as all the tax receipts were of the said date—the date when the application matured—no deposit could have been made when the application to purchase was filed.

We confess our inability to appreciate the force of this argument. The law requires that the deposit be made at the time the application is filed, and that within five days after the application matures the taxes, etc., shall be paid. The tax deed recites, not only that the deposit was made when the application to purchase was filed, but that within five days after the application matured there was paid to the clerk all taxes, levies, interest, penalties, fees, and costs, and all city, town, and county levies and taxes remaining unpaid, together with all interest, penalties, costs, and charges, which amounted to the sum of \$7.64 (being the full amount necessary to purchase the said real estate from the commonwealth).

It is very true that, as in the case of *Bowe v. City of Richmond*, 109 Va. 254, 64 S. E. 51, proof for the purpose of "defeating" a tax deed may be supplied from the deed itself, as well as from outside sources; but the contention of the appellee that, because of the recital in the deed that the amount of the

final payment to the clerk was only \$7.64, the deposit made by appellant when his application to purchase was filed could not have amounted to "the statutory minimum of one dollar," and must have been no more than 85 cents, is an unwarranted deduction, and even if such a deduction could be made that is not sufficient to overcome the recital in the deed that the required deposit was made when the application to purchase was filed, treating the recital as only prima facie proof that this requirement of the statute had been complied with. To annul a tax deed on such a ground would strongly tend towards frittering away the validity of such conveyances, and to render them of little value in the enforcement of the payment of taxes and levies due the commonwealth on real estate which are delinquent.

We are of opinion that no irregularity, either in the proceedings looking to the sale to the commonwealth, or in the application to purchase from the commonwealth, or in the deed itself, has been pointed out in this case, which is not cured by section 661 of the Code; therefore the decree of the corporation court, annulling and canceling the deed to appellant, is erroneous, and will be reversed, and this court will enter the decree that the corporation court should have entered, dismissing appellee's bill, with costs to appellant.

Reversed.

(112 Va. 748)

MUNDY'S EX'RS v. GARLAND et al.  
(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

JUDGMENT (§ 180\*)—SUMMARY PROCEEDING—  
MOTION—ACTION ON CONTRACT.

A contract authorized plaintiffs, as executors of defendants' vendor under a contract for the sale of real estate, to resell the land, which defendants had previously agreed to purchase at the price of \$9,500, and obligated defendants, if on such resale the property should bring less than such sum, to pay the difference, with interest and costs and expenses incurred in the resale. *Held*, that such contract was one by which, on the happening of certain things, defendants bound themselves to pay money, the amount of which, after the happening of the contingency provided for, was a mere matter of calculation, and hence plaintiffs were entitled to a judgment on motion, under Code 1904, § 3211, providing that any person, entitled to recover money by action on any contract, may, on motion before any court which would have jurisdiction in an action otherwise than under section 3215 of the Code, to obtain judgment for such money.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 342; Dec. Dig. § 180.\*]

Error to Circuit Court, Botetourt County.

Proceedings by notice and motion by James Mundy's executors against J. L. Garland and others. On defendants' motion the proceeding was dismissed without prejudice, and plaintiffs bring error. Reversed and remanded.

This is a proceeding by notice and motion under section 3211 of the Code of 1904. The notice and contract, which is made a part of the notice, are as follows:

"To J. L. Garland and Mattie V. Garland:

"You are hereby notified that on the 25th day of August, 1910, that being the first day of the August term of the circuit court of Botetourt county, we shall move the said court for a judgment against you and each of you for the sum of \$1,300.76 (thirteen hundred dollars and seventy-six cents), with interest thereon from the 14th day of May, 1910, until paid, the same being due to us as executors of James Mundy, deceased, by virtue of a certain contract in writing, bearing date April 4, 1910, a copy of which is hereto attached and made a part of this notice, between us as parties of the first part and you as parties of the second part; we, the executors of the said James Mundy, having advertised the mill property mentioned in the said contract to be sold at public auction on the 14th day of May, 1910, and on which day we made sale of the said property at public auction for cash, at which sale the said property brought the sum of \$8,300.00 (eight thousand three hundred dollars), and we did incur and expend in costs and expenses in and about advertising the said property and sale thereof the sum of \$34.26, which, together with the interest on the \$9,500 mentioned in the said contract, makes the said sum of \$1,300.76, owing by you to us to make up the deficiency in the purchase price at the said public sale, so as to net us the said sum of \$9,500, with interest thereon from April 2, 1910, for said property as provided by the said contract, as shown by the following statement, namely:

Amount of agreed price of property..	\$9,500 00
Interest from April 2, 1910, to May 14, 1910.....	66 50
Costs of advertising and sale.....	34 26

Total due May 14, 1910.....	\$9,600 76
Deducting price property was sold for	8,300 00

Leaving due us by you..... \$1,300 76

—which bears interest from May 14, 1910.

"W. P. Mundy,

"A. H. Mundy,

"W. P. Barley,

"Executors of James Mundy, dec'd.

"E. V. Barley, }  
"C. M. Lunsford, } P. Q."

Contract, dated April 4, 1910, filed with the foregoing notice:

"This contract, made and entered this 4th day of April 1910, by and between W. P. Mundy and A. H. Mundy and W. P. Barley, executors of James Mundy, parties of the first part, and J. L. Garland and Mattie V. Garland, parties of the second part, witnesseth: That whereas, the said parties of the

first part did on the 2d day of April, 1910, enter into a contract of sale of the following property: 'Roller mill, known as the Buchanan Roller Mills, formerly owned by H. M. Swartz, same having recently been purchased by James Mundy, together with all the real estate conveyed to said James Mundy by H. M. Swartz, about last of January, 1910'—at the price of \$9,500 cash, on the delivery of a warranty deed by the parties of the first part with the said J. L. Garland; and whereas, the said J. L. Garland desires an extension of time within which to comply with said sale and purchase by him of the property aforesaid:

"Now, therefore, this contract witnesseth that for and in consideration of the premises, and in consideration of the said Mattie V. Garland becoming a party with the said J. L. Garland hereto, and in the further consideration of \$1 cash in hand paid, the said parties to this contract agree as follows:

"(1) That the said executors are to proceed to advertise said mill property to be sold at public auction in such manner as to them may seem best on May 14, 1910, on such terms as they may deem proper, and if at said sale the said property described in the contract dated April 2, 1910, and referred to in this contract, shall bring less than \$9,500, then in that event the said J. L. Garland and Mattie V. Garland hereby agree to make up the difference between the price it may bring at the said public sale and the said agreed price of \$9,500, together with 6 per cent. interest thereon from April 2, 1910, and all costs and expenses incurred by said executors in and about advertising said property and sale thereof. In other words, the said J. L. Garland and Mattie V. Garland hereby agree to make up any deficiency in said purchase price at said public sale so as to net the executors \$9,500, with interest thereon from April 2, 1910,

"(2) The said J. L. Garland is to have the privilege at any time prior to day of public sale to pay the said executors the said sum of \$9,500, with 6 per cent. interest thereon from April 2, 1910, also all costs and expenses incurred by them in advertising said sale, and receive the conveyance provided for in the contract of April 2, 1910.

"(3) The said executors shall likewise have the privilege of taking in said property at any time prior to day of said public sale and to release the said J. L. and Mattie V. Garland from this obligation to take and pay for said mill property, and all rights under this contract as to the said J. L. and Mattie V. Garland shall thereupon cease and terminate.

"(4) If at the said public sale of said mill property it shall sell for more than enough to pay the said sum of \$9,500, with 6 per cent. interest thereon from April 2, 1910, and costs and expenses of said sale, the surplus thereof shall go to and become the

property and be for the benefit of said executors.

"Witness the following signatures and seals the day and year first above written.

"[Signed] W. J. Mundy.	[Seal.]
"A. H. Mundy.	[Seal.]
"W. P. Barley.	[Seal.]
"J. L. Garland.	[Seal.]
"Mattie V. Garland.	[Seal.]

Upon motion of the defendants the proceeding was dismissed without prejudice; the circuit court being of opinion that "the plaintiffs ought not to be allowed to prosecute their alleged cause of action by motion." To that judgment this writ of error was awarded.

C. M. Lunsford and E. V. Barley, for plaintiffs in error. Benjamin Haden, for defendants in error.

BUCHANAN, J., having made the foregoing statement, delivered the opinion of the court.

The question involved in this case is whether or not a motion under section 3211 can be maintained upon the contract upon which it is based. That section provides that "any person entitled to recover money by action on any contract may, on motion before any court which would have jurisdiction in an action otherwise than under section 3215 of the Code, obtain judgment for such money. \* \* \*"

As was said by Judge Riely in delivering the opinion of the court in *Long v. Pence*, 98 Va. 584, 586, 587, 25 S. E. 593, 594: "The statute thus authorizes the proceeding by motion whenever a person is entitled to recover money in an action on 'any contract.' The only restriction imposed by the statute as to the nature of the contract upon which the recovery may be by motion is the right to recover money upon it by action. If the contract is such that the person making the motion is entitled to recover money upon it by action, he is entitled to proceed to do so by motion, whether it is based upon an express or an implied contract. The remedy extends to all cases in which a person is entitled to recover money by action on contract."

The agreement upon which this motion is based is clearly a contract upon which the plaintiffs could maintain an action to recover money. It authorizes the plaintiffs to resell the land which the defendants had theretofore agreed to purchase at the price of \$9,500, and binds the defendants, if upon such resale it should bring less than \$9,500, to make up the difference between the price obtained at such resale and the agreed price of \$9,500, together with 6 per cent. interest thereon from April 2, 1910, and all costs and expenses incurred by the plaintiffs in making such resale. It was a contract by which, upon the happening of certain things, the defendants bound themselves to pay

money, the amount of which, after the happening of the contingencies provided for, was a mere matter of calculation.

The notice avers the happening of the contingencies upon which the defendants agreed to pay and the amount of money due under the contract. Whether those averments are true or not is a question of proof. But clearly, as it seems to us, the contract upon which this motion is based is one upon which the plaintiffs had the right to proceed under section 3211 of the Code, as construed in *Long v. Pence*, supra, *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 266, 21 S. E. 487, *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 28 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715, *Grubbs v. Nat. Life, etc., Co.*, 94 Va. 589, 27 S. E. 464, and *Wilson v. Dawson*, 96 Va. 687, 32 S. E. 461.

The judgment complained of must be reversed, and the cause remanded, to be further proceeded with in accordance with the views expressed in this opinion.

Reversed.



(10 Ga. App. 133)

KINARD v. STATE. (No. 3,761.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

DISORDERLY HOUSE (§ 9\*)—ELEMENTS OF OFFENSE—PRINCIPALS AND ACCESSORIES—"KEEP OR MAINTAIN A LEWD HOUSE."

If a person, being in possession of a house, makes an executory sale thereof to a lewd woman for the purpose that she may conduct it as a lewd house, and she thereupon occupies it and devotes it to that purpose, he stands in such an accessorial relationship to her act as to be indictable under the provisions of Penal Code 1910, § 382, which makes it a misdemeanor for any person to "keep or maintain a lewd house."

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. § 1; Dec. Dig. § 9.\*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3914-3926; vol. 8, p. 7699.]

Error from City Court of Fitzgerald; El Wall, Judge.

G. B. A. Kinard was convicted of maintaining a lewd house, and brings error. Affirmed.

Elkins & Wall, D. El Griffin, and C. B. Teal, for plaintiff in error. Alex. J. McDonald, Sol., for the State.

POWELL, J. Kinard was indicted under Penal Code 1910, § 382, which provides: "If any person shall maintain and keep a lewd house, or place for the practice of fornication or adultery, either by himself or others, he shall be guilty of a misdemeanor." In this state, where no difference between actual principals and those sustaining accessorial relations is made, any one who in any wise aids or abets or assists in keeping or maintaining a lewd house may be convicted as a principal under this section. Under the

evidence in this case we would have no hesitancy in affirming the judgment on the ground that there was enough to justify the jury in finding that the defendant gave aid otherwise than by the act which we are about to discuss. However, the court charged the jury as follows: "I charge you in this case that if you find from the evidence the truth of this case to be that the defendant, Kinard, in any way let, by sale, or lease, or otherwise, any house in this county, within two years next preceding the date of the accusation, to any person for the purpose of maintaining and keeping a lewd house, and that person to whom he let the said house did actually maintain and keep a lewd house therein, then it would be your duty to convict the defendant." It appeared, from the evidence, that the lewd woman who actually ran the house did not get possession of it from the accused as an ordinary tenant, but that he gave her an executory contract of sale in the nature of a bond for title, whereby she paid \$50 down and was to pay \$8 per month until the full purchase price had been paid. There was sufficient evidence to justify the charge, so far as it submitted to the jury the question of whether the defendant made this contract for the purpose that the woman to whom he thus gave the possession of the house might use it as a lewd house.

But this charge and the exception to it bring squarely before us the question: Where one makes an executory sale of property to another for the purpose of the latter's keeping a lewd house therein, and the latter in fact keeps the lewd house there, does he commit such an act of aiding or abetting or maintaining as to be held accountable under the statute? It is readily conceded by the able counsel for the defendant that one who rents a house with intention that it shall be used for lewd purposes, or with a knowledge that it will be used for those purposes, may be indicted under this statute. They assert that there is a distinction between one who lets out property for this illegal purpose and one who makes a sale of it. We need not discuss what would be the effect of making an absolute sale, for here the defendant made merely an executory sale, by which he turned over to the lewd woman the possession of the property (together with certain equitable rights which need not now be mentioned), reserving the legal title in himself. There is a Kentucky case which gives color to the contention that the selling of a house for a bawdry is not illegal. *Ross v. Commonwealth*, 2 B. Mon. (Ky.) 417. In Bishop's *New Criminal Law* (8th Ed.) § 1093, this case is criticised, and Bishop gives it as his opinion that no distinction is to be made "between the sale in fee and a sale for a term of years. In both instances the trans-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fer carries the entire present possession." A reading of the entire context surrounding the section just cited from Bishop's work shows that as to offenses of this nature the citizen owes to the public, as to property in his possession, not only the negative duty of refraining from actively aiding the nuisance, but also the affirmative duty of not relaxing his control, wherever he has it, in such a way as to facilitate some one else to do the forbidden thing. For example, in *Scarborough v. State*, 46 Ga. 26, it was held that, if a man's wife and daughters carried on the practice of fornication and adultery in his home and with his knowledge, he would be guilty of maintaining a lewd house, whether he consented to it or not, provided he did not actively dissent, and did not show that the practice went on notwithstanding that he exercised his powers as head of the family to prevent it.

A person having possession of a house which a lewd woman desires for the purpose of carrying on her practices therein is under the active duty of not renting it to her if he knows that purpose. The law says that he owes that much to society. As to contracts of tenancy this is well settled. But it must be kept in mind that it is not the civil contractual status of the parties that is the important thing in fixing the culpability. It is the landowner's conduct in giving over the possession of the house to the lewd woman, with knowledge of the purpose to which it is to be devoted, that makes him a partner in her crime. In *Kessler v. State*, 119 Ga. 301, 46 S. E. 408, where the lewd woman was a tenant of the accused, the Supreme Court, speaking through Mr. Justice Cobb, in affirming the judgment of conviction, said: "One placing another in possession of a house for the purpose of being used for lewd purposes, or giving possession with knowledge that it is to be so used, directly aids him who is thus placed in possession in the unlawful enterprise by him therein carried on, and is liable to indictment as the keeper of a lewd house." Now, possession is just as effectively given under an executory contract of sale as it is under a contract of tenancy. In all such cases the question of legal title or of equitable title has no importance or bearing. It has been so held in the case of *Scott v. State*, 29 Ga. 263, where the crime charged was the maintaining of a gambling house. See, also, to the same effect, *Stevenson v. State*, 83 Ga. 575 (2), 10 S. E. 234, *Bryan v. State*, 120 Ga. 201 (4), 47 S. E. 574. The wrong which the accused does in such cases is not the parting with his title to some estate or interest in the property, of greater or less duration, but his transfer of the possession, knowing that, if he does transfer it, it will be used for immoral practices. As illustrative of how little cognizance the criminal law takes

of civil relationships in determining culpability, we may put this supposititious case: Suppose that a man rushed up to a hardware dealer and said, "Give me a pistol; I want to kill my neighbor," and the shopkeeper said, "No; I will not give you a pistol for that purpose," and the would-be murderer said, "Lend me a pistol," and the dealer replied, "No; I will not lend you one, but I will sell you one, and you may do what you please with it." Would the law make any difference in the culpability of the shopkeeper who parted with the possession of the pistol to a man who he knew was about to commit murder, because the possession was transferred under a contract of sale rather than under a contract of lending or of gift?

It is to be noticed, further, that the instruction complained of did not make mere knowledge that the property might be used for lewd purposes the test of culpability. The instruction was that the defendant would be guilty if he sold or let the property "for the purpose" that a lewd house might be maintained. We cannot pronounce this charge erroneous.

There are other assignments of error, but none of them are meritorious or of sufficient importance to justify a reversal.

Judgment affirmed.

(10 Ga. App. 108)

#### WATERMAN v. BARCLAY et al.

(No. 3,559.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

#### (Syllabus by the Court.)

**BILLS AND NOTES (§ 43\*)—"SEALED INSTRUMENT"—WHAT CONSTITUTES.**

A promissory note, in the body of which there is no recital indicating that it is to be a sealed instrument, does not, under the statute of this state, become a sealed instrument because there is placed after the maker's signature a scroll, or the letters "[L. S.]," or any device of similar import; nor because underneath the body of the note are written or printed the words, "Signed, sealed, and delivered in presence of," followed by the name of a subscribing witness.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 63; Dec. Dig. § 43.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6373.]

Error from City Court of Jeffersonville; L. D. Shannon, Judge.

Action by H. Waterman, Sr., against J. A. Barclay and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Oliver C. Hancock, for plaintiff in error.  
L. D. Moore, for defendants in error.

POWELL, J. The plaintiff sued on notes. The defendant filed a demurrer, on the ground that the petition showed on its face that the action was barred. More than six



years had elapsed since the notes became due, and it is conceded that, unless the notes are held to be instruments under seal, the demurrer is well taken. Under our statute (Civil Code 1910, § 4359), "no instrument shall be considered under seal unless so recited in the body of the instrument." It is well settled that merely to add the word "[Seal]," or the letters "[L. S.]" after the signature, does not make the instrument a sealed instrument. In this case there is no recital in the body of the note indicating any intention of creating a sealed instrument. The letters "[L. S.]" follow the signature, and on the corner opposite the signature, and below it, are the words, "Signed, sealed, and delivered in presence of," followed by the signature of an attesting officer.

The plaintiff contends that this recital in the attesting clause is a sufficient compliance with the statute, and relies on the case of *Humphries v. Nix*, 77 Ga. 98. In that case it was held that "where, at the end of a note, were the words, 'Signed and sealed,' followed by the signature of the maker and a scroll for a seal, with the letters '[L. S.]' written across it, this was equivalent to the words, 'Witness my hand and seal,' followed in the same way, and the paper was a sealed instrument." This case was considered and distinguished in *Echols v. Phillips*, 112 Ga. 700, 37 S. E. 977; it being there pointed out that in the *Humphries* Case an inspection of the record showed that the words "Signed and sealed" were in the body of the note, and that there was nothing to indicate that they were placed there for the attestation of a witness. In the case cited from 112 Ga. 700, 37 S. E. 977, it was held: "A promissory note, in the body of which there was no recital that it was under seal, was not a sealed instrument because there was, after the maker's signature, a scroll embracing the letters '[L. S.]'; nor because underneath the body of the note appeared the words, 'Signed, sealed, and delivered in presence of,' beneath which no name was signed, and which, from their position on the paper, were evidently designed to be signed by an attesting witness or witnesses, and not intended to constitute a portion of the contract embraced in the note."

The plaintiff in the present case tries to distinguish the case in the 112 Ga. 700, 37 S. E. 977, on the ground that in that case no witness had attested, while in this case there was an attesting witness. If any importance at all is to be attached to this circumstance, it only adds weight to the conclusion that the words, "Signed, sealed, and delivered," appearing in the note here sued on, were not intended to be a part of the body of the instrument, but were only intended to be a part of the attesting clause, and were in fact a part of it.

The court did not err in dismissing the suit on the ground that the action was barred by the statute of limitations. Judgment affirmed.

(10 Ga. App. 103)

MACON, D. & S. R. CO. v. HASTY.  
(No. 3,546.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 443\*)—INJURY TO ANIMALS—ACTIONS—EVIDENCE—SUFFICIENCY.

The evidence authorizes the verdict.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.\*]

2. DAMAGES (§ 210\*)—INJURIES TO ANIMALS BY RAILROAD—INSTRUCTIONS.

It was not error for the judge to charge the jury, in an action against a railroad company for killing stock, that it was within their discretion to enhance the damages by adding interest thereto at the rate of 7 per cent. per annum, but expressed merely in an aggregate sum in their verdict.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 537, 538; Dec. Dig. § 210.\*]

Error from Superior Court, Twiggs County; J. H. Martin, Judge.

Action by Charles Hasty against the Macon, Dublin & Savannah Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Minter Wimberly, L. D. Shannon, and Akerman & Akerman, for plaintiff in error. L. D. Moore, for defendant in error.

POWELL, J. The company killed one of the plaintiff's cows. The jury found for the plaintiff. The defendant made a motion for a new trial on the general grounds. The trial judge overruled it, and the defendant excepts.

[1] The engineer and the fireman were the sole witnesses for the defendant. The engineer testified that he did not see the cow at all; that the front of the extension boiler was in the way; that the track curved to the left, and that his first information as to the cow was when the fireman told him it was on the track; that he then applied the brakes and attempted to reduce the speed of the train; that it was downgrade, and that he could not stop in time to prevent hitting the cow. The fireman said that he was on the lookout on the left side of the engine, when he saw the cow about 125 yards away; that he immediately notified the engineer, and that the engineer tried to stop, but could not. The fireman was not able satisfactorily to explain why he did not see the cow sooner, except by stating that he saw it soon after they came out of the mouth of a cut. There was evidence that, notwithstanding the curve and the cut, the point where the cow was standing would have been in sight from an approaching train 200 yards, and that the cow ran down the track from that point 130

yards, making a total of 330 yards from the point where the cow could have first been seen to the point where she was finally struck. The engineer said that in his opinion he could have stopped his train, running at the speed he was and on the grade he was, in a distance of 300 or 400 yards; and if he could have brought it to a dead standstill at this distance, it would seem that he could have slackened speed sufficiently to have prevented striking the cow, which was running at some speed ahead of the train, in a somewhat shorter distance. Hence the jury had the right to infer negligence in one or two respects—either that the fireman was not maintaining a diligent lookout, or that he did not notify the engineer promptly after seeing the cow. At any rate, there is enough conflict to warrant the verdict.

[2] 2. There was no error in the charge of the court to the effect that the jury might enhance the damages, in their discretion, by adding interest at 7 per cent. from the time of the killing to the time of the trial, expressing the aggregate amount of damages in their verdict, the total amount in no event to exceed the amount sued for. We understand this to be the law. Of course, in such cases the interest becomes a part of the damages, and it may be technically inaccurate to speak of adding the interest to the damages; but a jury would not be misled by this, nor reach a wrong conclusion on this account.

There is another exception to the failure of the court to give in charge principles of law stated in a request to charge, but upon examination we find that he did in substance give the principles stated in the request. Judgment affirmed.

(108 Ga. App. 117)

FULLER v. STATE. (No. 3,708.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 67\*)—VIOLATION OF LABOR CONTRACT ACT—PROSECUTION—BURDEN OF PROOF.

This case is controlled by Mulkey v. State, 1 Ga. App. 521, 57 S. E. 1022.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. 67.\*]

Error from City Court of Americus; J. A. Hixon, Judge.

Ambrose Fuller was convicted of violating the labor contract act, and brings error. Reversed.

Holms Fort, for plaintiff in error. Zach Childers, Sol., for the State.

RUSSELL, J. The defendant was convicted of violating the labor contract act of 1903, (Penal Code 1910, §§ 715, 716). The court charged the jury in effect that if it was satisfactorily proved that the accused made the

contract, procured money, or other thing of value thereon, and failed to perform the service contracted for, or make restitution without good and sufficient cause, the burden of proof would then be shifted to the defendant to prove his innocence. This charge is contrary to the decision in Mulkey v. State, 1 Ga. App. 521, 57 S. E. 1022. This statute (section 716) does say that the acts therein enumerated shall be deemed presumptive evidence of the intent referred to. Evidence may be presumptive evidence, without being sufficient to establish a fact beyond a reasonable doubt. We held in the Mulkey Case that this statute does not give to the enumerated acts any greater probative value than they previously had; that it merely authorized these facts to be admitted in evidence, to be weighed by the jury as circumstances from which they might or might not infer the guilt of the accused; that the presumption of innocence was still in the defendant's favor, and that the burden was still on the state to prove its case beyond a reasonable doubt; and that one of the elements still to be proved with this degree of certainty is the intent to defraud.

Counsel for the accused does not properly raise any question as to the constitutionality of this portion of the act, and therefore we are not called upon to pass thereon, otherwise than to recognize the same rule we have always recognized, to wit, that it is the duty of the court to give this statute that construction which will not render it repugnant to either the state or the federal Constitution. We held in the Mulkey Case (uniformly adhered to since) that the trial is not legally conducted if the judge gives the foregoing provision in charge, unless he also informs the jury as to the attendant limitations referred to above.

Judgment reversed.

KIDD v. STATE. (No. 3,611.)†

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

1. HOMICIDE (§ 340\*)—WRIT OF ERROR—HARMLESS ERROR—INSTRUCTIONS.

The defendant was indicted for assault with intent to murder, and was convicted of unlawfully shooting at another. The defendant cannot complain that the judge erred in charging the jury as to the law of voluntary manslaughter. It conclusively appears that he could not have been injured by such charge.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

2. CRIMINAL LAW (§ 918\*)—NEW TRIAL—PRESENTATION OF QUESTIONS IN TRIAL COURT—NECESSITY.

Where, prior to an announcement of ready by both sides, the judge makes a complimentary remark as to credibility of one of the state's witnesses, subsequently sworn as a witness in the case, the remark being made in the hearing of the jury, and thereafter the defendant,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† For complete opinion, see 75 S. E. 266.

without objection, goes to trial before the jury and is convicted, it is too late to complain for the first time by motion for a new trial that the judge erred in making the remark referred to. *White v. State*, 7 Ga. App. 20, 65 S. E. 1073; *Smith v. State*, 7 Ga. App. 252, 66 S. E. 629.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2136; Dec. Dig. § 918.\*]

### 3. SUFFICIENCY OF EVIDENCE—NO ERROR.

The evidence amply authorizes the verdict, and no error of law appears.

Error from Superior Court, Madison County; D. W. Meadow, Judge.

C. C. Kidd was convicted of unlawfully shooting at another, and brings error. Affirmed.

J. F. L. Bond and J. H. Skelton, for plaintiff in error. Thos. J. Brown, Sol. Gen., and Jno. E. Gordon, for the State.

**RUSSELL, J.** Judgment affirmed.

(10 Ga. App. 142)

### WILLIAMS v. STATE. (No. 3,774.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(*Syllabus by the Court.*)

### LARCENY (§ 3\*)—ELEMENTS OF OFFENSE—INTENT.

There was no evidence whatever of the animus furandi, and the verdict was contrary to law.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 3-10; Dec. Dig. § 3.\*]

Error from Superior Court, Baker County; Frank Park, Judge.

Jim Williams, alias Banton, was convicted of crime, and brings error. Reversed.

A. S. Johnson, for plaintiff in error. W. E. Wooten, Sol. Gen., and F. A. Hooper, for the State.

**HILL, C. J.** Judgment reversed.

(10 Ga. App. 85)

### E. H. FROST & CO. v. POWELL. (No. 3,160.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(*Syllabus by the Court.*)

### 1. FACTORS (§ 45\*)—ADVANCES—SET-OFF.

Where cotton factors sued a customer for advances made on cotton consigned for sale, the customer could set off damages caused by wrongful delay in selling the cotton according to instructions.

[Ed. Note.—For other cases, see Factors, Dec. Dig. § 45.\*]

### 2. APPEAL AND ERROR (§ 1002\*)—REVIEW—QUESTIONS OF FACT.

On the question of diligence by the factors in selling the cotton according to instructions, the evidence was in conflict, and this issue was therefore settled by the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

### 3. FACTORS (§ 23\*)—DUTIES TO PRINCIPAL—LIABILITY FOR LOSS.

The trial judge properly instructed the jury to the effect that a factor was bound to obey the instructions of his principal as to the sale of produce, and if he disregarded his orders, and injury accrues to the principal, the loss would fall upon the factor. It was also proper, in this connection, to charge that a factor, who had made advances on produce consigned to him for sale, would have an interest in the consignment, and would have the right to exercise his discretion as to the time of sale, and would be entitled to disregard the instructions of his principal to sell, where he had reasonable ground to apprehend loss resulting to him by obeying the instructions, either because of the insolvency of the principal, or insufficiency in the value of the consignment eventually to repay the advances made on it. *Day v. Crawford*, 13 Ga. 508; *Brown v. McGraw*, 14 Pet. 494, 10 L. Ed. 558.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 23, 24; Dec. Dig. § 23.\*]

### 4. EVIDENCE (§ 186\*)—DOCUMENTARY EVIDENCE—AUTHENTICATION—COPIES.

What purport to be true copies of original letters should be identified as such, to authorize them to be admitted as secondary evidence, although notice to produce the originals has been duly served and answered by the party on whom the notice was served that he is unable to produce them. But in the present case, irrespective of this question, the contents of the letters were immaterial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 661-673; Dec. Dig. § 186.\*]

### 5. EVIDENCE (§ 113\*)—RELEVANCY—VALUE.

There was no error in allowing the testimony as to the market value of cotton at the point of shipment, and the market value of cotton of the same grade at Savannah, although the cotton had been shipped to Charleston, S. C., where it was to be sold. The evidence tended to show the market value of the cotton at the latter place.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.\*]

### 6. SUFFICIENCY OF EVIDENCE—NO ERROR.

No material error of law appears, and there is some evidence to support the verdict.

Error from City Court of Leesburg; H. L. Long, Judge.

Action by E. H. Frost & Co. against S. J. Powell, administrator. Judgment for defendant, and plaintiffs bring error. Affirmed.

Chas. H. Beazley, for plaintiffs in error. W. G. Martin and J. R. Long, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(10 Ga. App. 102)

### LINDER v. COLE BROS. LIGHTNING ROD CO. (No. 3,535.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(*Syllabus by the Court.*)

### 1. SALES (§ 340\*)—BREACH OF CONTRACT BY PURCHASER—REMEDIES OF SELLER.

Though an executory contract of purchase and sale may not be subject to countermand, under its terms, except by mutual consent,

still, so long as it is executory on both sides, notice by the purchaser to the seller that he will not take the goods amounts to a breach of the contract, and thereafter the seller cannot, by attempting to deliver the goods, treat the contract as executed on his part, and sue the buyer for the full purchase price. His remedy is an action for the damages resulting from the breach of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 840.\*]

## 2. STRIKING PLEA.

The plea, not being subject to general demurrer, was improperly stricken, and for this reason the judgment against the defendant must be reversed.

Error from City Court of Dublin; K. J. Hawkins, Judge.

Action by the Cole Bros. Lightning Rod Company against Frank Linder and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. S. Adams, for plaintiffs in error. J. A. Thomas and W. C. Davis, for defendant in error.

POWELL, J. The lightning rod company sued Linder for the purchase price of about 200 feet of lightning rod, which had been ordered under a written contract stating that it was not subject to countermand, except by mutual consent. The petition alleged delivery. The plea set up that, though the defendant had signed the contract, he had never accepted any of the lightning rods from the plaintiff, and had renounced the contract, for that, within a few hours after the contract was made, and before the plaintiff had been put to any expense or trouble whatever, or had undertaken to fill the order, he had canceled it, and had told the plaintiff that he would not take the rods, and had directed the plaintiff not to ship them. He denied that delivery had been made. On this state of facts, the case is controlled by *Black v. Kaplan*, 9 Ga. App. —, 72 S. E. 303, *Rounsaville v. Leonard Co.*, 127 Ga. 735, 56 S. E. 1030 (6), and *Oklahoma Co. v. Carter*, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112.

Judgment reversed.

(10 Ga. App. 142)

THOMAS v. STATE (No. 3,769.)  
(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

## SUFFICIENCY OF EVIDENCE.

The evidence, though slight as to one of the material elements of the case, is not legally insufficient to support the verdict.

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Henry Thomas was convicted of crime, and brings error. Affirmed.

Dan R. Bruce, for plaintiff in error. M. B. Cannon, Sol., for the State.

POWELL, J. Judgment affirmed.

(10 Ga. App. 100)

FEW v. GUNTER. (No. 3,254.)  
(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

## 1. SUNDAY (§ 7\*)—EXECUTION OF NOTE—"WORK OF CHARITY."

Where a prisoner is in the common jail of the county under a warrant charging a bailable offense, and in order to be released from imprisonment he employed a lawyer to secure for him a bond and to represent him in the case, and the attorney does secure the bond and the prisoner is thereupon released, *held*, that a note given by the prisoner to the lawyer for his services, including the service rendered in procuring the bond, is valid and collectible, although executed on Sunday. The case is within the exception of section 416 of the Penal Code of 1910, being in the nature of a "work of charity."

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 14-20; Dec. Dig. § 7.\*]

## 2. SERVICES OF ATTORNEY.

The evidence applicable to the foregoing principle of law demanded a verdict for the plaintiff, and the court erred in not granting a new trial. *Salter v. Smith*, 55 Ga. 245; *Weldon v. Colquitt*, 62 Ga. 449, 35 Am. Rep. 128; *Adams v. Candler*, 114 Ga. 152, 39 S. E. 893.

Error from City Court of Monroe; A. G. Stone, Judge.

Action by M. C. Few against A. R. Gunter. Judgment for defendant, and plaintiff brings error. Reversed.

M. C. Few and Walker & Roberts, for plaintiff in error. Jos. H. Felker, for defendant in error.

HILL, C. J. Judgment reversed.

(10 Ga. App. 118)

HEARD v. STATE (No. 3,742.)  
(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

## SUFFICIENCY OF EVIDENCE.

The evidence, though slight as to one of the material elements of the case, is not legally insufficient to support the verdict.

Error from City Court of Dawson; M. C. Edwards, Judge.

Fid Heard was convicted of crime, and brings error. Affirmed.

M. J. Yeomans, for plaintiff in error. W. H. Gurr, Sol., for the State.

POWELL, J. Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

(112 Va. 660)

**ARMENTROUT et al. v. ARMENTROUT'S EX'RS et al.**

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

**1. WILLS (§ 733\*)—TIME OF ACCRUAL—LEGACY CHARGED ON INTEREST.**

Where testator left both real and personal property to his wife for life, with remainder to named children, and provided that they should pay certain sums to three other children, it being apparent that the life estate of the wife was not subject to payment of these sums, and that they were charged upon the estates in remainder, the legatees could not enforce payment until the remaindermen had come into possession; the value of the estate being subject to fluctuation, and the devisees being entitled to their election whether they would accept the gift burdened with the charge when the value of the estate is determinable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1843; Dec. Dig. § 733.\*]

**2. WILLS (§ 734\*)—RIGHTS OF LEGATEES—INTEREST ON LEGACY.**

A testator bequeathed both real and personal property to his wife for life, remainder over to named children; the remainder being charged with the payment of specific legacies to other children. *Held* that, while ordinary legacies are payable at the end of one year from the death of the testator, with interest from that date, the legacies charged on the remainder would not carry interest until the termination of the life estate, as it cannot be presumed that the testator intended those having the estate in remainder should pay interest upon the specific legacies before their remainder vested.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1847-1872; Dec. Dig. § 734.\*]

**3. PLEADING (§ 218\*)—DEMURRERS—RULING.**

Where a demurrer to a bill in equity was sustained upon a ground which went to the very foundation of complainant's case, the failure of the circuit court to pass upon other grounds of demurrer was not error.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 549-566; Dec. Dig. § 218.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 26\*)—BOND—NECESSITY—PLEADING.**

Where those entitled to monetary legacies, made a charge upon an estate in remainder, filed a bill in equity seeking to compel the remaindermen to pay such legacies before the death of the life tenant, and the remaindermen were executors of the estate, a mere allegation that the executors had not been required to give bond and that complainants feared their rights might be impaired would not justify the court in exerting its powers to preserve the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 26.\*]

Appeal from Circuit Court, Rockingham County.

Action by Henry A. Armentrout and others against Johnston P. Armentrout and another, as executors of the will of Augustine Armentrout, and others. From a decree for defendants, complainants appeal. Affirmed.

See, also, 111 Va. 348, 69 S. E. 333.

John E. Roller, for appellants. Charles D. Harrison, for appellees.

HARRISON, J. In June, 1906, Augustine Armentrout departed this life, having first made his last will and testament, dated February 14, 1901, which was duly recorded in Rockingham county in June, 1906. The testator, after the payment of his debts, gives his farm upon which he resides, his household furniture, and his other personal property to his wife, and at her death he gives the same to his sons Johnston P., James C., Robert A., and Martin L. Armentrout, and his daughter, Hattie G. Clatterbuck. The testator then provides as follows: "It is my wish that my sons Johnston P., James C., Robert A. and Martin L. and my daughter Hattie shall pay to Henry A. Armentrout \$400, Jennie Baker \$400, and E. L. Armentrout \$400, less what he is due me at my death."

The bill in this case was filed by the three beneficiaries of these charges of \$400 each, exhibiting therewith the will, and praying for a decree enforcing the payment of such charges, with interest from June 13, 1906, against the defendants, who were the owners of the estate in remainder after the expiration of the life estate of their mother. The only other allegation of the bill is that the executors (two of the sons who took the estate in remainder) were not required to give bond and complainants feared that their rights might therefore be impaired.

The defendants demurred to the bill, upon the ground, among others, that the sums which by the will were directed to be paid severally to the complainants by the demurrants were not due from them until the death of Margaret Armentrout, to whom the entire estate was given during her natural life; that the bill does not allege the death of the life tenant, and therefore falls to show a present right in the complainants to have payment of the several sums demanded by them. This ground of demurrer was sustained by the circuit court, and the bill dismissed. From that decree this appeal has been taken.

[1] It is clear that the three several sums of \$400 each constitute charges upon the interests of those to whom the estate in remainder is to pass; but there is nothing in the will to justify the contention of the appellants that the testator intended that the whole estate should be charged with their payment, and that the widow and her children should only have the residue after satisfying these charges. The provision for the appellants is that the sums named shall be paid to them, and the charge is, not upon the shares of the widow and the appellees, but upon the shares of the appellees alone. It is very plain that the testator never intended that the life estate given to his wife should be diminished for the purpose of satisfying the sums claimed by the appellants.

The will gives the appellees the estate in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexer

remainder, after the expiration of the life estate of their mother, and nothing more; and it requires the appellees to pay the appellants \$400 each, thus making these sums a charge upon the estate in remainder of the appellees, and upon no other estate.

Under the will the appellees do not come into possession of any part of the estate devised and bequeathed to them until the expiration of the precedent life estate, and then their interest is subject to the payment by them of \$400 to each of the three appellants. Clearly the appellees have the right to elect whether they will or will not accept the provision for them, coupled with the requirement that they discharge the payments imposed upon them by the will. There is no allegation in the bill that the remaindermen have elected to accept the devise and bequest in their favor, and until the expiration of the life estate they cannot be required to make such election, because until that time arrives they cannot determine the value of the devises and bequests to them. The personal property, consisting evidently, from the will, in large part of household furniture and farming equipments, is liable to be consumed in its legitimate use by the life tenant, while the real estate is subject to fluctuation in value.

In *Showalter v. Showalter*, 107 Va. 713, 60 S. E. 48, this court quotes with approval 2 Minor's Inst. (4th Ed.) 1006, where it is said: "It is well established that no one shall be constrained to make an election until the interests to which the election relates are clearly defined and their relative values ascertained; and an election made before that is done will, for the most part, be disregarded, at least if it be made under mistaken impressions as to the facts." This language is again quoted with approval in *Waggoner v. Waggoner*, 111 Va. 325, 68 S. E. 990, 30 L. R. A. (N. S.) 644.

[2] It is not denied that the general rule with respect to legacies is, as contended by appellants, that they are payable at the end of one year from the death of the testator, with interest from that date, unless some other time is fixed by the will when interest is to begin. This general rule, however, is applied in cases where the legacies are made payable by the executor out of the estate of the decedent in his hands to be administered. Our attention has been called to no case where this rule has been applied to a case like that under consideration, where the charge is upon an interest to arise after the expiration of a life estate and to be paid by another legatee or devisee.

One of the cases relied on by the appellants is *Shobe v. Carr*, 3 Munf. 10. This is an authority to the contrary. In that case the court, under its construction of the will there involved, was of opinion that the widow was entitled to a life estate in one-third of the personalty of the decedent, with remainder in equal shares to the children, and

that the real estate was devised, with right of immediate possession, to certain of the children, charged with payments for the benefit of others. Upon this state of facts Judge Roane, speaking for the court, says: The "court is of opinion that, under the will of Martin Shobe, the appellees were entitled to one-fifth part of two-thirds of the estate of the said Martin Shobe (exclusive of lands), with interest thereon from the end of one year from the death of the testator, and also to one-fifth part of the remaining one-third of the same (which was bequeathed to the wife of the said Martin Shobe) from and after the time of her death, with interest thereupon in like manner from the end of the year in which she shall have died."

This case shows that a legacy postponed in time of enjoyment as to the corpus does not bear interest, except from the time the right of enjoyment begins, which, so far as the question of interest is concerned, is in accordance with the contention of the appellees in the case at bar.

The appellants contend that it must be presumed that the testator intended to give all of his children an equal interest in his estate, and that this intention would be defeated unless the appellees were required to pay now the charges upon their estate in remainder, with interest thereon from the testator's death. Without pausing to question the presumption relied on, but admitting its existence only for the sake of the argument, it by no means follows that the intention thus attributed to the testator would be carried out by adopting the method proposed by the appellants. If the interests are equal, all ought to await the death of the life tenant. It would be a very unequal distribution of the estate to give three of the children their equal interests now, and require the other four to wait for theirs indefinitely, until the preceding life estate was ended.

We are of opinion that the reasonable interpretation of the testator's will is that the three several sums of \$400 each given to the appellants constitute charges alone upon the interests of those to whom the estate in remainder is to pass; that these charges do not become payable until the expiration of the life estate and, therefore, do not bear interest except from that date, for the reason that otherwise the interests of the remaindermen might be sacrificed. It is reasonable to suppose that the testator intended that those upon whom he imposed the burden of the charges should have possession of the property charged as a means of discharging them.

[3] One of the grounds of demurrer filed by the defendants was that the executors of Augustine Armentrout were not proper parties to the bill, and counsel for appellants indulge in a lengthy discussion to show that they were proper parties, and insist that it was the duty of the circuit court to pass upon every ground of demurrer relied on.

As the ground of demurrer upon which the circuit court rested its decree went to the foundation of the complainants' case, there was no occasion for it to pass upon the other grounds relied on by the defendants.

[4] The only allegation of the bill, other than the assertion of the present right in complainants to enforce payment of the charges in their favor, is the bare statement that the executors were not required to give bond to account for the estate, and complainants feared their rights might be impaired. There is no allegation of any act or omission on the part of the executors which could justify the court in holding that it was necessary to exert its powers in order to preserve the estate. A glance at the bill is sufficient to show that its sole purpose was to assert the right of complainants to the present enforcement of their claims. Upon the third ground of demurrer, the circuit court properly decided that question adversely to the appellants, and its decree must be affirmed.

**Affirmed.**

(112 Va. 721)

### LONG v. FLORY & GARBER.

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

#### 1. BROKERS (§ 49\*)—COMPENSATION—SUFFICIENCY OF SERVICES.

An agent for the sale of real estate at a fixed price can recover no commission where he has neither made an actual sale at the specified price nor procured a customer, ready and able to purchase at the sum named, unless it appear that the principal has wrongfully prevented a sale or has waived strict performance.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

#### 2. BROKERS (§ 49\*)—COMPENSATION—WRONGFUL INTERFERENCE OF PRINCIPAL.

Where an owner employs a broker for the sale of property at a stipulated price, but gives no exclusive right of sale, a later sale by the principal to a person in no way procured by the broker, without knowledge or belief that the purchaser was acting for a person whom the broker had interested in the purchase, is not such a wrongful interference with the broker as will entitle him to recover the agreed commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

**Error to Circuit Court, Rockingham County.**

Action by Flory & Garber against William C. Long. From a judgment for plaintiffs, defendant brings error. Reversed.

Sipe & Harris, for plaintiff in error. Ira S. Flory and Ed. C. Martz, for defendant in error.

**WHITTLE, J.** This writ of error brings under review a judgment for \$500, recovered by the defendants in error against the plaintiff in error as commissions for the

sale of his farm. The case was submitted to the court without the intervention of a jury.

The material facts from the point of view of a demurrer to the evidence may be summarized as follows: In February, 1909, William C. Long, who was the defendant below, listed his farm with the plaintiffs, Flory & Garber, real estate brokers, for sale at the gross price of \$16,800, of which sum, in the event of sale, Long was to receive \$16,000, and the brokers a commission of \$800. Thereupon the plaintiffs interested one Samuel Cline in the purchase of the farm, and at his request for a reduction in price it was fixed at \$16,000—\$15,500 to Long and \$500 to the brokers. These latter terms were never modified, and the right of the plaintiffs to demand commissions was predicated upon the consummation by them of a sale at the price named. In point of fact, they never effected a sale at any price, and Cline explicitly testified that at no time would he have agreed to pay \$16,000 for the farm.

It is not pretended that the plaintiffs possessed the exclusive right to sell, and in September, 1909, Long sold the farm to Rodeffer for \$15,500. Rodeffer afterwards sold to Cline in circumstances which tended to show that he had purchased the farm for him in the first instance, though Cline denied the existence of any previous understanding or contractual relations between them on the subject. However that may have been, Long had no reason to suspect that Cline was interested in the purchase, if, indeed, such was the fact, until after the contract of sale had been reduced to writing and signed by the parties.

[1, 2] There is really no conflict of evidence on the controlling features of the agreement between the plaintiffs and the defendant. The former were not to have a commission for a sale at *any price*, but the price was fixed at \$16,000; and unless and until a sale was effected at that sum (or, at least, until a purchaser had been procured who was ready and able to pay the price named), no claim to commissions could arise. Long would, therefore, have been within his rights if he had sold his farm directly to Cline for \$15,500, unless, of course, in so doing he had thwarted a sale to him by the plaintiffs for \$16,000. And there is absolutely no evidence of such interference.

The governing principle in this class of cases is clearly and succinctly stated in the syllabus by the court to *Parker v. National Mut. Bldg. & L. Ass'n*, 55 W. Va. 134, 48 S. E. 811, as follows: "Under a special contract between an owner of real estate and an agent for the sale thereof, on commission, at a price agreed upon, the agent cannot recover his commission without prov-

ing that he has actually made a sale at the price stipulated, unless it appear that his principal has wrongfully prevented the making of a sale at such price, which would have been made, but for his interference, or has waived the strict performance of the contract."

In that case the court, after stating that the plaintiff's contract for commissions was upon condition that he should sell the property, or procure a purchaser, at a price in excess of \$3,000, observes: "It may have been a hard contract, and the plaintiff may have entered into it under a misapprehension of the law; but that cannot relieve him from the terms of his contract. In order to recover, he is bound to show compliance with it. This he has utterly failed to do, so far as the evidence shows; for he does not pretend to show that he procured a purchaser for the property, or made a sale of it, at a price which under his contract would have entitled him to commission."

This principle is sustained by the general course of decision on the subject. *McFarland v. Lillard*, 2 Ind. App. 160, 28 N. E. 229, 50 Am. St. Rep. 234; *Gellat v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683; *Kost v. Reilly*, 62 Conn. 57, 24 Atl. 519; *Peet v. Sherwood*, 47 Minn. 347, 50 N. W. 241, 929; *Fraser v. Wyckoff*, 63 N. Y. 445; *Charlton v. Wood*, 11 Heisk. (Tenn.) 19.

The learned judge of the circuit court rests the plaintiffs' right to recover upon the theory of prevention of performance by the defendant, but the evidence does not support that conclusion.

It follows, from what has been said, that the judgment must be reversed, and judgment will be entered for the defendant.

Reversed.

(112 Va. 826)

TRIMBLE v. COVINGTON GROCERY CO.  
(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

1. FRAUDULENT CONVEYANCES (§ 241\*)—REMEDIES OF PARTIES.

A creditor sued his debtor and served an attachment on R. to whom the debtor had conveyed a stock of goods, taking notes in part payment, and thereafter filed a bill in chancery alleging a sale of the stock by R. to T. without the giving of the notice to creditors as required by Code 1904, § 2460, and the attachment was brought into the chancery suit before any judgment was entered at law, and a decree was entered for the debt. *Held* irregular, as the proper mode would have been to have taken judgment in the action of assumpsit and reported the perfected lien in the chancery suit.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 241.\*]

2. FRAUDULENT CONVEYANCES (§ 54\*)—SALE OF STOCK IN BULK.

Code 1904, § 2460, provides that a creditor, before obtaining a judgment or decree for his claim, may, whether it be due or not, institute any suit which he might institute after

obtaining judgment to avoid a gift, assignment, transfer, etc., void as in fraud of creditors; and section 2460a makes a sale of a stock of goods in bulk *prima facie* fraudulent as to creditors unless notice is given to creditors of the contemplated sale. *Held*, that where plaintiff sued his debtor and served an attachment on R. to whom the debtor had sold a stock of goods, taking notes in payment, and thereafter, but before judgment for plaintiff was rendered in the action, R. conveyed the stock to T. without giving the statutory notice, R. was not a debtor of plaintiff within the statute.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 54.\*]

Appeal from Circuit Court, Alleghany County.

Suit by the Covington Grocery Company against R. M. Trimble and others. From a decree in favor of complainant, defendant Trimble appeals. Reversed.

Geo. A. Revercomb and R. C. Stokes, for appellant. C. B. Cushing, for appellee.

KEITH, P. Whitaker was engaged in the mercantile business in Covington, Va., and became indebted to various persons, including the Covington Grocery Company. While so indebted he sold his stock of goods and fixtures in bulk to R. L. Rose. Rose took possession of the goods and conducted a mercantile business in the same building, purchasing from time to time other goods and adding to the stock purchased by him from Whitaker. Rose upon purchasing the goods paid to Whitaker \$300 in cash and executed two promissory notes, one for \$300 payable November 17, 1907, and the second for \$359.62 payable on December 1, 1907. Whitaker deposited the cash in the Covington National Bank to his own credit and placed the notes with the bank for collection. Rose conducted the business for a short time, and then sold the entire stock of goods and fixtures purchased from Whitaker, together with such as he had purchased from time to time, in bulk to R. M. Trimble; this sale taking place on November 20, 1907. Trimble took possession under his purchase, and conducted the business in the same store building, adding small purchases from time to time. He became indebted to various creditors whom he was unable to pay, and on the 26th day of December, 1907, executed a deed of assignment conveying his stock of goods, fixtures, and open accounts to Stokes and Revercomb, trustees, to be converted into money and the proceeds divided among all his creditors.

The Covington Grocery Company, learning of the sale of Whitaker to Rose, instituted an action of assumpsit against Whitaker in the circuit court of Alleghany county, setting up an account of \$964.62, and, Whitaker being a nonresident, an attachment issued out of the circuit court designating the Covington National Bank as being indebted to



or having in its possession effects of the said defendant, Whitaker, and R. L. Rose as being also indebted to Whitaker. This attachment was sued out on the 9th of November, 1907, and a copy thereof was served on the Covington National Bank; and as appears from the record, as we shall hereafter endeavor to show, this attachment was also served upon Rose on the 11th day of November, 1907. On the 20th day of November, 1907, Rose sold the stock of merchandise in bulk to Trimble, as above stated.

At the December term, 1907, of the circuit court of Alleghany county, which convened on December 15th, in the attachment suit of the Covington Grocery Company against Whitaker, and the Covington National Bank and Rose, as garnishees, an order was entered which recites that the Covington National Bank has in its hands of the effects of H. E. Whitaker the sum of \$300 in cash, and that it also holds for collection two negotiable notes due to Whitaker from Rose, and it further appearing from the statement of Rose on oath that he is indebted to Whitaker in the sum of \$659.62 with interest on \$300 part thereof from November 17, 1907, and on \$359.62 the remainder thereof from December 1, 1907, until paid, as evidenced by the negotiable notes mentioned, and that the entire fund in the hands of the bank, including the two negotiable notes, is the purchase price of a stock of goods purchased by him of H. E. Whitaker, it is ordered that the Covington National Bank pay to the clerk of the court the sum of \$300 and turn over to the said clerk of the court the two notes of R. L. Rose above described, and upon so doing said Covington National Bank shall be discharged from any further liability in these cases, and the said R. L. Rose is ordered to pay the clerk of this court the sum of \$659.62 with interest on \$300 part thereof from November 17, 1907, till paid, and on \$359.62 the remainder thereof from December 1, 1907, till paid, and, upon the payment of said amount with interest as aforesaid, the said clerk shall turn over to said R. L. Rose the two above-described notes duly canceled, and the said R. L. Rose shall be discharged from any further liability in these cases.

On December 14, 1907, the Covington Grocery Company filed its bill in chancery in the circuit court of Alleghany county, in which it sets forth that, in the sale from Rose to Trimble referred to in the foregoing statement of facts, he failed to take from Rose the proper affidavit and statements required by section 2460a of the Code of 1904; that neither party to the sale gave the required notice of said sale to any creditor of Rose; and that complainants received no such notice as the law contemplates, nor any notice whatever of the fact that such sale was contemplated until it had been fully completed. The complainants charge that owing to the

failure of the parties to take the proper inventories and the proper affidavits, to give the proper notices required by law, the sale by law is deemed to be a fraudulent one, and that it is void as to complainants, and that whatever goods were passed from Rose to Trimble are still liable for complainants' claims against Rose; and that they are also informed and believe that any goods belonging to Rose, who has conveyed away most, if not all, of his goods in fraud of his creditors, are liable to be attached for any debts owed by him; and that, since said Trimble is deemed by the law to be a party to said fraud, any goods purchased from Rose by Trimble in said fraudulent transaction are liable to be so attached. Rose and Trimble were made parties defendant, answer under oath was waived, and the bill concludes with a prayer for the sale of the goods, the payment of complainants' debt, and for general relief.

The defendants answered the bill, evidence was taken, and the matter was referred to a commissioner, who reported in favor of the complainants. The report was confirmed, and the court entered a decree directing the fund under its control and the proceeds of the sale of the stock of goods purchased by Trimble from Rose to be turned over to the Covington Grocery Company, and from that decree Trimble has appealed.

[1] It appears that the attachment at law of the Grocery Company against Whitaker was brought into the chancery suit before any judgment was rendered, when it stood merely upon an inchoate lien created by the levy of the attachment, and the circuit court proceeded to enter a decree for the debt. As what was done in this respect is not material to our conclusion, we mention it only to point out the irregularity of the procedure, lest it should pass into precedent. The proper mode would have been to have taken judgment in the action of assumpsit and reported the perfected lien in the chancery suit.

[2] The crucial question in this case is: At what moment did R. L. Rose become a creditor of the Grocery Company? There were no contractual relations between the Grocery Company and Rose. The Grocery Company was a creditor of Whitaker; Whitaker sold to Rose; the Grocery Company sued Whitaker, and, he being a nonresident, Rose was named as a debtor of Whitaker, and the attachment was served upon him. We say that it was served upon him, though counsel for appellant stoutly deny it. The service is charged in the bill.

The cause was referred, as we have said, to a commissioner, and that commissioner reports that the attachment was served upon Rose on November 11, 1907. To that finding of fact no exception was taken, and upon that statement of fact unexcepted to the court rendered its decree. At the same term an order was entered directing the money and property attached to be brought into

court, but it was not until the decree of February 1, 1910, that there was complete adjudication of the rights and liabilities of the parties to this controversy.

The sale was made by Rose to Trimble on the 20th day of November, 1907. It is not averred that that sale was fraudulent otherwise than by failure to comply with the terms of section 2460a of the Code. The whole case was proceeded with upon the theory that it turned upon that statute—upon the compliance or noncompliance with its terms.

That section creates no new right of action. It is by virtue of section 2460 that a creditor, before obtaining judgment or decree for his claim, may institute a suit to avoid a gift, conveyance, assignment, or transfer of or charge upon the estate of his debtor. The effect of section 2460a is to provide that, the cause of action existing, certain consequences should be attributed to the doing or the omission to do. In the case of a sale in bulk of an entire stock of merchandise, which is enjoined or forbidden by its terms, the suit must be brought by the creditor of the seller—a creditor existing at the date of the sale which is the subject of investigation.

In 1 Shinn on Attachments, § 313, it is said of a foreign attachment that it creates "only an inchoate or qualified lien, which may become perfected by being merged into the judgment thereafter obtained in the suit, and it may be defeated by a dissolution of the attachment. The attaching creditor acquires no property, neither general nor special, in either realty or personalty by his attachment. The title remains in the debtor, not only until the attachment lien is merged into a judgment condemning the property, but until a sale is made thereof. The only right the plaintiff acquires under his attachment levy is to use such measures as may be necessary to preserve his security until he can reduce his demand to a judgment. He cannot interfere with the claims of third persons. He has no right of possession and will have no right of action against one who takes the attached chattels from the possession of the attaching officer. While the attachment proceedings are pending, the officer controls the property and the plaintiff controls only the lien."

In Waples on Attachments (Ed. 1885) p. 580 et seq., it is said: "By the law of relation, an attachment judgment retroacts to the time the property was first attached; to the time it was first subjected to garnishment; so that no incumbrances put upon it by its owner since that time can have higher rank than the attaching creditor's lien. Such retroaction makes the lien perfect from its first inception as though created by the contract of the parties; as though it were a mortgage lien voluntarily put upon the property by the defendant himself. On the contrary, in case of final judgment for the de-

fendant, there never has been any lien whatever; his subsequently created incumbrances, mortgages, or voluntarily bestowed liens of any sort are perfectly good, and the plaintiff's claim has never been more than an ordinary one. \* \* \* From the moment of service the lien is perfect—provided judgment recognizing the lien shall follow. From that moment the lien is nothing—provided no such judgment shall follow. The garnishee cannot know the future contingency. He is bound to hold the money, or goods, or indebtedness, subject to the order of court. \* \* \* The plaintiff cannot enforce the lien till matured by judgment."

The inchoate lien upon the property attached, when final judgment is rendered upon it, relates back to the date of levy of the attachment; but it cannot by relation render a transaction unlawful which was not unlawful at the time it took place. The levy having been made on November 11th, and the sale having been made on November 20th, the subsequent course of procedure in the attachment suit which culminated in the final decree in 1910 cannot render fraudulent the sale from Rose to Trimble, if that sale were free from fraud at the time it was made. On the 20th of November, 1907, Rose was not the debtor of the Covington Grocery Company, unless that relation was established by operation of law as a result of the service of the process of attachment upon Rose on November 11th. By that levy the Grocery Company acquired a lien, but nothing more.

In Manhattan Fire Ins. Co. v. Weill, 28 Grat. 389, 26 Am. Rep. 364, a condition of a policy of insurance on a building was: "If the building insured stands upon leased ground, it must be so represented to the company, and so expressed in the written part of the policy; otherwise the policy shall be void." The assured had given a deed of trust upon the building to secure a debt, and it was held that this condition did not refer to the legal title, but to the interest of the assured in the property, and that the fact that he had given a deed of trust to secure a debt upon the property does not make the cestui que trust a joint owner.

The lien of the attaching creditor is likened to "a mortgage lien voluntarily put upon the property by the defendant himself." Waples on Attachments, p. 581.

It will not be contended that the beneficiary in a deed of trust which conveys choses in action to a trustee is such a creditor as before the execution of the trust would be entitled to sue under section 2460 to set aside a fraudulent conveyance made by the obligor in the choses of action covered by the deed, and yet the beneficiary under the deed has an interest identical in character with that of the attaching creditor. Section 2460a, assuming that it is constitutional, may be regarded as remedial, and should be so construed as to advance the remedy, but the

relation of debtor and creditor cannot be held to flow from the inchoate lien of an attachment such as appears in this case in order to accomplish that result.

We are of opinion that under the facts disclosed in this record Rose was not, on the 20th of November, 1907, a debtor to the Covington Grocery Company within the meaning and intentment of sections 2460 and 2460a; that there was no obligation upon the part of Rose or of Trimble to comply with section 2460a; and that for the reasons stated the decree of the circuit court was erroneous and must be reversed; and this cause will be remanded to the circuit court to be further proceeded with in accordance with this opinion.

Reversed.

(112 Va. 667)

ATKINSON et al. v. SOLENBERGER et al.  
(Supreme Court of Appeals of Virginia. Nov. 17, 1910. On Rehearing, Nov. 18, 1911.)

1. TRIAL (§ 2\*)—TRIAL OF CAUSES TOGETHER.

An order that two causes be proceeded with and heard together does not have the effect of making depositions taken in one of them, before the order, evidence in the other; the parties thereto not being the same, and the effect of hearing the two together not being to make them one cause.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 2.\*]

2. FRAUDULENT CONVEYANCES (§ 248\*)—SUIT TO AVOID—LIMITATIONS.

Code 1904, § 2929, declaring a limitation of five years for bringing suit to avoid a conveyance, for the cause only that it was not on a valuable consideration, while applying where the grantee receives it without reason to suspect the grantor was insolvent and without any purpose to defraud his creditors, does not apply where one, with intent to defraud his creditors has property conveyed to another having notice of such intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Dec. Dig. § 248.\*]

3. FRAUDULENT CONVEYANCES (§ 278\*)—CONVEYANCES TO WIFE—PRESUMPTION.

A purchase by a wife from her insolvent husband or from another with means furnished by him is prima facie actually fraudulent as to the husband's creditors, and casts the burden on the wife to show clearly that the consideration was in good faith paid by her out of her own separate estate.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 801, 802; Dec. Dig. § 278.\*]

4. HUSBAND AND WIFE (§ 149\*)—RIGHTS OF HUSBAND'S CREDITORS—SERVICES OF HUSBAND TO WIFE—SUPPORT OF FAMILY BY WIFE.

Independently of whether one is a laboring man, within Code 1904, § 3652, declaring wages owing to such a man, not exceeding a certain amount per month, exempt, where his creditors are seeking to charge his wife with the value of his services rendered to her, she, having supported the family with her own means, while he was rendering such services for her, may set off what she has so advanced for the reasonable support of him and the family during

such period; his creditors being entitled to no more than he could have recovered.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 149.\*]

On Rehearing.

5. REFERENCE (§ 63\*)—ADMISSION OF EVIDENCE—IRRELEVANT EVIDENCE.

In a suit by creditors to set aside a conveyance to a trustee for the debtor's wife of land claimed to have been purchased with the debtor's money, in which the debtor claimed compensation for managing the wife's estate, a reference was ordered to report upon the question of compensation to the husband, and on any other matter deemed pertinent by the commissioner or required by any party in interest. *Held*, that evidence to sustain the good faith of executing the deed to the wife was inadmissible; it being essential that the evidence be confined to the questions upon which the commissioner is ordered to report.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 63.\*]

6. REFERENCE (§ 48\*)—REPORT—MATTERS REPORTED.

A general direction, in an order of reference requiring the commissioner to report on any other matter deemed pertinent by himself or required by any party in interest, does not authorize him to report upon questions wholly different from that referred, but only upon matters incidental and germane.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 75; Dec. Dig. § 48.\*]

7. WITNESSES (§ 52\*)—COMPETENCY—HUSBAND AND WIFE.

Under Code 1904, § 3346a, prohibiting husband or wife from testifying for each other in any proceeding by a creditor to avoid a conveyance from the one to the other on the ground of fraud, in proceedings by a creditor to set aside a conveyance, made to a trustee for the debtor's wife, of land claimed to have been purchased with the debtor's money, depositions of the debtor and his wife as to the good faith in executing the deed were not admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124-136; Dec. Dig. § 52.\*]

Appeal from Circuit Court, Frederick County.

Suit by Atkinson, administrator, and others, against Solenberger and others. From the decree, complainants appeal. Reversed in part.

R. T. Barton and Carrol G. Walter, for appellants. Ward & Larrick and Quarles & Pilson, for appellees.

BUCHANAN, J. One of the objects of the proceedings in this cause was to set aside a deed executed February 14, 1894, by John W. Solenberger to his son Noah W., as trustee for Barbara, the latter's wife, and to subject the lands conveyed to the payment of a debt evidenced by a judgment against Noah W., upon the ground that the lands conveyed were in fact purchased and paid for by the husband and the deed executed to the wife, without consideration passing from her, and was so made for the purpose of defrauding the husband's creditors, and that she had notice of such intent when the conveyance was made. Another

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

object of the proceedings was to subject other lands than those conveyed by the deed of February 14, 1894, and the value of services rendered by the said husband for his wife Barbara.

This cause was heard with the cause of Joseph W. Solenberger, Adm'r, v. Noah W., his Wife and Others, and a decree entered refusing to set aside the conveyances attacked, charging Barbara, the wife, with the value of her husband's services, and crediting her thereon with the amount which the court deemed necessary for the reasonable support of the husband and family during that period. From that decree this appeal was taken.

[1] The first error assigned is to the action of the court in refusing to set aside the deed of February 14, 1894. This suit was instituted in December, 1903, nearly nine years after the conveyance of February 14, 1894, was recorded. The beneficiary in the deed claims in her answer that her husband was indebted to her, and that the consideration of \$3,000 for which he executed his bonds to his father, the grantor, was for the debt which he owed. It is conceded in the brief of the appellees that there is "nothing in the record apart from the averment of the answers and the recital in the deed that the consideration of \$3,000 was paid by said trustee, i. e., out of her separate estate; but it does appear that her trustee had used her money to an amount greater than the consideration named."

The evidence relied on to show that the trustee (husband) had used his wife's money is the depositions of the husband and the wife, taken in the cause of Joseph W. Solenberger v. Noah W. Solenberger, in the year 1904, two years before that case and this were ordered to be proceeded with and heard together. These appellants were not parties to that suit, and are not affected by the evidence taken in it. The effect of hearing the cases together was not to make the two one cause.

"The parties," as correctly stated in 8 Cyc. 608, "in one suit do not become parties to the other, and their rights still depend or turn on the pleadings, proof, and proceedings in the respective causes. The issues remain precisely as they were, and are to be determined exactly as if the cases had been heard separately. In short, the consolidation (in equity) merely operates to carry on together two separate suits supposed to involve identical issues, and is intended to expedite the hearing and diminish the expense." See, also, Daniel's Ch. Pr. note 3, p. 797 (5th Am. Ed.); Judge (now Justice) Lurton's opinion in Toledo, etc., Ry. v. Continental T. Co., 95 Fed. 497, 506, 36 C. C. A. 155.

[2] Having failed to establish by clear and satisfactory evidence, or even to show at all, that any such indebtedness existed from the husband to the wife, the conveyance to her is without consideration and merely volun-

tary as to her. But, as this suit was not instituted until more than five years after the recordation of the deed, the right to have it set aside, merely because it was made to the wife without consideration deemed valuable, would be barred by the statute of limitations. Code, § 2929.

But the appellants not only allege that the conveyance as to the grantee was voluntary, but that the lands were purchased and paid for by the husband and the conveyance made to his wife for the purpose of hindering, delaying, and defrauding his creditors, and that she had notice of such intent. If this allegation of actual fraud be sustained by the evidence, section 2929 has no application to the case. Flook v. Armentrout, 100 Va. 638, 42 S. E. 686; Snoddy v. Haskins, 12 Grat. 363.

It appears from the answer of the wife to the bill of Joseph W. Solenberger, a copy of which is filed with the bill in this case, that at the time the conveyance was made she knew that her husband was insolvent, as did his father, the grantor, and that the husband could not hold property because of his financial condition; that the grantor urged her to purchase the land, and said that he would accept time bonds of her husband for \$3,000 in consideration and satisfaction of the purchase price of the land. There is no claim made in the answer that her husband was indebted to her, or that she was furnishing any part of the consideration, directly or indirectly. The answer further states that her husband had paid at that time \$900 on account of the purchase price, evidenced by the bonds. It thus appears that the wife knew that her husband was insolvent at the time the conveyance was made to her and that he and not she was to pay the purchase price of the lands conveyed. Both the husband and the wife knew when the conveyance was made that he was providing for her at the expense of his creditors—that he was doing what he had no right to do.

This is not a case where money or property is received from an insolvent donor by one who has no reason to suspect such insolvency and without any purpose to defraud the creditors of the donor. In such a case, the transaction being merely voluntary, it is as to the donee constructively fraudulent and must be attacked within the five years; but where the donee has knowledge of the fact that the donor is insolvent and the natural and necessary effect of the transaction is to hinder, delay, or defraud the donor's creditors, it is actually fraudulent, not only as to the donor but also as to the donee.

[3] It is settled law in this state that in a contest between the existing creditors of an insolvent husband and his wife, touching an alleged purchase from her husband or from another with means furnished by him, the transaction is prima facie presumed to be actually fraudulent, and the burden is on

the wife to show by clear and satisfactory evidence that the consideration was in good faith paid by her out of her own separate estate, and not by her husband. See *Richardson v. Pierce*, 105 Va. 628, 54 S. E. 480, and cases cited; 2 Min. Real Prop. § 1181, and cases cited in note 8.

The contention of the wife, that the transaction of February 14, 1894, was in fact a gift and not a sale, is in conflict with the averments of her pleadings in this cause, for in them she claims that she furnished the consideration for the conveyance. It is in conflict with her answer in the case of *Solenberger's Adm'r v. Solenberger*, filed as an exhibit in this cause. In that answer her claim is that the consideration was to be furnished and was in fact furnished by her husband. There is no evidence that the transaction was intended to be a gift, except that the grantor accepted the bonds of his insolvent son without reserving a lien upon the land conveyed.

Upon the whole case, we are of opinion that the conveyance of February 14, 1894, was, as to the wife, not only voluntary, but actually fraudulent; that the appellants have not been guilty of such delay in asserting their rights as to bar them from the relief sought; and that the trial court erred in not setting aside the said conveyance as fraudulent and void.

[4] Another error assigned is that "the appellees were not entitled to have an exemption or an allowance, for the support of the family, set off against the amount ascertained to be due for services" rendered by the husband.

The commissioner, to whom was referred the question, found that the husband had rendered valuable services to the wife in the management of her property, for which a fair compensation would be \$600 per annum during the five years preceding the institution of this suit. The commissioner also found that all the means for the support of the husband and the family had been furnished by the wife during the said five years. This support the commissioner estimated as worth \$500 per annum, and credited the same upon the amount he ascertained as the value of the husband's services. Upon a hearing of the cause, the court sustained an exception to the commissioner's report, filed by the husband and wife, as to the amount allowed by the commissioner as a proper sum to be credited on the value of the husband's services for the support of his family, and increased that amount from \$500 to \$600 per annum.

The objection made to the action of the court is not, as we understand it, to the amount allowed by the court for the support of the family, but to any allowance whatever.

The allowance is objected to on two grounds: (1) That the husband as the general manager or trustee of his wife's prop-

erty was not a laboring man, within the meaning of section 3652 of the Code, which exempts from distress, levy, or garnishment the wages of a laboring man, being a householder, not exceeding \$50 per month. (2) That an insolvent debtor, whose creditors are subjecting to the payment of their claims the value of his services, is not entitled to an allowance for the support of himself and family when it appears that the means for such support have not been furnished by him.

Where a husband renders services for his wife, whether under an express or implied agreement, his creditors have the right to subject the value of such services to the payment of their debts, less the amount necessary for the reasonable support of the husband and his family. See *Catlett v. Alsop, Mosby & Co.*, 99 Va. 680, 687, 40 S. E. 34; *Penn v. Whitehead*, 17 Grat. 503, 525, 94 Am. Dec. 478; *Id.*, 12 Grat. 74, 80.

The fact that during the period the husband is rendering services for the wife she supports the family is no reason why, when his creditors are seeking to charge her with the value of his services, she should not be permitted to set off what she has advanced for the reasonable necessary support of the husband and his family during the period she is charged with the value of his services. If the husband himself, under like circumstances, were to sue his wife to recover the value of his services, it is clear that he could only recover from her the value of his earnings or wages in excess of a reasonable support for himself and family. The creditors are entitled to no more. See *Catlett v. Alsop, Mosby & Co.*, *supra*; *Penn v. Whitehead*, *supra*.

It is unnecessary to consider the question whether or not the husband, in this case, is a "laboring man," within the meaning of section 3652 of the Code, since independent of that section, where creditors are in a court of equity seeking to subject to the payment of their debts the earnings or wages of an insolvent husband in the employment of his wife, they can only subject so much thereof as is in excess of a reasonable support for himself and family. See authorities cited above.

For the error of the trial court in refusing to set aside as fraudulent and void the conveyance of February 14, 1894, the decree appealed from, to that extent, must be reversed and set aside, and in other respects affirmed; and the cause remanded to the circuit court for further proceedings to be had not in conflict with the views expressed in this opinion.

Reversed in part.

CARDWELL, J., absent.

On Rehearing.

WHITTLE, J. Upon a former hearing this court reversed the decree of the circuit

court in so far as it refused to set aside the deed of February 14, 1894, from John W. Solenberger to Noah W. Solenberger, trustee for his wife, Barbara, on the ground of actual fraud, being of opinion that the land in controversy was purchased and paid for by the husband, who procured the title to be conveyed to himself, as trustee for his wife, for the purpose of hindering, delaying, and defrauding his creditors.

There is no occasion to depart from the conclusion reached by the court on that issue upon the evidence then before us. Since the last hearing the appellees have supplemented the former record by bringing up proceedings on an amended and supplemented bill in the principal case, and on an original bill filed by Joseph W. Solenberger against appellees. The trial court sustained demurrers to these several bills, save only with respect to the allegation common to both that Noah W. Solenberger had rendered services for his wife in the management of her property, compensation for which was liable to payment of his debts. The cases were then ordered to be heard together, and a specific reference was made to a commissioner in chancery touching the question of compensation for alleged services of the husband. The decree also contained the usual provision that the commissioner should report any other matter deemed pertinent by himself or required by any party in interest, and should certify the evidence to the court.

[5] Upon this reference, Noah W. Solenberger and wife gave their depositions tending to sustain the bona fides of the deed of February 14, 1894. Their evidence was plainly irrelevant to the question referred to the commissioner, and was objected to on that ground. Indeed, the evidence related to a subject expressly eliminated by the court (in sustaining the demurrer) from the pleadings upon which the reference was ordered.

It is a fundamental rule of practice that the evidence must be directed and confined to the questions upon which the master is ordered to report. *Ware v. Starkey*, 80 Va. 191, 198; 2 Bar. Chy. Pr. 635; 2 Daniel's Chy. Pl. & Pr. 1296.

A party can neither be expected nor required to present evidence to a tribunal upon an issue which it has no jurisdiction to pass upon. And, conversely, such party is not to be prejudiced by the transgression on the part of his adversary of a rule of practice, upon the observance of which depends the due and orderly administration of justice. Therefore, for the reason that the controversy concerning the validity of the deed was not within the pleadings or issues referred to the commissioner, depositions on that subject were inadmissible.

[6] The general direction found in the decree, that the commissioner shall report any other matter deemed pertinent by himself or

required by any party in interest, does not warrant departure from the rule of practice adverted to, but it is merely intended to include matters which are germane and incidental to the questions specifically referred.

[7] The depositions in question were accepted to and were inadmissible for the further reason that Noah W. Solenberger and his wife were incompetent witnesses under the statute (Va. Code, 1904, § 3346a), which declares that "neither husband nor wife shall be competent to testify for or against each other in any proceeding by a creditor to avoid or impeach any conveyance, gift, or sale from the one to the other on the ground of fraud or want of consideration."

The cross-error assigned by appellees involves the contention that moneys expended by the wife for the support of the family stand on the same footing as moneys paid by the wife to the husband without promise on his part to repay the same. But the contrary principle is well settled—that money so expended by the wife is a proper set-off to the demand of the husband against her for services. The creditor of the husband can occupy no higher ground in such case than his debtor. *Penn v. Whitehead*, 17 Grat. 503, 94 Am. Dec. 478; *Catlett v. Alsop, Mosby & Co.*, 99 Va. 680, 40 S. E. 34.

For these considerations, we shall adhere to the decision reached on the former hearing.

Reversed.

(112 Va. 353)

### VALZ v. GOODYKOONTZ,†

(Supreme Court of Appeals of Virginia. Nov. 16, 1911.)

#### 1. EXPLOSIVES (§ 12\*)—INJURIES FROM BLASTING.

Where a contractor, engaged in building a spur track for a state institution, obstructs the main track of a railroad by blowing rock thereon in the prosecution of his own work, and his foreman is engaged in removing it, an assistant trainmaster of the railroad company, charged with the proper movement of trains, who is on the ground in the discharge of his duty is not a mere sightseer, as to whom the contractor is liable only for willful or wanton injury, but is entitled to have ordinary care exercised to insure his safety.

[Ed. Note.—For other cases, see *Explosives*, Dec. Dig. § 12.\*]

#### 2. EXPLOSIVES (§ 12\*)—CARE REQUIRED—EVIDENCE.

In an action against a contractor for injuries to an assistant trainmaster of a railroad, whose main track was blocked by rock blown thereon in the course of construction of a spur track for a state institution by such contractor, evidence held sufficient to charge the contractor with knowledge of the official character of the authority of a person and the object of his visit, so as to raise a liability for a failure to exercise ordinary care for his safety.

[Ed. Note.—For other cases, see *Explosives*, Dec. Dig. § 12.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes  
† Rehearing denied.

### 3. EXPLOSIVES (§ 12\*)—INJURIES—NEGLIGENCE—PRESUMPTIONS.

Where a contractor uses high explosives, it is presumed, in an action for an accident resulting from a delayed blast, that he knew the danger attending its use.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 12.\*]

### 4. EXPLOSIVES (§ 12\*)—INJURY TO THIRD PERSONS—NEGLIGENCE.

Where a contractor who is blasting an obstruction off a railroad track, placed thereon in the prosecution of his own work, has set a number of blasts, an assurance to an employé of the railroad company, present to see that the obstruction is quickly removed, that there is no danger, before all the blasts have exploded, is negligence, and amounts to a failure to exercise the ordinary care which such person is entitled to have exercised for his safety.

[Ed. Note.—For other cases, see Explosives, Dec. Dig. § 12.\*]

Error to Circuit Court, Amherst County.

Action by John T. Goodykoontz against A. M. Valz. From a judgment for plaintiff on a demurrer of evidence, defendant brings error. Affirmed.

J. M. Perry and Randolph Harrison, for plaintiff in error. Lee & Kemp, for defendant in error.

WHITTLE, J. The judgment under review was rendered for the defendant in error (the plaintiff below) on a demurrer to the evidence by the defendant.

The following are the essential facts of the case as thus submitted: The defendant, Valz, was a railroad contractor in the employment of the Western State Hospital, engaged in grading a spur track from the Norfolk & Western Railway, at a point about one mile east of Lynchburg, to the power house of the Virginia State Epileptic Colony, in Amherst county. At the time of the accident, the defendant, in the course of his work, had caused a large quantity of rock to be blown down on the track of the railway company, which entirely obstructed the passage of trains. A freight train from the east had been stopped 150 yards from the mass of débris (which one of the witnesses testified was "as high as a house"), and still further east a passenger train was held up at a stop known as James River. The plaintiff was assistant trainmaster of the railway company, and, as such, was charged with the duties, among others, of giving special attention to the prompt movement of traffic, to investigate the detention of trains, and to clear the track of obstructions. He came from James River to the obstructed point on one of the company's light engines, which was drawn up in rear of the delayed freight train, and went forward to the engine of that train, where he engaged the conductor in conversation concerning the obstruction. Samuel Harvey was the defendant's foreman in charge of the work of clearing the

track where the accident happened. In order to remove the rocks from the track, it was necessary to break them up by means of "doble" blasts, which were being placed and exploded under his direction. After the plaintiff had talked with the conductor for a short while, the two men started in the direction of the slide, when they were notified that blasts were about to be set off. Thereupon, along with Valz's men and a section foreman and his gang, they retired to a place of safety, where they remained until after four blasts had exploded, when Harvey called out: "All over, boys; come on back"—and set out with his men to resume work. The plaintiff, in company with the freight conductor and a civil engineer, followed Harvey, and, addressing him by name, inquired at what time they could clear the track. About that time the plaintiff also directed Harvey's attention to smoke arising from behind a nearby rock, and said, "Mr. Harvey, what is that smoking?" to which remark Harvey replied that it was "nothing," "just some powder or a chunk burning up;" that there was "no danger." The plaintiff repeated the inquiry about the smoke, and asked if it was perfectly safe, and was assured by Harvey that it was safe, and that there was no danger. Thus assured, he continued to follow Harvey, who had passed the danger point, when a delayed blast, from which the smoke was issuing, went off, and a fragment of rock struck the plaintiff on the side of his head, crushing in the skull and leaving a hole large enough to admit the passage of a large duck egg or goose egg, and inflicting upon him injuries of a serious and permanent character.

We are of opinion that the foregoing facts and just inferences which a jury would have been warranted in drawing from the evidence make out a clear case for the recovery of damages.

[1, 2] We cannot yield to the suggestion of counsel that at the time of receiving the injury complained of the plaintiff was a mere sightseer on the scene, drawn thither by idle curiosity, and to whom the defendant owed no higher duty than to refrain from inflicting wanton or willful injury upon him. In the light of the evidence, such conclusion would be to the last degree unwarrantable. The plaintiff was stricken down at his post of duty, while on the premises of the railway company, and in discharge of an important function to his master and the public, to relieve a condition brought about by the defendant himself. Moreover, it is a just, if not an irresistible, inference from the evidence, which the jury might well have drawn, and which the court must draw on the demurrer to the evidence, that the official character of the plaintiff and the object of his visit were known to the defendant.

The light engine which brought him on the ground was run up in the daytime, and stopped in rear of the freight train, and within 150 yards of where the foreman, Harvey, was at work. Besides, it appears that the plaintiff was personally acquainted with Harvey, and addressed him by name, and while in company with the conductor of the freight train and the civil engineer talked with him about the progress of the work and safety of the premises. It would, indeed, be a pernicious doctrine to establish that, in these circumstances, the only consideration to which the plaintiff was entitled at the hands of a contractor (who, in the prosecution of his own work, had obstructed the main track of an important railway company) was that he should not be wantonly or willfully injured.

There can be no question but that the defendant owed the plaintiff the duty to exercise ordinary care for his safety; and that the defendant failed to discharge that duty is equally plain. The measure of duty owing from the defendant to the plaintiff was unquestionably as great as that from master to servant. *Norfolk & Portsmouth Traction Co. v. Dally's Adm'r*, 111 Va. 665, 69 S. E. 963; *Lane Bros. Co. v. Barnard's Adm'r*, 111 Va. 680, 69 S. E. 969, 31 L. R. A. (N. S.) 1209; *Walton, Witten & Graham v. Miller*, 109 Va. 210, 63 S. E. 458, 132 Am. St. Rep. 908.

Even in case of an employé, the master would be liable, where he assured the servant, who was ignorant of the danger, that a place was safe, and who went to work therein, acting upon such assurance. *Lane Bros. v. Bauserman*, 103 Va. 152, 48 S. E. 857, 106 Am. St. Rep. 872; *Low Moor Co. v. La Bianca*, 106 Va. 83, 55 S. E. 532; *Lane Bros. v. Seakford*, 106 Va. 93, 96, 55 S. E. 556; *Va. Iron, etc., Co. v. Munsey*, 110 Va. 156, 162, 163, 63 S. E. 478.

[3, 4] The defendant's foreman, in this instance, was using a high explosive—dynamite—in making these "doble" blasts, and he must be held to have known the danger attending its use. He also knew that five blasts had been set, to be exploded at intervals; and he knew, or ought to have known, that only four had been exploded. Hence it was negligence on his part to have called in his employé to work, and to have assured the plaintiff of the safety of the place, and iterated that assurance after his attention had been specifically directed to smoke arising from a point at which the blast had been placed.

These are the controlling considerations in this case, and render further discussion of it unnecessary.

The judgment of the circuit court is plainly right, and must be affirmed.

Affirmed.

(69 W. Va. 459)

**CAMPBELL v. O'NEILL et al.**

(Supreme Court of Appeals of West Virginia.  
April 4, 1911. Rehearing Denied  
Nov. 7, 1911.)

*(Syllabus by the Court.)*

**1. TRUSTS (§ 371\*)—EXPRESS TRUSTS—ENFORCEMENT—VARIANCE.**

If an express trust, admitted and declared in the answer of a defendant, be substantially the same as that alleged in the bill, it will be enforced according to its terms, though the trust so declared differ in form or details from the trust alleged.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 598; Dec. Dig. § 371.\*]

**2. FRAUDS, STATUTE OF (§ 152\*)—TRUSTS (§§ 17, 18\*)—EXPRESS TRUSTS—STATUTE OF FRAUDS—PLEADING DEFENSE—WAIVER.**

Such an express trust relating to land, though unenforceable under the statute of frauds in the State of Iowa where the land is situated, is not void; and if in a suit brought in this State to enforce such trust, respecting the proceeds of the sale of such land, the trustee in his answer admits and declares such trust, not relying therein on the statute of frauds, he will be treated as having waived the benefits of the statute of frauds, and the trust enforced.

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 365; Dec. Dig. § 152.\* *Trusts*, Cent. Dig. §§ 15-24; Dec. Dig. §§ 17, 18.\*]

**3. TRUSTS (§ 365\*)—ENFORCEMENT—DEFENSES—LIMITATIONS.**

Laches or the statute of limitations constitute no defense in a suit in equity to enforce the provisions of an express trust, except under such circumstances as would render it inequitable to enforce the same.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 568-573; Dec. Dig. § 365.\*]

**4. GUARDIAN AND WARD (§ 125\*)—ESTATE—ACTION TO RECOVER—LIMITATIONS—LACHES.**

A ward is not barred in equity by laches, or the statute of limitations, from recovering his estate from his guardian.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 428; Dec. Dig. § 125.\*]

**5. GUARDIAN AND WARD (§ 58\*)—ACCOUNTS—SETTLEMENT—DISBURSEMENTS BEYOND INCOME.**

The guardian of an infant in settlement of his accounts is not entitled to credit, or to be reimbursed out of the principal of his ward's personal estate, for disbursements beyond the income from his personal estate, and the rents and profits of his real estate without previous order of the court.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 264-282; Dec. Dig. § 58.\*]

**6. GUARDIAN AND WARD (§ 80\*)—DISBURSEMENTS—COLLEGIATE EDUCATION.**

Disbursements by guardian beyond the income of his ward's estate for necessities furnished him, without the previous order of the court, and for which he may be credited in settlement, or be reimbursed out of the principal of the ward's personal estate, do not include disbursements for collegiate education of such ward.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 180; Dec. Dig. § 30.\*]



# 7. GUARDIAN AND WARD (§ 139\*)—GUARDIAN DE FACTO—ACCOUNTING.

Although one not legally appointed and qualified as such, but acting as guardian of an infant, cannot be required to account by or before a commissioner of accounts, or by a court of probate of this state, yet in a court of equity he may be required to account in the same way as if he had been duly appointed and qualified as such guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 466-468; Dec. Dig. § 139.\*]

Appeal from Circuit Court, Hancock County.

Action by Abbie Campbell against Mary O'Neill and others. From a judgment in favor of plaintiff, defendant John A. Campbell appeals. Affirmed.

Alfred Caldwell, John R. Donehoo, John A. Campbell, and Henry M. Russell, for appellant. Oliver S. Marshall and John Marshall, for appellee.

MILLER, J. This is an appeal by defendant from two decrees of the circuit court against him in favor of plaintiff, the first, pronounced November 18, 1904, adjudicating the principles of the cause, and referring the same to a commissioner to state an account between them in accordance therewith; the second, pronounced November —, 1908, overruling defendant's exception to the commissioner's report, confirming it, and adjudging that plaintiff recover of defendant the sum of two thousand one hundred and forty-nine dollars and fifty cents, the aggregate of principal, as found by said commissioner, arising from sales of real estate by defendant, money collected by him on a policy of life insurance on the life of plaintiff's father, with interest from March 1, 1906, together with her costs incurred in the prosecution of her suit.

Plaintiff, an infant, by her next friend, sued defendant in his own right, and as guardian *de son tort*, for an accounting of her share of the moneys received by him from sales of lands in the State of Iowa, one hundred and sixty acres whereof, residue of a tract of five hundred and twenty acres, originally purchased at a tax sale by her father, M. B. Campbell, in 1862, it is alleged belonged to her father, and of which in 1886 he died seized and possessed; and another portion whereof, it is alleged, was in 1866 conveyed by her father to his mother and the mother of defendant, plaintiff's grandmother, and of which in 1869 she died seized and possessed, intestate, leaving surviving her Alexander Campbell, her husband, and the said M. B. Campbell, John A. Campbell, and Mary Brandon, her two sons and daughter, who inherited said land and possession of which, on the death of said Alexander, occurring in 1884 came to them jointly, the share of her father therein, on his death, intestate, in 1886, descending to plaintiff and

her three sisters, named as co-defendants in the bill; the other portion of said five hundred and twenty acres, as the bill alleges, having been conveyed by said M. B. Campbell in his life time to said John A. Campbell.

It is further alleged in the bill that after said land had been so acquired, and conveyed, and after the death of plaintiff's father, the defendant John A. Campbell, assuming to own all of said land, leased the same, collected the rents thereof, and proceeded to sell and dispose thereof, and had, at the time of the bringing of this suit, disposed of all of said land to various persons, named in the bill, for an aggregate sum, in which the share of plaintiff and her sisters, as heirs of their father, in the principal amounted to eight thousand three hundred and forty-one dollars.

The allegation of the bill, respecting said insurance money is, that after the death of plaintiff's father, defendant assumed the guardianship of herself and her sisters, then all infants, collected said life insurance money, amounting to two thousand two hundred dollars, and representing himself to be their guardian, had collected and held all the moneys belonging to them, but had never rendered any account thereof, as such, as required by law, and a full accounting whereof is sought by the bill.

The defendant in his answer, not denying the material facts charged, alleges, in reply, respecting said lands, that he, and not M. B. Campbell, was the purchaser of said land, at said tax sale, but that he, being then under age, took title thereto in the name of his brother; but that afterwards, the validity of said tax title being questioned, he, in 1869, obtained an assignment of a mortgage on said land, executed by one Leroy R. Tuttle, prior to said tax sale, and by means of which, and the release thereof to the said Tuttle, he obtained from said Tuttle and his wife a deed for said land investing in him the absolute ownership of said land, of which he alleges said M. B. Campbell had full knowledge and notice in his life time, and consented thereto. He disclaims all knowledge, until the filing of the bill in this cause, of the deeds of conveyance from M. B. Campbell to himself and Eleanor Campbell of portions of said land, and alleges that no deed was ever delivered to him for the part so conveyed to him.

While asserting absolute title in himself, by virtue of the Tuttle deed, defendant admits in his answer, declaratory of and defining the trust in relation thereto: First, that at the time of the tax sale and purchase of said land in 1862, it was agreed and understood between him and said M. B. Campbell, that the persons who should be interested therein, and for whom the same should be held as joint tenants, were M. B. Campbell,

in the proportion of an undivided two-sevenths; John A. Campbell, in the proportion of an undivided three-sevenths therein, and that the remaining undivided two-sevenths interest therein should be held for their mother and sister, referring to the said Eleanor Campbell, and the said Mary Brandon, their sister, the interest of the latter being subject to some contingencies, not definitely stated. Second, that from the time he became the owner of said lands, and until the death of said M. B. Campbell, he recognized the fact that the latter was entitled to the proceeds of the sale of an undivided two-sevenths of said land, when sold, less prior costs and charges incident to perfecting the title: Provided, first, "that the contingent liability as to the mortgage indebtedness, assigned to this defendant as aforesaid should be satisfied, if feasible and demanded;" second, "that the said M. B. Campbell would pay off and discharge the two hundred dollars alleged to have been procured by defendant for him," as his proportion of the expenses incurred in perfecting said title, which was the consideration for his interest in said land.

The answer further avers that neither M. B. Campbell in his life time, nor his heirs since his death, ever paid the money so procured for him by defendant, and that the defendant had since discharged the same, and that he and they had therefore forfeited any and all rights, under the terms of the trust, to participate in the proceeds of the sale of said land, or in the rents and profits thereof.

The answer admits receipt by the defendant of the \$2,000.00, collected on said insurance policy, and that he had received the same from the administrator of M. B. Campbell, supposing that he had been regularly appointed guardian for the said infants, but finding that he had not been so appointed, he denies liability to plaintiff, averring that his liability, if any, is to the administrator, from whom he received the same, and not to plaintiff. But in his answer, and also in his testimony, defendant admits that he took charge of the persons and property of said infants, cared for them as guardian, made disbursements to them out of the rents and profits of the land and the proceeds of the sale thereof, and from the money collected on the insurance policy, for their maintenance and education, various sums, amounting in the aggregate to more than their interests therein, and particularly more than the interest of the plaintiff therein would have amounted to, had her father, said M. B. Campbell, complied with the conditions of said trust, as declared by defendant, and that she is now actually indebted to him, and not he to her, if a proper accounting be had.

These latter allegations are of course defendant's interpretation of the law applicable to the facts. It becomes our duty, however,

to apply the law to those facts, harsh though it sometimes is, and as it seems to be in this particular case. We accept with entire confidence the professions of good faith, and fair dealings by the defendant with these infant children of his brother, known as he is to all of us, to be a man of high character and standing; but the duty we have to perform, in reviewing the judgment or decree of the court below is, to apply the law to the facts, being as liberal therein as the facts will justify.

The record shows that the three sisters of the plaintiff have long since reached their majority, and that some settlement has been effected between the defendant and them, of the matters relating to this controversy. The plaintiff, who began this suit by her next friend, has since reached her majority, and the suit was ordered, and did proceed, to final decree in her name individually.

As expressive of our own conclusion as to the facts we quote, substantially, from the opinion of the learned judge of the court below, as follows: "The parties to this controversy became interested in the Iowa lands through Alexander Campbell, the father of Milton B. and John A. Campbell. Alexander Campbell traded his store in Fairview to A. R. McCown, for a note made by Owen Bros. of Omaha, Nebraska, endorsed by A. R. Tuttle and C. B. Smith, for over \$3,200.00. The note not being paid, Alexander Campbell was compelled to make an assignment to Alex. Morrow, and this note passed to his assignee. Owens then conveyed to Tuttle the five hundred and sixty acres in question in this suit, and Tuttle made a new note to take up the first one. This second note was for over thirty-eight hundred dollars, and was secured by mortgage on the land conveyed to him by Owens. It will be seen from these transactions that Alexander Campbell furnished the real consideration for these lands, and that the payments which were subsequently made by M. B. and J. A. Campbell were but incidental matters, necessary to secure and save the estate of Alexander this large sum which had been put into these lands. To me it is clear, beyond question, that what was done by M. B. Campbell, in taking the tax titles in his own name, was done to protect the investment already made, and that in holding these tax titles he held as trustee, and that what was done by J. A. Campbell, in securing the Tuttle deed to himself, was as trustee for the same interests. This conduct of the business, through the agency of these trustees, was made necessary by the insolvency and indebtedness of the father. Therefore when the tax titles were bought in it was done in the name of M. B. Campbell, and when the Tuttle title was acquired, it was done in the name of J. A. Campbell. It is obvious that in neither case was there any intention of securing the property for the

exclusive use of the person to whom the title was conveyed. The defendant, J. A. Campbell, had Morrow, the assignee, transfer to him the note and mortgage, given to the assignee, by Tuttle; and this was done without any consideration passing from J. A. Campbell to the assignee; and the satisfaction of this mortgage was the sole consideration for the deed from Tuttle to J. A. Campbell. To say that J. A. Campbell accomplished this transfer with the purpose and intention of holding these lands as his own, and of asserting the title thus acquired, adversely to the claims of others interested, is to charge him with perpetrating a fraud on those others, and with a serious breach of trust, and a total disregard of the moral obligation arising out of the transaction. Yet this is the necessary effect if we allow the contention that this land was acquired and held by adverse title. This, however, was not the case. The Tuttle title was acquired by J. A. Campbell, as was the tax title by M. B. Campbell, pursuant to a trust arrangement, by which M. B. Campbell was to have two-sevenths of the land, Eleanor, the wife of Alexander, the two-sevenths, and J. A. Campbell, the three-sevenths. This is a conceded fact in the case, and as a fact it disposes of the claim of adverse possession and of rights of property resulting therefrom."

On the question of the non-compliance by M. B. Campbell with the condition of the trust, declared by the defendant, we think that the judge below, in his opinion, properly concluded, that there is no real force in this contention, for the reason stated, that M. B. Campbell did furnish the money, by borrowing it from his aunt; besides, it is a disputed fact whether that money was not in fact paid out of the estate of M. B. Campbell, after his death, by the payment by his administrator of a three hundred dollar note. Whether this be the fact or not, the payment by the defendant in the manner claimed, was voluntary on his part, and cannot lawfully be set up by him to defeat the interest of his brother in the property. Moreover, the subsequent acts of the defendant, in recognizing the rights of his brother in this land, and in the proceeds of the sale thereof, in distributing and paying to his heirs portions of the money realized from rents and profits, and from sales thereof, are rather inconsistent with the position now taken that M. B. Campbell had forfeited his interest in the property, by not complying with the said condition.

The decree below, predicated on these facts, and adjudicating the principles of the cause was, that the lands described in the bill and answer, were acquired and held by defendant John A. Campbell, in trust, in the proportion of two-sevenths thereof to M. B. Campbell and his heirs, two-sevenths to the use of Eleanor Campbell and her heirs, and

three-sevenths to the use of the said John A. Campbell, and that the plaintiff Abbie Campbell, as one of the four heirs of Milton B. Campbell, and one of the heirs of the said Eleanor Campbell, was entitled to an accounting with the defendant of the said trust, and also of the money which went into his hands as a part of the insurance on the life of her father.

With respect to the claim of defendant, that the interest of Eleanor Campbell in the trust property was a contingent one, and that it was agreed between the parties that her two-sevenths interest, in case of her death, was to go to Mrs. Brandon, the court below says, that the only evidence in support of this contention is that of the defendant and Brandon, her husband, which is incompetent. Does not the fact also that M. B. Campbell in his life time deeded a portion of the land to Eleanor Campbell absolutely, without such condition, and while he held title to the land, not only for himself, but for the defendant and Eleanor Campbell, amount to a denial of any such agreement? It is not claimed that Eleanor Campbell was a party to the alleged agreement, that her interest was to go to her daughter, Mrs. Brandon. Possibly that would have been an equitable disposition of the property. So far as the record shows she died intestate, and we cannot say that the decree below, respecting her alleged interest, is erroneous.

[1] The decrees below are attacked on numerous grounds. We will notice only such of them as seem to us meritorious and as presenting questions fairly arising upon the record. First, in logical order, it is said that the trust alleged in the bill is not the same as that acknowledged and declared in the answer; and that the trust so declared by the defendant, being an express trust, is by the laws of Iowa, the statute of frauds, wholly void and unenforceable. Our reply to this proposition is that the trust alleged in the bill, while differing in details, and in the manner of statement, from that acknowledged and declared in the answer, is nevertheless substantially the same. We do not regard the fact that after the land was acquired by tax title, and the title thereto invested in M. B. Campbell; and the fact that he subsequently made deeds to the defendant and to Eleanor Campbell, as alleged, and that the parts so conveyed may have been held in severalty, and the further fact that defendant subsequently acquired from Tuttle a deed for the whole land, to be made to him, and which was to be subject to the same trust, render the defendant any the less liable as trustee, to account to the plaintiff for her interest therein, for we must assume that in the attempted partition of said land by the deeds from M. B. Campbell to his mother Eleanor, and to his brother John A. Campbell, the purpose was to divide the land, according to quality and quantity, in

the same proportions in which it was held by him for himself and them.

[2] We believe it to be true, as argued, that under the statute of frauds of the State of Iowa, an express trust cannot be created by parol, but must be in writing. The Supreme Court of that State, however, in *McCormick & Co., v. Griffin*, 116 Iowa, 397, 90 N. W. 84, holds, that a trust required by the statute to be in writing is not void, but merely unenforceable, and that a conveyance by the trustee in discharge of the trust, is based on a sufficient consideration even as against strangers. In the case at bar we have the defendant in his answer filed declaring the trust, substantially as sought to be enforced against him by the bill. In *Perry on Trusts* (6th Ed.) § 84, that eminent writer says, applicable we think to this case, that: "In all cases, however, the defendant may answer, and if in his answer he confess the trust without insisting upon the statute of frauds, he will be held to have waived the benefit of the statute, and his answer may be used as a written declaration and proof of the trust, on the ground that the plaintiff is not called upon to introduce evidence, and the trust appears upon the written answer before the court." And this court held in *McCandless v. Warner*, 26 W. Va. 754, that a writing to prove a trust under our law need not be made at the time the trust is created, but may be made at any time thereafter, and that it is not necessary that it be addressed to the cestui que trust, or to any other person. We think if the case here depended upon such declaration that the answer of defendant satisfies the requirements of the statute, even of the State of Iowa.

[3, 4] A second point we will notice is, that defendant after he acquired the deed from Tuttle, took possession of the land by tenants, sold the same as his own, and in every way treated it as his individual property, and that laches or the statute of limitations bars recovery by the plaintiff. We have seen how the court below disposed of this question in part. In another part of his opinion, the judge below says, on the same question, that the Tuttle title was not a constructive, but an express trust, and that the statute of limitations can have no application thereto. We have recently held, in *Roush v. Griffith*, 65 W. Va. 752, 65 S. E. 168, points seven and eight of the syllabus, that the question, what constitutes laches barring an express trust? depends for the most part upon the circumstances of the particular case; that a ward is not barred in equity, by delaying suit to recover her estate from her guardian for a period of fourteen years after attaining her majority, unless evidence has been lost, or the trust has been disavowed, or upon some equitable principles it would be inequitable to enforce such trust. And in *Sommers v. Bennett*, 69 S. E. 694, on

the authority of numerous prior decisions, it is said, that until an actual disseisin of a co-tenant has been effected by some notorious act of ouster brought home to his knowledge by another co-tenant, and in the case of a beneficiary under a trust, until the duties of the trustee are ended, or the trust is disavowed by the trustee, such co-tenant or cestui que trust cannot lose his or their rights of entry on the land, by delay in asserting the same and demanding possession. In the case here there is no evidence of any disavowal of the trust in the life time of M. B. Campbell, and there has been no such disavowal to his heirs and beneficiaries, since his death. Quite the contrary we think; besides, no such disavowal could bar an infant of his right of action, at least until after he has reached his majority.

[5] A third point is, that the defendant was unlawfully deprived of credits for disbursements to plaintiff, beyond her share of the rents and profits of the land, interest on the purchase money, and on her share of the insurance money, with which defendant had been charged. The commissioner's report shows an account between plaintiff and defendant of her share of these items, made up with annual rests, and as of the first day of March of each year, beginning March 1, 1886, and ending March 1, 1906, with accompanying schedules explanatory thereof, and by which defendant is charged, each year, with these items of income, and credited with disbursements, proven by his evidence to have been made to, or for and on account of plaintiff, and showing payments in excess of rents and interest received and available therefor, a balance in his favor of four hundred and fifty-five dollars and seventy-two cents, which the commissioner refused to allow him out of her share of the principal sums collected by him, and charged against him in said account, and which the court below by confirming said report, and giving decree against defendant, also disallowed him. Was the defendant entitled to be so credited, or reimbursed out of the principal sums with which he was charged in said account? He asserts his right to such credit on the ground that said disbursements were for necessities furnished plaintiff, relying chiefly, on *Myers v. Myers*, 47 W. Va. 488, 35 S. E. 868. It is conceded by counsel that that case was a hard one. We think, however, that it affirms correct legal principles. It affirms, as do some of the authorities cited therein, that for necessities furnished by a guardian to his ward, the guardian has the same right of enforcement and reimbursement therefor as any other persons, furnishing such necessities. Can the claim of defendant to be reimbursed be supported upon the ground of necessities furnished? Food, lodging, clothing, medical attendance and education are regarded as necessities. And the authorities hold that wide

discretion is given a guardian in such expenditures, depending upon the estate, and station in life of his ward. [6] But they say that education is confined to a common school education, and does not include a college education. Woerner Am. Law of Guardianship, 12. By reference to the account, and to the testimony of the defendant in this case, we observe that many of the items cover disbursement for tuition and expenses, outside of board, while attending school or Oberlin College, Ohio, and apparently amounting to more than the amount of the excess of his disbursements. Besides sections 8 and 9, chapter 82, Code 1906, expressly disallow to a guardian in settlement, credit for disbursements for any purposes, beyond the income of the ward's estate, unless the same be previously authorized by a court, as provided thereby. Some early Virginia cases are cited by counsel to the contrary; but they are decisions occurring before the present statute was enacted in that State or in this. See *Rinker v. Streit*, 33 Grat. Anno. (Va.) 663, and notes. Notwithstanding this statute, however, a court of equity may, upon the principles of the Virginia cases cited, and *Myers v. Myers*, supra, where it has the entire matter before it for settlement, reimburse a guardian out of the principal of the ward's personal estate, for disbursements which the law regards for necessities. The general rule, however, is, that where expenditures of this kind have been made without a previous order of the court, some good excuse must be furnished to the court why application was not made to the court for the authority before doing so. *Bond v. Lockwood*, 33 Ill. 212, 224-225.

[7] The fourth and last point which will be noticed is, that the defendant, not being the legally appointed guardian, cannot be required to account to the plaintiff, in strict accordance with the rules and principles governing a regularly appointed guardian. In this we think the authorities, without exception, are against him. He says he thought he was guardian. He received the money belonging to these infants, believing that he had been duly appointed guardian. But if he did not so believe, still, having acted in that capacity, he is bound to account in a court of equity in the same way, as if duly appointed and qualified. Although a commissioner of accounts, and our county court of probate would not have jurisdiction over him as over a regularly appointed, and qualified guardian, to compel an accounting, nevertheless a court of equity has that power. Woerner Am. Law of Guardianship, § 94, says: "So one who acts as guardian without authority, or under an appointment void for want of jurisdiction in the court having granted it, becomes liable as a trustee in invitum, and may be made to account in a court of equity, or, under some circum-

stances, in an action of account at law for money had and received. And where such court has obtained jurisdiction in a proceeding to set aside, on the ground of fraud, a decree made on final settlement between a guardian and his ward, it may retain jurisdiction of the whole case, not only for the purpose of setting aside the fraudulent settlement and decree, but also of determining the amount due the plaintiff upon an honest accounting. So it is held, that where an administrator is also the guardian of infant distributees of the estate, chancery alone has jurisdiction to settle his accounts, though a settlement made by the Probate Court in such case is not absolutely void." That de facto guardians may thus be required to account is the doctrine of many cases, including *Evans v. Pearce*, 15 Grat. (Va.) 513, 78 Am. Dec. 635; *Peale's Adm'r v. Thurmond*, 77 Va. 753, and *Martin's Adm'r v. Fielder*, 82 Va. 455, 4 S. E. 602. And we find this doctrine recognized and applied in some of the cases cited and relied upon by the appellant. *Houseal v. Gibbes*, Bailey, Eq. (S. C.) 482, 23 Am. Dec. 186; *Van Epps v. Van Deusen*, 4 Paige (N. Y.) 64, 25 Am. Dec. 516; *Bailey v. Bailey*, 67 Vt. 494, 32 Atl. 470, 48 Am. St. Rep. 830. And citing many decisions, it is said, in 21 Cyc. 152, that "Any person acting as guardian whether as a natural or statutory guardian (even though his appointment be void), or as special guardian to sell realty, or as a mere volunteer, may be required to account, and on the removal of a guardian it is a matter of course to require him to account and to pay over the balance if any which shall be found in his hands upon such accounting. It is the duty of every guardian whose trust as such is revoked to account honestly to the late ward or to his successor in the trust if there be one. If the guardian dies before the settlement of his account his representatives may be required to account. If the guardian has appointed an agent to manage the estate, he may be required to file and settle an account of his agency."

It seems wholly unnecessary to say more in support of the decrees appealed from, and our plain duty is to affirm them.

BRANNON, J., absent.

(69 W. Va. 641)

CECIL et al. v. CLARK et al.

HALL et al. v. SAME.

(Supreme Court of Appeals of West Virginia.  
Oct. 31, 1911.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT (§ 133\*)—ACCEPTANCE OF SERVICES—LIABILITY FOR COMPENSATION.

Parties to a suit, accepting the services of an attorney, with knowledge thereof, as the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

services are performed from time to time, and in the absence of any agreement for gratuitous service, and circumstances from which gratuitous service would be implied in law, are liable therefor.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 321; Dec. Dig. § 133.\*]

**2. ATTORNEY AND CLIENT (§ 133\*)—EMPLOYMENT BY AGENT—LIABILITY FOR COMPENSATION.**

Acquiescence of persons, jointly interested in a fund in litigation, in the employment of an attorney by one of their number for the protection of their common interest amounts to a representation of agency in the person making such contract, which will justify the attorney in making a subsequent contract of employment with the same person for protection of the same fund in litigation, other than that in respect to which he was first employed; the parties having knowledge of the rendition of his service in such subsequent litigation as it is performed, and not disavowing or denying agency of their associate to make such employment.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 133.\*]

**3. RECEIVERS (§ 196\*)—RIGHT TO COMMISSION.**

An attorney, jointly interested with his clients in the fund recovered in a suit, and having such fund in his hands as special receiver by appointment of the court, may be allowed a commission thereon as receiver, in the absence of an agreement to handle the fund as such receiver without compensation.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 196.\*]

**4. RECEIVERS (§ 101\*)—FUNDS IN HANDS—LIABILITY FOR INTEREST.**

Failure of a special receiver to obey an order directing him to loan funds in his hands, in the absence of any good reason shown for such failure, justifies a charge against him, in his settlement, of an amount equal to the interest he would have received, if he had obeyed the order of the court.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 189; Dec. Dig. § 101.\*]

**5. RECEIVERS (§ 199\*)—SETTLEMENT OF ACCOUNTS—UNDISPUTED CLAIM OF RECEIVER—ALLOWANCE.**

It is not error to allow a special receiver a claim, presented after the report of the commissioner, settling his accounts, has been acted upon by the court, but before entry of the decree; the validity of the claim being undisputed, or proved beyond question, and a satisfactory excuse given for not having presented it before the commissioner's report was made up.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 199.\*]

**6. APPEAL AND ERROR (§ 1054\*)—HARMLESS ERROR—ADMISSION OF IMPROPER TESTIMONY.**

Admission of improper testimony by a commissioner in chancery, returned with his report, is not cause for reversal of a decree, if the appellate court finds sufficient admissible evidence to sustain the finding of the commissioner and the trial court, as to the item to which the inadmissible evidence relates.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.\*]

Appeal from Circuit Court, Summers County.

Bills by W. P. Cecil and others, and by J. R. Hall and others, against E. W. Clark and

others. From an allowance of certain attorney's fees, W. H. H. Allen and others appeal. Reversed in part, modified in part, and affirmed.

R. F. Dunlap, for appellants. Price, Smith, Spilman & Clay, for appellee Geo. E. Price, Sp. Receiver.

**POFFENBARGER, J.** On the settlement of the accounts of Geo. E. Price, special receiver of the circuit court of Summers county, in the chancery cause of Cecil et al. v. Clark et al. (the decision of an appeal in which is reported in 44 W. Va. 659, 30 S. E. 216, where the general nature of the case can be ascertained), respecting a certain fund accumulated in his hands to the credit of divers persons, adjudicated in said cause to be the owners of a share or portion of the Henley Chapman land, known in some of the proceedings in said cause as the A. A. Chapman interest, questions arose concerning an attorney's fee, interest on a part of the fund, and commissions and other allowances to the receiver, resulting in this appeal.

The attorney's fee of \$1,000, paid to the late Wesley Mollohan by the receiver, without an order of the court authorizing him to do so, was allowed to him as a proper credit in his settlement, both by the commissioner to whom the court referred the matter for inquiry, finding, and report, and the court itself, overruling an exception to the commissioner's report. Though Mr. Mollohan rendered the service for which he charged and collected the fee, the allowance thereof to the receiver is resisted by the appellants on the theory or ground of nonemployment by them. Admittedly recipients of the benefit of the services in common with others, they deny liability for the fee. This service was rendered, not in the cause above named, but in a contest in the federal courts between the heirs of A. A. Chapman and the appellants and others similarly situated, who purchased the A. A. Chapman interest in the Henley Chapman lands involved in the main cause, at a judicial sale thereof under a decree of the United States Circuit Court, in a creditor's suit against A. A. Chapman or his heirs.

That purchase was made while the other and principal cause was pending. One W. H. H. Allen was induced by some of the A. A. Chapman heirs to become the purchaser at the price of \$2,850. At or about the same time, an agreement was entered into, by which Allen bound himself to pay the firm of Price, Flournoy & Couch 25 per cent. of what should be realized from the purchase, after refunding to Allen his purchase money, in consideration of their conducting "all legal proceedings and litigation in the matter of said purchase and title to said lands, and

especially the Flat Top Coal Company suit" then "pending as to said lands, and to render their services through the different courts until there" should be "a final decree as to said title." Then there was an agreement by which Allen was to divide the remaining three-fourths equally with Wm. A. and Geo. B. Wade.

There was a decree in the main suit in favor of the Chapman heirs. Allen, purchaser of an interest therein as aforesaid, filed his petition in that suit, and had that interest decreed to him. The appeal of the trustees of the Flat Top Coal Land Association, disposed of in 44 W. Va. 659, 30 S. E. 216, endangered all these interests, as this court at first reversed the decree, and so denied the Chapman heirs any interest in the land. In view of this peril, Mr. Mollohan was employed on a contingent fee of \$3,000, of which \$1,000 was to be paid by Allen and his associates, to assist in obtaining a rehearing. The rehearing was granted, and the decree affirmed. But there was further trouble. Part of the heirs of A. A. Chapman then filed a bill of review in the United States Circuit Court, to reverse and annul the decree of sale under which Allen had purchased, and also a petition in the circuit court of Summers county, denying the validity of that purchase. Mr. Mollohan went right on into the successful defense of the bill of review and petition of the Chapman heirs against Allen, separate and distinct matters from that in which he was first employed. The disputed fee is for this service. As to the other \$1,000, paid in the spring of 1903, there was no controversy.

This allowance is opposed by Allen and the two Wades, who deny all knowledge of intent or purpose upon the part of Mr. Mollohan to make any charge for this service against their interest in the fund. Their contention is that the firm of Price, Flournoy & Couch, which later became Price, Flournoy & Smith, if anybody, employed Mr. Mollohan, and ought to pay him out of their share of the fund. In support of this position, they invoke the terms of the original contract, binding said firm to conduct all legal proceedings and litigation concerning the title, and render their services in respect thereto through the different courts to a final decree. Opposed to this is the testimony of Mr. Mollohan to an express verbal agreement with Wade for a contingent fee out of the common fund of not less than \$1,000 for his services in the Chapman heirs suit in the federal court. Those heirs, it will be remembered, attacked that sale in two ways and by two proceedings at the same time—by a bill of review in the federal court, and a petition in the state circuit court. Mr. Mollohan says Wade conferred with him as to the place and best method of defense, and was advised that the safer course was to make it to the bill of review in the federal court. This conversation, as

well as the service to which it related, was subsequent to the rendition of service by Mr. Mollohan under his first contract. Mr. Wade makes no specific denial of this conversation, but says in a general way he never had any knowledge of the character of the arrangement made with Mr. Mollohan by Price and Flournoy, and was never asked to give his consent to the payment of a second fee until December, 1904. A copy of what purports to be a letter written by Mr. Flournoy to Wade, November 23, 1903, giving such notice, was put in evidence, but the latter denies receipt of it. A memorandum prepared by Mr. Flournoy, and relating to the distribution of the fund or a portion of it, indicates his understanding that such charge was to be made. Mr. Flournoy being dead, this memorandum was put in evidence as bearing upon the question. A letter from W. C. Clephane, attorney for Allen, is relied upon as evidence of notice to the latter of purpose to make the charge. That letter acknowledges receipt of one from Mr. Flournoy, requesting a copy of an agreement between Allen and the Wades, and then adds: "Mr. Allen thoroughly understands the agreement with regard to the retention of Mr. Mollohan, and acquiesces in it." This letter bears date January 19, 1903. Shortly after that date (some time in March, 1903), a distribution of some of the funds realized from the litigation was made, and Mr. Mollohan had not then been paid his first fee. According to the testimony of Wade and Price, that fee was paid in the spring of 1903; Wade saying "in the spring of 1903," and Price "early in 1903." Evidently this correspondence took place in view of the distribution of funds about to be made, and, as Mr. Mollohan's first fee had not then been paid, his retention, referred to, was probably the first one. Hence we do not regard this letter as one clearly importing agreement to the second employment of Mr. Mollohan.

We think Mr. Wade's denial is too general to be considered a response to, or anticipation of, the testimony of Mr. Mollohan. He does not deny having met Mr. Mollohan and consulted him at Hinton. Nor does he deny knowledge of Mr. Mollohan's services in the federal court suit. Correspondence in evidence shows that W. A. Wade, interested as a party, kept close track of the litigation, and had knowledge of what was done. It also shows that Walter C. Clephane, attorney for Mr. Allen, kept himself advised of the proceedings. Mr. Wade, according to the testimony of Mr. Mollohan and Mr. Price, was at Hinton and other places while Mr. Mollohan was engaged in the defense of the suits of the Chapman heirs against Allen and his associates, and this is undenied.

[1] We have no doubt that these parties had knowledge of Mr. Mollohan's services for them in these collateral and subsequent proceedings, constituting a serious menace

to the claimants of the A. A. Chapman interests in the land, and willingly accepted the benefit thereof. From the decree of the federal circuit court against them, they appealed to the Circuit Court of Appeals at Richmond. It would be too much to assume that Allen and the Wades, interested in a fund of several thousand dollars, were oblivious to the proceedings in that suit, or did not know who was conducting them. They had no agreement or assurance from Mr. Mollohan that his services were gratis, or performed without expectation of reward out of their share of the fund at stake. Their acceptance of his services, under such circumstances, without such an agreement or understanding, or notice of their unwillingness to pay him, bound them in law to compensate him. Against this legal view, they invoke and rely upon the terms of the agreement between themselves and the firm of Price, Flournoy & Couch, and also the terms of the first employment of Mr. Mollohan, which they argue covered his services in these collateral proceedings, as well as in the main case. We do not regard the contract with Price, Flournoy & Couch as imposing upon them any obligation beyond the rendition of their own services in the litigation. Nowhere does it say they shall bear the expenses of that litigation. Their fee was not contingent, otherwise than that it should be paid out of such fund as might be recovered, and not by Allen and the Wades personally. They agreed to conduct the proceedings and litigation, but not to employ additional counsel at their own expense, in case of necessity therefor. Not a word in the agreement imports any such obligation. Moreover, when it became necessary to employ additional counsel on the occasion of a crisis in the progress of the litigation, the owners of the four parts of the A. A. Chapman interests employed Mr. Mollohan, at their joint expense contingently, not at the expense of Price, Flournoy & Couch. His contingent fee was to come out of the whole fund, not out of the part going to the law firm. This amounts to a practical construction of the contract, consistent with the view here expressed, and inconsistent with the contention of the appellants. At the time of Allen's purchase, which antedated this first employment of Mr. Mollohan, somebody gave a warning of defects in the title. The appellants say this was done by the Chapman heirs; wherefore it must have been understood that Mr. Mollohan's employment covered the litigation commenced by them. It suffices to say it does not appear that Mr. Mollohan knew anything of that, since it occurred long before he was employed. Mr. Price swears that warning was given by the Flat Top Coal Land Association, and not by the Chapman heirs.

[2] Mr. Wade admits that, in the employment of Mr. Mollohan on the first occasion, he represented himself, his brother, George

Wade, and Mr. Allen. The acquiescence of his two associates in this employment by him was a representation by them of his agency for them in matters of that kind. Hence Mr. Mollohan had the right to rely upon his assurance, for and on behalf of himself and his associates, of an additional contingent fee of \$1,000. Thus they come into contact with the law of estoppel. Upon such of the testimony as is clearly admissible, and the facts and circumstances, considered in the light of legal principles, our conclusion is that the allowance of this fee was proper. Payment of it without an order was technically wrong, but not destructive of the right.

[3] The commissioner disallowed the receiver's claim of commissions on funds in his hands. Sustaining an exception to this finding, the circuit court allowed him 3 per cent. on \$12,227.18, the aggregate of the first four collections made, which were distinguishable in some respects from the funds subsequently received, and 5 per cent. upon the royalties received later, amounting to \$233.12. He was also allowed a commission of 5 per cent. on interest collected on funds loaned out by him in obedience to the decrees of the court, amounting to \$2,029.76. The aggregate of these amounts is \$701.42. There went into Mr. Price's hands large sums of money belonging to other heirs of Henley Chapman. This was distributed to the parties entitled soon after it came into the hands of the receiver. In his testimony, Mr. Price says he took no commission on the funds going to the Chapman heirs, other than those representing the A. A. Chapman interest or share, and, by way of explanation, that these funds occasioned him no trouble, and imposed upon him but slight responsibility, as they were paid out very soon after the receipt thereof, and had been paid into a bank to his credit. On this point, his testimony is as follows: "By some tact, if not expressed, understanding, no commission was allowed me in the distribution of the funds received under the decrees of January 27, 1899, and October 26, 1900, set forth in my first report, which was confirmed by the court, and which was filed September 9, 1902. These funds were really never handled by me in any way, except that they were paid into bank, immediately checked out, and the distribution of them was comparatively simple, as Judge Strothers at that time received the checks for nearly all of the parties in interest, and disbursed them himself; but it will be noticed that the A. A. Chapman interest in these funds was left in my hands, because of the pending litigation with reference to it, and I was required to loan it out, and I did so." This is relied upon as evidence of an agreement, contemporaneous with his appointment, to serve as receiver without compensation. It does not sustain that view. Manifestly it was subsequent, and imports only a con-



cession or relinquishment of compensation, founded upon facts and circumstances showing lack of responsibility, care, and trouble, relating to that portion of the fund. We find no evidence of a prior agreement for gratuitous service as receiver. Mr. Price had an interest in the fund through his firm, and sustained a friendly relation toward the appellants as their counsel and cotenant in the land involved in the litigation, and realized large returns from it, circumstances which might have induced him to serve without compensation, had they been urged upon him in that connection, but no such agreement is shown. His allowances come out of the gross fund, so that his associates are not thereby charged a commission for handling his own share. In other words, he bears this burden pro rata with them. In these circumstances, we see no denial of discretionary power in the trial court to allow him commissions, nor any abuse of discretion in the rate of commission allowed. The commissioner based his disallowance of commissions partly upon the untenable view of obligation imposed by the contract of employment to collect and pay over as attorney the money recovered. Exigencies of the case made necessary a receivership, not at all included in the employment as attorney, and probably not contemplated. The fund would have gone into the hands of the general receiver of the court, or some other person as special receiver, had not Mr. Price been appointed.

The amount of the allowance is challenged, upon the theory of a double charge upon about \$3,000 of the royalties. Certain statements in Price's deposition constitute the basis of this. He said that in the distribution of royalties, covering the period of 1902 and 1903, commissions had been allowed him on the royalties received and disbursed; that these commissions were taken from the whole fund; that in some instances he had charged these commissions again in the statement accompanying his last report; that this mistake should be corrected; and that no commissions had been allowed him on any of the items from the fourth quarter of 1903 to the second quarter of 1905, prior to the date of his deposition. In another part of his testimony, he says the amounts charged from July, 1900, to and including the third quarter of 1903, are the amounts received after the commission had been taken out. For some reason undisclosed, the court, in reforming the commissioner's report, took no notice of this admission, treated the net charges as gross charges, and allowed commission thereon. Of course this is an erroneous allowance, and amounts to \$181.20.

[4] Though ordered by the court to loan out the funds in his hands to the credit of the owners of the A. A. Chapman interest, the receiver retained, unloaned for a period of about two years, the sum of \$3,854.98, part of the amount. The commissioner charged

him with 5 per cent. interest on this sum for that time, amounting to \$385.50. On an exception to this charge, the court struck it out and modified the report to that extent. The receiver makes no satisfactory explanation of his failure to loan said sum. Having admitted such failure, he says, "At that time, there was difficulty in loaning funds on call, and I did the best I could with it, and have accounted for whatever interest was received." Having in his hands in 1903 about \$13,470, which had been loaned, and was bearing interest, he disbursed the sum of \$5,388.30 under an order of the court, part of which might have been paid with the idle money above mentioned. Instead of doing that, he collected enough of the money he had loaned to make that disbursement. He does not say the borrower would not have retained the money then collected, so as to enable him to use the idle money; nor does he show any special effort to loan the latter. On the whole, we think his explanation is insufficient, and does not sustain the action of the court in striking out this charge for interest. Under such circumstances, a receiver is liable for interest. *Roller v. Paul*, 106 Va. 214, 55 S. E. 558; *Hooper v. Winston*, 24 Ill. 353; *Rosenthal v. McGraw*, 138 Fed. 721, 71 C. C. A. 277; High, Rec. § 804; Beach, Rec. (2d Ed.) § 757.

[5] After the court had heard and passed upon these and other contentions raised upon the commissioner's report by exceptions, but before the entry of the decree complained of, the receiver discovered an item of \$116.82, a payment by check to W. A. Wade, attorney for himself, George B. Wade and Allen, which is not in any way disputed, and which he had neglected by oversight to present to the commissioner. The allowance of this was resisted upon the technical ground that it had been presented too late. It was a credit to which, but for this technical objection, the receiver was admittedly entitled. The court still had the cause within its jurisdiction, with power to do substantial justice between the parties. Upon sufficient cause shown, it could have set aside its decree, had it been actually entered, and recommitted the cause to its commissioner. We have no doubt about the propriety of the allowance of this item.

[6] Refusal of the court to pass upon certain exceptions to testimony, relating to the Mollohan attorney's fee, brought to its attention after the hearing and decision, but before entry of the decree, is assigned as error. Assuming the inadmissibility of some of this testimony, without actually deciding it, we may say the mere admission of it constitutes no cause for reversal of the decree, since the court, unlike a jury, may exclude from consideration such evidence found in the record in arriving at its findings, without formally noting such exclusion. In view of this, the appellate court goes no further than to see whether the competent evidence sustains the finding of the trial court. Part of the evi-

dence excepted to may have been inadmissible, but, as we think the allowance of the attorney's fee is sustained by admissible and competent evidence, such as Mr. Mollohan's conversation with W. A. Wade, and the facts and circumstances adverted to in the disposition of the assignment of error, based upon the allowance of that claim, we consider it unnecessary to pass upon the admissibility of the balance of the evidence, or the action of the court in refusing to consider the exceptions.

For the reasons stated, the decree complained of is reversed and set aside, in so far as it sustained the receiver's first exception to the report of the commissioner, and modified, in so far as it sustains the special receiver's second exception to that report, by deducting, from the allowance of commissions to him, the sum of \$181.20. The report of the commissioner, as reformed and confirmed by said decree, will also be corrected by charging said receiver with an additional sum of \$385.50, on account of interest which he should have acquired by loaning out said sum of \$3,854.98, and by deducting from the commissions allowed the said sum of \$181.20, allowing him commission on said sum of \$385.50, amounting to \$19.28, increasing the total fund in his hands by the sum of \$547.42, and charging him interest at 6 per cent. on \$410.58, three-fourths of the sum so added, belonging to Allen and the Wades, from February 14, 1905, until December 14, 1906, amounting to \$45.16, which two sums, together with \$88.90 decreed by the court to Allen and the Wades, make a total of \$544.62, and, as so modified and corrected, the commissioner's report will be confirmed, and a decree entered, requiring the receiver to pay to W. H. Allen, W. A. Wade, and Geo. B. Wade, or their attorney, said sum of \$544.62, with interest thereon from December 14, 1906, together with costs in this court and costs in the court below, as provided in the decree appealed from.

(69 W. Va. 636)

#### DUNCAN v. DUNCAN.

(Supreme Court of Appeals of West Virginia.  
Oct. 31, 1911.)

(Syllabus by the Court.)

#### DIVORCE (§§ 129, 133\*)—DESEPTION—ADULTERY—EVIDENCE.

On a bill by a husband seeking a divorce a mensa et thoro on the ground of desertion, and an answer and cross-bill by defendant, admitting desertion, but charging adultery in justification thereof, and as a ground also for a divorce a vinculo matrimonii prayed for, the facts proven show desertion by the wife, but not adultery by the husband, entitling him to the relief prayed for, and precluding her from a divorce from the bonds of matrimony.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. §§ 129, 133.\*]

Appeal from Circuit Court, Ohio County. Bill by Charles H. Duncan against Sarah Duncan. Bill and cross-bill dismissed, and plaintiff appeals. Reversed in part, and affirmed in part.

J. J. Coniff, for appellant. Handlan & Reymann, for appellee.

MILLER, J. In a suit for divorce a mensa et thoro, brought by plaintiff, the husband, against defendant, the wife, on the ground of desertion, and on her answer and cross-bill seeking a divorce a vinculo matrimonii, for alleged adultery of plaintiff, the opinion and decree below was that plaintiff had not clearly proven his allegations, and should take nothing, and that his bill be dismissed, and that the allegations of defendant's answer and cross-bill had not been clearly proven, and that she should take nothing thereby, and that her said cross-bill be also dismissed.

Plaintiff has appealed, and defendant has assigned cross-error in this court. The record is voluminous, and includes the depositions of numerous witnesses. There is no conflict in the evidence as to the fact of desertion by defendant. Not only is it distinctly charged in the bill, and admitted in the answer, but it is fully proven by numerous witnesses, including the father and mother of defendant, with whom she and plaintiff resided from the date of their marriage in November, 1896, until August, 1906, when she deserted him, with the declared purpose never to again return as his wife. She first went to Clarksburg, where her brother resided, the plaintiff following her on the same train as far as Grafton, in an effort to induce her to return. This she declined to do. Plaintiff sent his mother-in-law to Clarksburg, there, to try and induce her daughter to return, and before she died, pending this suit, she testified on behalf of plaintiff, that with pleadings and tears she had endeavored, without avail, to get her daughter to go back home to her husband. Defendant did, however, that same evening, follow her mother back to Wheeling, going directly to the home of her aunt, Mrs. Taylor, and the following evening, in company with a Mrs. Brannen, left for Reno, Nevada. Learning of her departure, plaintiff, at his own expense, sent his sister-in-law, the wife of defendant's brother, who resided at Clarksburg, out to Reno, to again try to induce his wife to return to him. This effort also resulted in failure. Later, in November following, plaintiff wrote defendant, at Reno, urging her to return, proposing any fair terms, and inquiring on what terms she would be willing to come back to him. To this letter she replied, December 6, 1906, in a very characteristic way, that she would return on the following conditions, namely, that he would furnish and maintain for her a home in town; that she should have the privilege of going and coming, when, where, and with

whomsoever she pleased, with right to entertain whomsoever she desired, and that her actions were not to be criticised, or questioned either by him or by any one else; that her rulings regarding Dorothy, the little daughter, should be supreme; that the relationship of husband and wife should not exist, except in name only; that she should have her own room, and that there should be no trespassing therein, unless invited, and that she should be clothed and furnished with spending money consistent with her station in life; and after chiding him for alleged disrespect, she adds: "For Dorothy's sake, I am willing to make what I consider a sacrifice and return under conditions above named, provided you forward me five hundred dollars, (\$500.00) with which to pay indebtedness and expenses to Wheeling."

Plaintiff did not accept this proposition. In January, 1907, however, defendant returned to Wheeling. Plaintiff first learned of her return by telephone message from his father-in-law, Mr. John Mendel, received at his place of business, saying that Mrs. Duncan had returned, and had gone to the school house, and taken Dorothy from school. On going out on the street he met Mrs. Duncan with the little girl, in company with a Miss Beall, coming down the street. He crossed the street and greeted her, took hold of the little girl's hand, and accompanied both to the house of Mrs. Taylor, the aunt, where he remained until evening. He says that after sending the child out of the room, he again tried to persuade Mrs. Duncan to return to his home, and again inquired of her as to the conditions on which she would be willing to go back and live with him. Her answer was, that he had her only terms in the letter she had written him from Reno. He told her that he could not accept those terms. After leaving her he procured his mother-in-law to go and see defendant, and to try to induce her to return, but she did not succeed. Mrs. Duncan remained obdurate. Later he sent his father-in-law, and the chief of police after the little girl, who got and took her to his home. Afterwards he brought this suit.

We think these and other facts proven, clearly establish desertion. If not, it would be difficult to make out a case of that kind.

But the rights of the parties then must be determined on the truth or falsity of defendant's charges of adultery, as showing good cause for desertion; and as grounds for the affirmative relief she seeks against plaintiff. She charges: First, that some time prior to August 26, 1906, and particularly about three months prior thereto, she received information of the misconduct and misdoings of plaintiff, but of which she had never heard the full particulars and details, until on August 24, 1906, when in her presence, he was accused thereof by Ida Brannen; that some three or four years prior to that time she had received information from her mother that plaintiff was then suffering with a venereal

disease, which he could not have contracted, except by adulterous conduct, her mother, as she alleges, then giving her, what seemed to be conclusive proof thereof, but of which she was not then satisfied; that some three months prior to August 26, 1906, she had learned that said charges were true, and that he was then not only suffering from that disease himself, but had communicated it to her, and from which she had suffered for a long time without knowing the cause, and had required the treatment of a physician; second, on information received prior and subsequent to said date, she charges that plaintiff, after his marriage, had been guilty of adultery with Florence Dilworth, and other women unknown to defendant, and that during the same period he had frequented houses of prostitution, and had conducted himself in grossly immoral and indecent manner on many occasions.

These are all the specific charges made by defendant in her answer; but without amendment of her pleadings she undertook to prove by Stella Fendt, a common prostitute, that in 1903, plaintiff had on several occasions been guilty of adultery with her while she was employed in plaintiff's laundry; and by Sue Ingham, another prostitute, and proprietress of a house of ill fame, she proved that since the institution of this suit plaintiff, on two different occasions, had been guilty of adultery with her. Her evidence was objected to, because relating to alleged transactions occurring subsequent to the suit. However, she fixes the time after she had been confined in a hospital with typhoid fever, and had returned home. She was almost positive that the first time was in April, 1908; later she swears it was in April. The next time she fixes about a month later, in May. The Fendt girl, who had been employed in another laundry before she was employed by plaintiff, says, that the first instance with her was at night, in plaintiff's laundry; the next time at an assignation house in Wheeling, to which plaintiff took her.

An effort was also made to convict plaintiff of improper relations with other female employees. This was a signal failure, for want of proof. The Fendt girl swore that plaintiff had had such relations with nearly all of his female help. The only one specifically mentioned was a young woman whose father had died, and whom plaintiff was seen taking to an undertaking establishment one day in his buggy. No proof was offered connecting him with any improper conduct with Miss Dilworth, as charged in defendant's answer.

Defendant is flatly contradicted by her mother, as to the alleged information obtained from her. She denies that she ever gave her any such information, or that it in fact existed. Both father and mother attest the good character and habits of plaintiff, and his kindness and devotion to his family and to them. The Fendt woman is

flatly contradicted not only by plaintiff himself, but by many corroborating facts and circumstances; also by the evidence of another female employee who swears that she worked with Miss Fendt, and that when the latter worked at night she worked with her, and went away with her; and the foreman and the time-book kept by him, showing extra time made by these two women, corroborate these witnesses. A young lady bookkeeper employed by plaintiff gives strong, direct and corroborating evidence contradictory of the story of the Fendt girl. An affidavit made by Miss Fendt at the instance of defendant's counsel, before her evidence was taken, is in conflict with her testimony on the witness stand, in some important particulars. Plaintiff swears that after his foreman had discharged Miss Fendt, she appealed to him to get her reinstated, and that when he declined, she told him, with an oath, that she would get even with him. She does not deny this. This fact is relied on to show motive on the part of this woman to swear falsely.

Respecting the Ingham woman, her testimony stands wholly unsupported. Plaintiff had some trouble with her about a laundry bill. He flatly contradicts her, and she is also contradicted by the driver of plaintiff's laundry wagon, who swears that he accompanied plaintiff on each visit to her house, to see her about the bill, and that at no time was plaintiff out of his plain sight while in the witness' house. Both swear that plaintiff requested the driver to follow him into the house, and not to allow him to get out of his sight, that because of the trouble he was then having with his wife, he feared he might be, as he has been, charged with improper conduct with this woman. Another fact stipulated by counsel, tending strongly to contradict this woman, and shown by the hospital records is, that she went into the hospital March 23, 1908, and did not leave until May 2nd, so that plaintiff could not have had his first intercourse with her, as she swears, in April of that year.

The strongest evidence in support of the defendant's cross-bill, is that of Dr. Plant. His testimony was objected to, on the ground of his professional relationship to plaintiff. He seems to have given his testimony willingly, regardless of the objection. Plaintiff swears he discharged him from service, and afterwards had some trouble with him in connection with one Johnson, at his laundry. Dr. Plant's testimony in substance is, that in the fall of 1903, correcting himself he said, in the summer of 1903, he was called to see the plaintiff, and found him suffering from a catarrhal condition of the sexual organ, which he pronounced gonorrhœa, and that upon a microscopic test, he found the germ gonococcus in this discharge; that he also found evidences that the plaintiff had been previously treated for the same disease. He also swears that two or three weeks after this he was called to see Mrs. Duncan, professionally, and that

he also found her suffering with an inflammatory condition of the uterus, ovaries and fallopian tubes, and the presence of gonococcus in her vaginal discharges; that he informed plaintiff of these facts, and that upon his advice arrangements were made to take her to the hospital, for an operation. Plaintiff, while admitting that Dr. Plant was called by him, and afterwards by his wife in this professional way, yet he swears that he stoutly protested at the time against the diagnosis of Dr. Plant. He says that he had never in any way subjected himself to the dangers of such disease, and that he had not communicated it to his wife. He admits that, urged by Dr. Plant to do so, he had gone with him to the hospital and looked at a room, which would be satisfactory in case an operation was found necessary, but that on that occasion he had distinctly told the doctor he would not permit his wife to go to the hospital for such operation, without the consultation and advice of one or more other physicians, that an operation was in fact necessary. He then or soon afterwards demanded of Dr. Plant his bill for services rendered, and called Dr. Frank L. Hupp, a reputable physician, who made an examination of plaintiff's wife, and who pronounced the discharge not gonorrhœa, but leucorrhœa, with which he testified most women suffer, more or less, after childbirth, and with which plaintiff testifies his wife had suffered ever since the birth of her child, Dorothy. On the advice of Dr. Hupp Mrs. Duncan got out of bed, went about her duties, took treatment from him, and while Dr. Plant gives it as his opinion that she is still afflicted with gonorrhœa, Mrs. Duncan herself does not pretend to be seriously afflicted in any way. She continued thereafter to reside with her husband, until she broke off her marital relations, as alleged, in August or September, 1906. And it must not be forgotten, that the defendant charges in her cross-bill, that her mother, some three years previous, had given her information which amounted to conclusive proof, that plaintiff was then suffering with a venereal disease. After getting this information she continued to live and to cohabit with him as his wife, without complaint, so far as the record shows.

Respecting the opinion of Dr. Plant, as to the nature of his malady, plaintiff further swears, that a day or two after Dr. Plant had expressed his opinion, he called Dr. N. D. Jobes, who, after an examination, gave it as his opinion that the plaintiff did not have gonorrhœa, but that his trouble was the temporary result of injuries received shortly prior to that time, from the falling of a box upon his back, evidenced by severe bruises, which he found there, and which yielded readily to external treatment, prescribed by Dr. Jobes; that within a week's time the trouble was gone, and that he has not from that day forward suffered from that or any like malady. Dr. Jobes, as a wit-

ness for the plaintiff, fully corroborates him. He did not make a microscopic examination, as Dr. Plant professes to have done, but states it as his opinion, after an examination of the discharge, and from the manner in which it yielded to treatment, that the plaintiff was not afflicted as Dr. Plant had advised.

There is much evidence of other witnesses, pertaining to the conduct of plaintiff and defendant, and reflecting their relationship to each other, and more or less pertinent, but which it is impossible to detail in a judicial opinion, and we are satisfied, as was the court below, that the defendant's charges against her husband are not sustained, and that her cross-bill was properly dismissed.

Another circumstance, not heretofore mentioned, has impressed us, that is, that the immediate cause of defendant's breaking off matrimonial relations, with plaintiff, and deserting him, does not seem to have been his alleged infidelity, of which she says she had obtained information by her mother months before, amounting to conclusive proof. The immediate occasion of her going away was the objection her husband, and her father and mother all interposed, the night before she left, to her going off with young unmarried men, in company with Mrs. Brannen, to a fishing club, in an out of the way place, and returning with them late at night. After Mrs. Brannen had left, to use the defendant's own language, "Mr. Duncan and I went upstairs, and he was still scolding quite a good deal, and I told him that things now were all over between us; that I never intended to live with him again as his wife, and would leave the next morning." In this conversation, she does say that Mrs. Brannen accused the plaintiff of being untrue to her, to which he replied that she was "talking about things she didn't know anything about," but that as he did not more specifically deny Mrs. Brannen's accusations, she interpreted what he did say to be an admission of its truth. This Mrs. Brannen, who is a cousin of defendant, and the woman with whom she traveled to Reno a few days afterward, was not examined as a witness on either side. The evidence convinces us that this woman was the disturbing element in this family. It was from her home, in Reno, that defendant made her declaration of independence, in her letter to her husband of December 6, 1906.

We are very reluctant to disturb the decree of the court below in a divorce proceeding, and particularly so, coming as this one does from the hands of so able and painstaking judges, as those of the circuit court of Ohio County; but we have a duty to perform as well as they. The plaintiff sought relief on the ground of desertion. Desertion is admitted and fully proven. It was incumbent upon the defendant, if she would defeat the plaintiff, or sustain her grounds of cross

relief, to prove her charges of infidelity. This the decree below says she did not successfully do. On the evidence, we are of the same opinion. If then the plaintiff has proved his case, and the defendant has failed in the proof of her allegations against him, we do not see how we can withhold from him the relief prayed for. We must look at this case as we do at all other civil causes. We must determine the rights of the parties in the same way, based on the pleadings and proofs, giving them their full legal force and effect. We do not see how we can justly deny plaintiff relief.

No legal propositions have been argued or presented for decision. The case involves no new legal principles. Our conclusion is to reverse the decree below, in so far as it denies plaintiff relief and dismisses his bill; and to enter such decree here as we think the circuit court should have entered, adjudging the plaintiff entitled to the relief prayed for, and that plaintiff and defendant be divorced a mensa et thoro, as prayed for in his bill.

(69 W. Va. 619)

PERRY et al. v. McDONALD et al.

(Supreme Court of Appeals of West Virginia.  
Oct. 31, 1911.)

(Syllabus by the Court.)

1. QUIETING TITLE (§ 1\*)—WHEN SUIT IS MAINTAINABLE.

The holder of the true superior title to land which is in his actual possession may maintain a suit in equity to remove from his title the cloud of a claim by another under an inferior title.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

2. QUIETING TITLE (§ 12\*)—JURISDICTION—POSSESSION.

That the possession relied on by a plaintiff in a suit to remove cloud was taken in the night time, or for the purpose of bringing suit, when no prior exclusive possession was disturbed or tortious act committed, will not deprive equity of jurisdiction.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. §§ 8-12, 44, 45; Dec. Dig. § 12.\*]

Appeal from Circuit Court, Summers County.

Bill by Mary A. Perry and others against George R. McDonald and others. Decree for plaintiffs, and defendant McDonald appeals. Affirmed.

Chafin & Bland and Vinson & Thompson, for appellant. Ragland & Greene and Campbell, Brown & Davis, for appellees.

ROBINSON, J. In this suit for the removal of cloud from title to land, the bill sets up a superior title in plaintiffs as against an inferior one in defendant and alleges that plaintiffs are in actual possession. On the hearing of the cause, from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the pleadings and proofs, the court granted plaintiffs the relief sought. The decree in their behalf is, by defendant's appeal, challenged as erroneous.

There is no merit in the assignment that the court erred in overruling the demurrer to the bill. Defendant argues that the bill does not aver that the title of the party whose superior deed is relied on by plaintiffs is now vested in them. This point is not well taken. The bill sufficiently shows that plaintiffs are the heirs of the grantee in this deed, and that the title is now in them by descent.

[1] Defendant further contends that no such suit as this one can be maintained. That a party in actual possession of land may, by a suit in equity, remove a cloud from his title is too well settled to be discussed here. "One in actual possession of land under superior title may go into a court of equity to remove the cloud over his title arising from a claim under color of title thereto by another under an inferior adverse title." *Whitehouse v. Jones*, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49.

[2] The mere fact that plaintiffs went into possession of the land in the night time cannot defeat their right to rely upon that possession as a basis of this suit. The act was not unlawful or tortious. Defendant has not shown that he was in absolute possession at that time. The only possession on his part prior to the entry of plaintiffs was by occasional acts of taking a little coal and cutting timber therefrom, throughout a great number of years. He exercised no exclusive possession. The land was open. It had not been taken in by the enclosure of defendant or by actual, exclusive and continuous occupancy on his part. Entry thereon could be made without ousting him; for he was not in complete possession himself. Under such circumstances it cannot be said that the entry of plaintiffs was forcible, tortious, fraudulent, or unlawful. It is true that the possession which gives jurisdiction in suits to quiet title must be such as was acquired in a legal way, and that possession wrongfully obtained by force or fraud will not suffice. 32 Cyc. 1341. The facts presented in the case before us, however, plainly do not show a violation of that principle. They do not show a wresting of the possession from defendant. An exclusive prior possession was not disturbed, and tortious acts were not committed. It is immaterial that possession may have been taken for the purpose of instituting suit. *Kraus v. Congdon*, 161 Fed. 18, 88 C. C. A. 182; *Apperson v. Allen*, 42 Mo. App. 537.

Plaintiffs proved that they were in actual possession of the land and that they were the legal owners thereof by a title superior

to that under which defendant claimed. The decree asserting their title and annulling defendant's deed is a rightful one, and, therefore, will be affirmed.

(68 W. Va. 653)

FRENCH v. BENNETT, Judge, et al.  
(Supreme Court of Appeals of West Virginia.  
Oct. 31, 1911.)

(Syllabus by the Court.)

1. MANDAMUS (§ 81\*)—TO COURTS—REFUSAL TO TAKE JURISDICTION.

If an inferior court refuse to take and exercise jurisdiction of a case, when by law it has jurisdiction, mandamus will be awarded to compel it to do so.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 74, 75; Dec. Dig. § 31.\*]

2. ELECTIONS (§ 275\*)—CONTEST—JURISDICTION—COUNTY COURTS.

The county court of Fayette county has jurisdiction of a contest for the office of judge of the criminal court of that county, and the circuit court of that county has jurisdiction of an appeal therein.

[Ed. Note.—For other cases, see *Elections*, Dec. Dig. § 275.\*]

Petition by Edmund R. French for writ of mandamus against W. R. Bennett, Judge, and others. Writ awarded.

W. E. R. Byrne and C. R. Summerfield, for petitioner. Dillon & Nuckolls, for respondents.

BRANNON, J. At the general election in November, 1910, John T. Simms was the Republican candidate for judge of the criminal court of Fayette county, and Edmund R. French was the Democratic and Independent Republican candidate. On the face of the returns French was elected, and on a recount of the ballots Simms was declared elected. French then instituted a contest in the county court, which sustained a demurrer and a motion to quash the petition and notice filed by French, and dismissed them on the ground that the office of judge of said criminal court was a state office and the county court had no jurisdiction. French appealed to the circuit court. The circuit court sustained a demurrer to the petition and notice of contest, stating in its order that its action was upon the ground that the office of judge of the criminal court of Fayette county is a state and not a county office. Thus it held that the court had no jurisdiction, and refused to proceed further and hear the merits of the contest. French has applied to this court for a writ of mandamus to require the circuit court to entertain jurisdiction of said appeal and proceed to hear and determine it.

[1] The first question is whether mandamus is the proper remedy. For Simms a volume of authority and argument is presented for the claim that a writ of error is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the proper remedy, and that mandamus does not lie. It has over and over been held that mandamus does lie where the inferior court refuses to take jurisdiction where by law it ought to do so. *Roberts v. Paul*, 50 W. Va. 528, 40 S. E. 470. True, a writ of error would lie in the case, but that does not exclude mandamus in a case where the inferior court refuses wholly to entertain the case on the claim of want of jurisdiction. *National Bank v. Burdette*, 71 S. E. 399; *King v. Mason*, 60 W. Va. 607, 56 S. E. 377. In order to shut out mandamus, the other remedy must be adequate under the circumstances of the particular case, as these cases hold. If we drive French to a writ of error we would have the delay of going through this court, and pending his writ of error the whole or material part of the term of four years would expire, and if he reversed the case he would have to go back to the circuit court and try the merits. If the term should run out pending his writ of error, it would be dismissed as a moot case, or the term may run out during the trial of appeal in the circuit court; whereas, mandamus compels the immediate trial of the appeal. But I repeat that mandamus lies when an inferior court ought to take jurisdiction, but refuses to do so. In such case mandamus speedily starts in motion the obstructed wheels of justice.

[2] Great length of argument by counsel and many authorities bear on the question whether the office of judge of the criminal court is a state or county office. As our Code, in chapter 6, § 3 (section 161), gives the county court jurisdiction for trial of contests for only county and district offices, and section 15 (section 173) provides a special tribunal for contests as to state offices, it is confidently insisted by counsel for Simms that the county court has no jurisdiction for this contest—indeed, that no court has, because it is a state office. We do not deem it material to decide this question. We are satisfied that the county court has jurisdiction to try this contest, and, as it has jurisdiction, the circuit court has jurisdiction of the appeal. The Constitution, in article 4, making general provisions as to elections, in section 11 (Code 1906, p. lix) says: "The Legislature shall prescribe the manner of conducting and making return of election, and of determining contested election." Therefore, it matters not whether an office has the character of a state or county office, a contest for it is regulated by statute, and if we can find a statute giving the county court power to try the contest we have in hand, it plainly has jurisdiction. This power is given by chapter 86, Acts of 1891, creating the criminal court of Fayette county. It provides for the election of a judge. It says: "Poll books for said election shall be prepared by the clerk of the said county court, and by him delivered to the commissioners, or some one of them, ap-

pointed to superintend the election on that day; and said election shall be superintended, conducted and returned, and the result thereof ascertained, in all respects as is provided for by law in regard to the election of county officers, and all the provisions of the law in regard to general elections shall, so far as applicable, govern and apply to elections held under the provisions of this chapter; and the result of said election shall be ascertained by the commissioners of the county court of said county, in the same manner as required in elections for county officers held under the general law; and within five days after it is ascertained, the result thereof shall be certified to the Governor, and he shall issue a commission to the person elected." Here we have it broadly provided that the result of such an election shall be ascertained, in all respects, as is provided for by law in regard to the election of county officers, and all the provisions of the law in regard to general elections shall govern and apply to elections under that act. I hold that ascertaining the result of an election includes a contest, since the general law of elections provides, not only for making out precinct returns and ascertaining the result from them and by counting the ballots, but for contests also. I hold that, when there is a contest, the result, the final result, is not ascertained until such contest ends. Its result tests the title of the office. Judgment therein declares the final result. In such case there is no result until the end of the contest. Look at the broad language above quoted from the statute. It says that the election shall be conducted and returned, and the result ascertained, in all respects, as provided by law in regard to the election of county officers, and all the provisions of law in regard to general elections shall apply to an election under this act.

As stated above, the Code provides that the county court shall try contests for county offices. Can we suppose for a moment that when the Legislature passed the act creating the criminal court, and made such broad provisions, saying that an election under it shall be conducted, returned, and the result ascertained in all respects as provided by law for county offices, and not only that, but all the provisions of law in regard to general election should apply, the Legislature did not know that the general law touching elections provided for the trial of contests, and did not intend to apply the law touching contests triable by the county court in such cases? Can we suppose for a moment that it intended to stop with the count of the precinct returns or counting of ballots, and leave contested election unprovided for? This is a remedial statute, and we must not give it a construction which will leave a contestant without a court for the trial of his case; for if section 3 of chapter 6 of the Code, giving jurisdiction to

the county court to try contests for county officers does not apply, then there is no tribunal for the trial of this contest, because the provisions of section 15 setting up a special tribunal for the trial of certain contests is limited to Treasurer, Auditor, State Superintendent of Free Schools, Attorney General, Judge of the Supreme Court and judge of a circuit court in its very letter. This would be a *casus omissus*, and courts in the construction of statutes never—almost never—allow a construction leading to this result. We cannot do so in this case in defiance of the language of the statute from which we have quoted. True, section 1 of chapter 6 does not mention the judge of the criminal court, but it provides contests for "any county or district office"; but the act establishing the criminal court of Fayette county says that the result of an election for its judge shall be ascertained as provided as to the county officers by general law. Thus it incorporates section 3, c. 6, into the act, makes it a part of the act, for the purpose of the act.

To give this act any other construction would be highly detrimental to public interest and administration. If we do not so construe this act, where is there any law for a contest as to an election for judge of the criminal court? To deny such construction would run counter to well-established rules of construction of statutes. In *State v. Snyder*, 64 W. Va. 660, 63 S. E. 386, we laid down the following principles: "A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject-matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." In *Hassen v. City of Chester*, 67 W. Va. 278, 67 S. E. 731, we find the following rule of construction: "That which is plainly within the spirit, meaning, and purpose of a remedial statute, though not therein expressed in terms, is as much a part of it as if it were so expressed." "Of two permissible constructions of a statute, one working manifest injustice and the other equity and fairness, the latter is to be adopted, upon the presumption that the Legislature did not intend the result flowing from the former."

It is even contended that the comprehensive provisions of the act under consideration are applicable only to the first election under the act. This position is wholly untenable on first view. The first section of the act establishes the court in permanence. The second section provides that on the

third Tuesday in May, 1891, and on the first Tuesday after the first Monday in November, 1894, and every four years thereafter a judge shall be elected. Is it not preposterous to say that all the provisions of that act ceased after the first election, notwithstanding that it provides for an election every four years? Is a part of the act enduring, and the other not? An election every four years, and no means of conducting it, returning it, and ascertaining its result? Notice in the quotations given above the language is that the general election law shall apply to "elections under the act"—using the plural, "elections." Here is a permanent act, without limit of duration. The only ground for this contention must be that section 4 provides a notice for the first election. That was designed only for the first election. That clause has no other office.

We award the mandamus.

(69 W. Va. 617)

LOBBAN et al. v. ELY et al.  
(Supreme Court of Appeals of West Virginia.  
Oct. 31, 1911.)

*(Syllabus by the Court.)*

FRAUDULENT CONVEYANCES (§ 162\*)—PARTICIPATION OF GRANTEE.

To maintain a suit to set aside a deed of trust as one made with intent to hinder, delay, or defraud creditors, it must be shown that the trustee or the beneficiary participated in the unlawful intent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 504, 505; Dec. Dig. § 162.\*]

Appeal from Circuit Court, Monroe County.

Bill by F. G. Lobban and others against Ralph H. Ely and others. Decree for defendants. Plaintiffs appeal. Affirmed.

Rowan & Meadows, for appellants. T. N. Read, for appellees.

ROBINSON, J. This suit is one attacking a deed of trust as being in fraud of creditors. There is a decree dismissing plaintiffs' bill. That decree is warranted by the record. We shall affirm it.

To maintain a suit of this character a plaintiff must show by a preponderance of evidence that the trustee or the beneficiary in the deed of trust participated in intent on the part of the grantor to hinder, delay, or defraud his creditors. "In this state the trustee in a deed of trust or assignment made to secure creditors is regarded as a purchaser for value, and in order to make void the deed, notice of the grantor's fraudulent intent must in some way be brought home to him or to the creditor." *Douglass Merchandise Co. v. Laird*, 37 W. Va. 687, 17 S. E. 188. See, also, *Baer Sons Grocer Co. v. Williams*, 43 W. Va. 323, 27 S. E. 345; *Merchants' Bank v. Ballou*, 98 Va. 112, 32

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715; 6 Enc. Dig. Va. & W. Va. Rep. 624. In this case it is not established that the trustee or the beneficiary participated in any such intent. It is not established that Crawford, the beneficiary, or Guinn, the trustee, intended to injure any creditor of Ely, the grantor, when the deed of trust was executed to secure a loan of \$700 in cash made by Crawford to Ely at the time. The slight inferences that Crawford so intended, arising from the mere circumstances presented, are not sufficient to establish the fact that he meant to hinder, delay, or defraud anybody, especially in view of his sworn testimony in the case. By no means can we say that the chancellor erred in pronouncing the decree. Even were the evidence more conflicting than it is, we could not reverse. "When the evidence relating to fraud is conflicting and tends to support the decree of the circuit court, such decree will not be disturbed unless plainly wrong." *Sibley v. Stacey*, 53 W. Va. 293, 44 S. E. 420.

(69 W. Va. 635)

**KELLEY-SPRINGFIELD ROAD ROLLER CO. v. COFFMAN.**

(Supreme Court of Appeals of West Virginia. Oct. 31, 1911.)

*(Syllabus by the Court.)*

**1. SALES (§ 440\*)—BREACH OF WARRANTY—EVIDENCE.**

On an issue arising upon a claim of recoupment for breach of an express warranty in a contract of sale of a piece of machinery which had been in use in the kind of work for which it was designed and constructed, at the time of the purchase thereof, testimony tending to show its efficiency while so used is admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261-1276; Dec. Dig. § 440.\*]

**2. EVIDENCE (§ 513\*)—OPINION EVIDENCE—CAPACITY OF ENGINE.**

Opinions of expert witnesses as to the capacity of an engine are admissible on the trial of an issue as to whether the article fulfills a warranty of capacity in the contract of purchase.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.\*]

**3. SALES (§ 440\*)—BREACH OF WARRANTY—EVIDENCE.**

On an issue as to whether a steam boiler complied with a guaranty of material and workmanship in a contract of sale, the testimony of witnesses concerning the method of getting out and testing materials for such boilers, employed in the manufacturing plant in which the machine in question was made, at a date a few years subsequent to that of the manufacture of the machine in question, is admissible.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261-1276; Dec. Dig. § 440.\*]

**4. SALES (§ 440\*)—BREACH OF WARRANTY—EVIDENCE.**

On a trial involving such issues as are stated above, arising out of a contract of sale of a secondhand machine, testimony showing the difference between the price paid for the

machine and the price of a new one of its class is admissible, as one of the circumstances under which the contract was made.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261-1276; Dec. Dig. § 440.\*]

**5. SALES (§ 440\*)—BREACH OF WARRANTY—EVIDENCE.**

Upon the trial of such issues it is also competent to show that the purchaser, after acceptance of the machine, hired it out, representing it to be first class in all respects, and received for its use compensation in an amount indicating conviction of its fitness for the use contemplated in the purchase thereof.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261-1276; Dec. Dig. § 440.\*]

**6. SALES (§ 439\*)—BREACH OF WARRANTY—BURDEN OF PROOF.**

Upon the trial of an issue, arising on a claim for recoupment for a breach of warranty in the sale of property, the purchaser carries the burden of proof, under the general rule requiring the party alleging a fact to prove it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1253-1260; Dec. Dig. § 439.\*]

**7. SALES (§ 439\*)—BREACH OF WARRANTY—NOTICE OF DEFECT—PRESUMPTIONS.**

Upon the trial of such an issue, the court may properly instruct the jury that, if they find the purchaser accepted and used the article in question and gave no notice of any defect therein, there is a presumption against the validity of his claim, unless they further find a satisfactory excuse for failure to give such notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1258-1260; Dec. Dig. § 439.\*]

Error to Circuit Court, Mercer County.

Action by the Kelley-Springfield Road Roller Company against W. H. Coffman. Judgment for plaintiff, and defendant brings error. Affirmed.

Ritz & Ritz, for plaintiff in error. D. E. French, for defendant in error.

POFFENBARGER, J. Upon an alleged breach of warranty, the plaintiff in error endeavored to scale down by recoupment the claim asserted against him in an action by motion in the circuit court; but the jury found against him, and he attributes the result to rulings of the court, admitting evidence, and giving instructions, which he insists were erroneous.

The demand was for a balance due on the contract price of a secondhand steam road roller, guaranteed "to be made of the best material and workmanship throughout and to do first-class work, if properly operated, and to be durable with proper care." Breach of this warranty was charged as matter of defense, with an averment of damage equal to the unpaid portion of the contract price, \$1,287.74. Defectiveness of the engine, part and parcel of the roller, considered in its entirety, constitutes the alleged breach. The notice says it was not of sufficient capacity to propel the roller so as to make it do first-class work, and that the boiler was not of good material, but was of inferior material and workmanship.

[1] Six of the assignments of error are based upon the admission of evidence over the objection of the defendant. As has been stated, the roller was a secondhand one. At the date of the purchase thereof, it was in use by the United States government at Huntington, a fact known to the purchaser. As tending to prove its fitness for the use for which it was constructed and sold, the court permitted two witnesses to testify that no complaint or charge of defectiveness was made by the government engineers who had so used it. This evidence, it is said, falls within the rule *res inter alios acta*, but it is not wholly foreign to the subject-matter of the contract. It relates to the machine and its condition and capacity at the time of the purchase thereof. We are unable to agree that it does not afford a reasonable presumption or inference as to the matter in dispute. It tends to show good condition of the machine when received by the defendant, as he got it just after the time it is thus shown to have been in good condition, and even at the time of purchase, for he bought it while in use by the government. The vital question in the case was the condition and capacity of the roller, and this evidence bears directly upon it. That other persons were interested in that subject at the time to which the evidence relates does not preclude the interest of the defendant in the same question at the time of the making of the contract. The condition of the machine at that time and immediately before was its condition at the time of the purchase. This is not an instance of wholly foreign and disconnected evidence.

[2] The admission of the opinions of two witnesses as to the capacity of the engine is a subject of further complaint. One of these was the president of the plaintiff company, a man of large experience in the manufacture of road rollers and thoroughly informed as to the character of the one in question. The other was a practical machinist and engineer of 25 or 30 years experience in his vocation. He had run the engine in question, to test its capacity and fitness for use. Both of these witnesses, therefore, were experts, and testified concerning a matter about which the opinion of an ordinary jurymen is obviously not as likely to be correct as that of an expert, though based upon full and complete facts material to the question. Under such circumstances opinion evidence is admissible. *Delmar Oil Co. v. Bartlett*, 62 W. Va. 700, 59 S. E. 634; *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669; *Montgomery v. Gilmer et al.*, 33 Ala. 116, 70 Am. Dec. 562; *Brownfield v. Railway Co.*, 107 Iowa, 254, 77 N. W. 1038; *Tremblay v. Construction Co.*, 169 Mass. 284, 17 N. E. 1010; *Davidson v. Railway Co.*, 34 Minn. 51, 24 N. W. 324; *Read v. Barker*, 30 N. J. Law, 378.

[3] Testimony of a witness respecting the method of manufacture of steam rollers

by the plaintiff company was objected to, and its admission is assigned as error. This objection is based largely upon the relation in time between the manufacture of the machine and the witness' observation of the method described and the manufacture of the machine in question; the latter being some six or seven years subsequent, and the witness having had no connection with the company when the machine was made. He says it was made either by the O. S. Kelley Company, whose plant the Kelley-Springfield Company bought out, six or seven years prior to the date of his testimony, or by said last-mentioned company; the latter he thinks. This testimony related particularly to the method of getting out and testing the materials for boilers. As the plaintiff either made this boiler or owned the plant in which it had been made, the testimony related to the method of manufacture by which presumptively the machine in question was produced. The difference in the dates was not unreasonably long. It is hardly probable a large manufacturing plant would greatly change its methods within that time. Presumptively its methods at the date of this testimony were substantially the same as those of previous years within a reasonable limit. It was proper, therefore, to let the testimony go to the jury for what it was worth in their opinion.

[4] The same witness was permitted to testify over objection that the cost of a new roller of the class of the one sold at the price of \$1,800, including a harrow, would be not less than \$2,900. This was a circumstance in view of which the contract was made, tending to show the defendant did not expect to get, nor the seller to furnish, a machine as good as a new one. In controversies involving the interpretation of a contract and its application to the subject-matter, the situation and purposes of the parties and the surrounding circumstances are nearly always admissible as evidence. Hence the court did not err in the admission of this testimony.

[5] After the delivery of the machine, the defendant himself used and tested it in his own work and then hired it out to a construction company for use in the building of about two miles of macadam road, in consideration of \$500. A witness testified to this fact, the use of the machine in that work and the particulars in which it appeared to be defective, the explanation and cause of its bad work, namely, inefficiency of the engineer in charge of it, the representation of the defendant that it was a first-class piece of machinery and a fine roller, and the payment of \$500 for its use. We do not regard the evidence of the payment as wholly foreign, irrelevant, or immaterial. It is a circumstance bearing upon the opinion of the parties to that contract as to the real character of the machine. Moreover, it is in the nature of an admission on the part of the de-

defendant that the machine was such as it had been guaranteed to be.

Two instructions, relating to the burden of proof on the issue made, and putting it upon the defendant, were objected to. The court did not err in giving these instructions. The defense was an affirmative one. It admitted the contract and agreed to pay the amount of money claimed, but charged a breach of the plaintiff's agreement, as the basis of a claim for deduction. Therefore the agreement or contract upon which the plaintiff based its action was not really in issue.

[6] The real issue was whether the defendant should have an abatement from the purchase price, and, to obtain this, he was bound to prove the fact alleged by him as the basis thereof. This conclusion accords with the general rule, putting the burden of proof as to any fact upon the party alleging it. *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; *Manufacturing Co. v. Wood*, 84 Mich. 452, 48 N. W. 28; *Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890.

[7] Another instruction, telling the jury a presumption against foundation for the defendant's complaint arose from his delay in making it until after the action had been brought and his failure to give notice of it, is a ground of further complaint. The views expressed in *Harman-Crockett v. Maddy Bros.*, 57 W. Va. 68, 49 S. E. 1009, do not sustain the objection to this instruction. The instruction disapproved in that case was susceptible of two constructions, one of which made the fact, stated in it, a presumption of law and conclusive. In discussing it, we said: "As the instruction is susceptible of two meanings, and the jury might, and probably did, give it a wrong interpretation, it is such an instruction as is calculated to mislead and confuse them." Although we added that it might be regarded as one upon the weight of evidence, and bad for that reason, it was really condemned upon the other ground. The instruction complained of here contains no language importing conclusiveness of the presumption. It is susceptible of but one construction, namely, that as matter of fact, not law, a presumption against the good faith of the objection to the machine arose from the long delay in making it. Moreover, it has a qualification not found in the instruction disapproved in the case relied upon, namely, belief of the jury that no satisfactory excuse for delay had been given by the defendant. So limited, the instruction merely called upon the jury to say whether the conduct of the defendant was consistent with good faith. Though his conduct did not bar his claim for damages, as it would have barred rescission, had he attempted to rescind, it was a circumstance entitled to such weight as the jury saw fit to

give it. The instruction said only that the fact, if proven and not excused, raised a presumption, but did not say how much weight it should have. This is allowable. *Brickwood, Sack. Ins.* § 194. The presumption stated accords with the following legal principle and consideration underlying it: "Of course, there is danger of fraud and false claims, even where there is an express warranty, when notice is not early given of the defect. It leads the buyer into temptation. Hence juries should listen to such claims (never presented when their falsity could have been ascertained) with great caution. The proof thereof should be more clear than if the buyer had acted with the frankness of an honest man, willing to allow his claims to be tested. This is so declared by courts, while the rule is maintained as to an express warranty as above stated." *Day v. Pool*, 52 N. Y. 416, 421, 11 Am. Rep. 719. See, also, *Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890. Instructions, fairly submitting presumptions are of frequent occurrence in our practice in both civil and criminal cases.

Though two installments for purchase money of \$600 each and the interest thereon were due at the date of the trial, the jury rendered a verdict for only one of them, accompanied by this recital: "There was the sum of \$600 not due from the defendant to the plaintiff of the purchase price of the roller referred to in the evidence." Rendition of judgment for the amount of the verdict is assigned as error in the petition for the writ of error, but it is not noticed in the brief. The verdict is certain as to the amount for which judgment was rendered. In a verdict and judgment for less than the amount due from defendant, there is no error of which he can complain. If the verdict in any way affected the rights of the parties as to the other installment, a matter as to which we now express no opinion, it was not prejudicial to him.

Finding no error in the judgment, we affirm it.

Affirmed.

(69 W. Va. 658)

CRESAP et al. v. BROWN et al.

(Supreme Court of Appeals of West Virginia.  
Oct. 31, 1911.)

(Syllabus by the Court.)

1. PARTITION (§ 32\*)—WHO MAY BRING.

When one person holds the legal title to land for the joint benefit of himself and others, all having equal rights in equity, any one of them may compel partition thereof at any time.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 83-86; Dec. Dig. § 32.\*]

2. EQUITY (§ 148\*)—BILL—MULTIFARIOUSNESS.

A bill for partition of the land by one of the equitable owners against his cotenants, including the one who holds the legal title, is not

multifarious because it prays for the cancellation of an alleged fraudulent conveyance of the growing timber on the land, made by the holder of the legal title, and also for an accounting by him of proceeds of other sales.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.\*]

### 3. TRUSTS (§ 192\*)—HOLDER OF LEGAL TITLE—RIGHTS OF COTENANTS.

Such holder of the legal title has no right to dispose of the joint property without the consent of his cotenants. The rights of all are equal in equity.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 192.\*]

### 4. VENDOR AND PURCHASER (§ 239\*)—PURCHASERS FOR VALUE.

A purchaser for value from such holder of the legal title, without knowledge of the latent equities of others, will be protected.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583-593; Dec. Dig. § 239.\*]

### 5. LIS PENDENS (§ 24\*)—BONA FIDE PURCHASERS.

The pendency of a suit, brought to settle the estate of an equitable joint owner of land, against his co-owner, who holds the legal title, and others, but which does not seek to get in the legal title, or to have the rights of such equitable owner in the land adjudicated, will not defeat the rights of a subsequent bona fide purchaser from the holder of the legal title. The purchase, in such case, will not operate to defeat any proper decree which the court may make in the suit, and therefore the doctrine of lis pendens does not apply.

[Ed. Note.—For other cases, see Lis Pendens, Dec. Dig. § 24.\*]

### 6. PARTITION (§ 86\*)—DECREE—SALE OF LAND.

In a suit for partition and for accounting of proceeds of land, it is error to decree all the proceeds to the cotenant who holds them, and to compensate the others by an abatement pro tanto from his allotment of land. Each cotenant should have his share in both land and proceeds.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 86.\*]

### Appeal from Circuit Court, Randolph County.

Bill by Gustavus J. Cresap and others against Nannie I. Brown and others. Decree for defendants, and complainants appeal. Affirmed in part, and reversed in part.

W. G. Bennett and Dent & Dent, for appellants. S. V. Woods and C. W. Maxwell, for appellees.

**WILLIAMS, P.** Judge John Brannon, Judge Samuel Woods, and C. J. P. Cresap were the equal owners of a number of tracts of undeveloped coal and timber lands situate in Barbour, Upshur, and Randolph counties, aggregating several thousand acres. The legal title was held by Judge Woods. The interest of Brannon and Cresap was a latent equity, but was never denied by Judge Woods in his lifetime, nor by his devisees since his death. The joint interest of all, and the trusteeship of Woods, appear from two declarations in writing signed by him, one held by Woods, and another by Brannon. They

are the same in substance, though differing a little in verbiage. The copy vouched by Woods' devisees bears date June 24, 1882, and after reciting how and from whom the lands were acquired, reads as follows, viz.: "For this land so purchased, John Brannon, C. J. P. Cresap and myself were to pay equal portions of the purchase money, and of all taxes and levies charged and chargeable thereon, and of all costs and expenses attending the care of the title thereof, and of all costs and expenses of every kind and character attending the surveying, dividing, selling, conveying and contracting the same, and every part thereof; and the proceeds of rents, profits and incomes thereof, shall be for the joint and equal benefit of each of us, share and share alike; and the following accounts are intended to show the details of all the matters arising out of the ownership of said lands." The accounts referred to in this paper do not appear in the record.

A number of small parcels of these lands were sold and conveyed to various persons by Woods in his lifetime, and some were sold by him which were not paid for, and not conveyed until after his death, when conveyances were made by his devisees. All three of the original owners are now deceased; Judge Woods, the last survivor, having died in 1897. All of them made wills, disposing of their respective interests in the aforesaid real estate.

Samuel V. Woods and J. Hop Woods were appointed administrators with the will annexed of their father, Judge Samuel Woods, deceased. Exercising the right which they claim their father had in, and exercised over, said lands in his lifetime, and having power of attorney from their codevisees, the administrators sold the standing timber on the lands to J. B. Moore and Henry Kepple for the cash consideration of \$10.50 an acre, and conveyed the same to them by deed, dated December 16, 1902. The deed was recorded in the clerk's office of Randolph county on January 27, 1903. The deed also granted the right to manufacture the timber upon the land, and to remove it therefrom.

Gustavus J. Cresap, Rachel R. Cresap, and Mary B. Cresap, three of the devisees of C. J. P. Cresap, deceased, brought this suit against the executor and devisees of Judge John Brannon, deceased, the administrators with the will annexed, and the devisees, of Judge Samuel Woods, deceased, and Nannie I. Brown, one of the devisees of C. J. P. Cresap, deceased. J. B. Moore and Henry Kepple and J. B. Calkins, now composing the firm of J. B. Moore & Co., were also made defendants.

The suit has a fourfold object: (1) To partition the remaining portion of said lands, consisting now of about 3,500 or 3,600 acres; (2) an accounting against the estate of Samuel Woods, deceased, for the proceeds derived

from sales of portions of said land; (3) to cancel the deed made to Moore and Kepple for the timber; and (4) to enjoin the cutting of timber.

The devisees of Judge Brannon answered and united in the prayer of plaintiffs' bill; so that the suit is really a controversy between the devisees of Brannon and Cresap, respectively, on the one side, and the devisees of Samuel Woods on the other, with the right of Moore and Kepple, who claim to be complete purchasers from the Woods devisees, without notice of the equities of the Brannon and Cresap devisees, to be determined as an incidental matter. Two amended and supplemental bills were filed, and demurrers were interposed to each of them on the ground of multifariousness.

A final decree was pronounced on the 20th day of November, 1908, decreeing that J. Hop Woods and Samuel V. Woods, acting for themselves and as agents and attorneys in fact for their codevisees, had a legal right to sell and convey the timber to Moore and Kepple, and confirming the deed made to them. The court had previously awarded an injunction, restraining any operations on the land by Moore and Kepple, but had subsequently so modified the order as to permit Moore and Kepple to proceed with the construction of a railroad which they had commenced to build upon the land, for the purpose of removing the timber. The final decree dissolved the injunction wholly, and directed a partition to be made of the land, and permitted Woods' devisees to retain the whole of the proceeds from the timber sale, but directed the commissioners appointed to partition the land to abate from the allotment to be made to Woods' devisees so much land as would equal in value the share of the money that would otherwise have gone to the Brannon and Cresap devisees. From this decree, the plaintiffs and the devisees of Judge John Brannon, deceased, have appealed.

[1.3] It is admitted by Woods' devisees in their answer that the Brannon and Cresap devisees, respectively, are equal owners of the land with themselves, but they claim the unqualified right to make sale of it whenever they may think proper. The only evidence of the trust which existed between Woods, Brannon, and Cresap is the written declaration which we have quoted above. That writing does not show that Judge Woods had any greater interest in, or control over, the land than either one of his co-owners had. So far as it can be determined by the written declaration, Woods was the trustee, holding the legal title for the benefit of all, with no prescribed duties to be performed by him. The fact that Judge Woods did make sales of the lands, and did make conveyances therefor, without his joint owners uniting with him in such conveyances, does not prove that he had the absolute right to do so without the consent and ac-

quiescence of his co-owners. Such sales and conveyances may have been made by virtue of an express agreement between them, relating only to those sales. But, even if there was no express agreement for the sale of those lands, the subsequent acquiescence in such sales, by Cresap and Brannon, would not prove Woods' right to hold the land indefinitely, and against the wish of his co-owners. They all had equal rights, and any one of the three parties at any time could have demanded a conveyance from Judge Woods for his undivided one-third, or could have compelled a partition. There is no evidence that Judge Woods had the unqualified right to sell. But, assuming that he may have had such right, it was not such right as he could pass by will to his devisees, but only a personal trust, in the nature of a power of attorney, which would end with his death. But Judge Woods simply held the legal title as a matter of convenience, and for the mutual benefit of all three owners; he was a dry trustee, with no duties to be performed which could not have been performed by either of the other joint owners, and with no extra compensation provided for such services as he might render for their joint benefit. The fact that the legal title was in him could therefore give him no greater right in, or power over, the land in equity than the others had. They had equal rights to the possession, and any one could compel partition.

Moore and Kepple claim to be innocent purchasers, without notice of appellants' equities. They paid cash for the timber, received a deed for it from Woods' devisees, and placed it on record, January 27, 1903. The declaration of trust, made by Judge Woods in 1882, was not recorded until February 7 and 9, 1903, on the 7th in Upshur county, and on the 9th in Randolph county. This writing was therefore not constructive notice to them. But it is alleged they had actual knowledge of appellants' equities. This allegation is denied, and we do not think the proof sustains it. There is some testimony that a map was used by Woods and Cobb, and shown to J. B. Moore while negotiations for the sale of the timber were pending upon which were the words "Woods, Brannon and Cresap Lands." Other witnesses deny that the map contained more than the words "Woods Lands." But, even if taken as true that the map did have upon it the words "Woods, Brannon and Cresap Lands," that alone would not be sufficient notice to the purchasers that persons, other than Woods' devisees, were interested in it. The words might well have been intended as simply descriptive of the land, and might have been so understood. The map itself is not before us.

It is insisted that Cobb knew of the joint ownership, and that he was Moore and Kepple's agent in the purchase of the land. This is denied by both Cobb and J. B. Moore, who

was the only member of the firm of Moore, Kepple & Co. who was in West Virginia and made an examination of the land, before the purchase was completed. Cobb was examined as a witness in behalf of plaintiffs themselves, and, being asked what he had to do with the purchase of the timber by Moore and Kepple, replied, "I assisted Mr. Woods in selling this timber to Moore and Kepple." J. B. Moore was asked what services Captain Cobb rendered to him in the purchase of the timber, and his reply was: "Capt. [Cobb] brought the land to us, or brought us to the land, rather. He had it for sale from Mr. Woods, and we bought it through him." This evidence tends to prove that Cobb was the agent of Woods, rather than the agent of J. B. Moore. Cobb not being the agent of Moore, his knowledge is not chargeable to Moore.

It is asserted that the recitals in the deed from the Smith heirs to Samuel Woods, made in 1874, would put a prudent man upon inquiry, which, if pursued, would have disclosed appellants' interest in the land. True C. J. P. Cresap and wife joined the Smith heirs in the execution of that deed, as grantors, but it is very clear that they did so for the express purpose of conveying the equity which Cresap then had in the land, and which he had acquired from the Smith heirs by virtue of the contract of sale which he had taken from them. The deed recites that Cresap had sold the lands to Woods, and had, by writing indorsed upon his agreement with the Smith heirs, "transferred the benefit of the said contract to the said Woods, who consented to accept the said lands upon the terms specified in said agreement and to pay for the same at the time and in the manner therein prescribed." That assignment was on the 21st of August, 1874, and the deed itself bears date the 27th of September, 1874. There was nothing in the language of the deed to indicate that Cresap retained any interest whatsoever in the land. The deed itself shows quite the contrary.

[5] Some time after the death of C. J. P. Cresap, who was the first of the three joint owners to die, his wife, who was made executrix, brought a suit in the circuit court of Randolph county for the purpose of settling her testator's estate. There were numerous defendants to that suit, among them John Brannon and Samuel Woods, and it is insisted, by counsel for appellants, that Moore and Kepple took title to the timber with knowledge of the pendency of that suit, in which appellants' interests were disclosed. No notice of *lis pendens* was recorded in the clerk's office of the county court, as provided by section 13, c. 139, Code 1906, even granting that the suit was a proper one for such notice, and the suit itself was not of such a nature that its pendency alone could operate to affect Moore and Kepple's rights. The common-law doctrine of *lis pendens* does not involve the principle of constructive notice,

but rests upon public policy, and grows out of necessity. It is the application of a rule intended to prevent the defeating of the judgment, or decree, of the court, respecting the rights of some party to the suit whose interest in land is therein litigated, and whose right is determined by the decree of the court, by the purchase of the land from a party to the suit, by a stranger, even though he has no actual knowledge of the pendency of such suit. The right to be protected must be directly involved, and must be such a right as the decree of the court intends to determine and protect. The doctrine has no respect for the rights of bona fide purchasers; in fact, it denies them any rights, and operates very harshly upon them; hence the law proceeds upon the principle of *strictissimi juris* in applying the doctrine, when the effect is to defeat the rights of such purchasers. 25 Cyc. 1452; *White v. Perry*, 14 W. Va. 66, and cases cited in opinion by Judge Green, on page 76.

The suit by Cresap's executrix was not brought for the purpose of obtaining legal title from Woods to Cresap's interest in the lands. There was no controversy over the title; the respective rights of Woods, Cresap, and Brannon were not the subject of that litigation. True the bill alleged that Cresap's estate had a third interest in the Smith lands, and that Woods held the legal title, but it prayed for no relief whatever with respect to those lands. It only prayed for an accounting, by Woods, for Cresap's share of the proceeds derived from previous sales. Woods answered, admitting that he held a number of unpaid obligations against purchasers of portions of the land, and averred that proceeds from sales, which had been collected, had either been paid to Cresap in his lifetime, or to his executrix since his death. So far as it appears, the decrees in the Cresap Case left the title and the interest of the respective parties in the joint lands just as they were before the suit was brought. It cannot therefore be said that the purchase of the timber by Moore and Kepple would have the effect to defeat, in any manner, the operation of the decrees which the court has made, or any which it may yet properly make upon the state of the pleadings in the Cresap suit, provided it is still pending. And, unless the purchase of the real estate, pending litigation, operates to defeat the decree of the court with respect to such real estate, the doctrine of *lis pendens* can have no application to bona fide purchaser, pending the litigation. The suit by Cresap's executrix did not directly affect the title to the land in question, and, moreover, was not intended to do so; and therefore the doctrine of *lis pendens* cannot operate to defeat the rights of Moore and Kepple, who appear to be bona fide purchasers. *Davis v. Christian*, 15 Grat. (Va.) 11; 25 Cyc. 1454, and numerous cases cited in footnote 54.

[2] The bill for partition is not multifid-

rious because it asks for an accounting against the Woods estate, and for the cancellation of the Moore and Kepple deed. Such relief is properly incidental to, and not inconsistent with, the suit for partition. Of course, a partition suit cannot be made a substitute for ejectment. But Moore and Kepple are privies in estate with one branch of the cotenants, and if they had had notice of appellants' equities their deed could have been properly set aside, as an incident to the partitioning of the land, under section 1, c. 79, Code 1906. *Humphrey v. Foster*, 13 Grat. (Va.) 653; *Rust v. Rust*, 17 W. Va. 901; *Hudson v. Putney*, 14 W. Va. 561; *Oecil v. Clark*, 44 W. Va. 659, 30 S. E. 216; Code of West Virginia 1906, c. 79, § 1. The demurrers to the amended bills were therefore properly overruled.

[4] Moore and Kepple's title was properly held to be good, but the reason assigned by the circuit court for so holding is erroneous. The court held that the heirs of Samuel Woods, deceased, had a right, under the trust agreement between him and his joint owners, to make sale, and that he passed such right to his devisees. But, as we have heretofore said, he had no such absolute right, but was bound to respect the wishes of those jointly interested with him, and whatever right to sell he may have had was a formal one, which terminated at his death. The true reason for holding Moore and Kepple's title to the timber good is that they were complete purchasers for value, without notice of appellants' equities.

[5] It appears that the price received for the timber was a fair and reasonable one at the time the sale was made, and that the Woods devisees acted in good faith in making it, believing they had the legal right to do so. The fact, however, that Moore and Kepple obtained good title to the land is no reason why the court should have allowed the Woods devisees to retain all that purchase money. The decree permits them to retain the entire proceeds of the sale, and compensates the other joint owners by abating from the allotment of Woods' share in the land an amount equal in value to the share of the others in the funds. This was clearly wrong. Woods' devisees admit the rights of the Brannon and Cressap devisees to participate in said fund, and in their answer, express their willingness to pay to them their respective shares, as soon as the amounts thereof can be properly ascertained. The decree should have directed an accounting for all the proceeds, whether derived from the sale of lands or timber, in which the three estates were jointly interested, and should have directed a partition of the remaining lands to be made among the three sets of devisees, in three equal parts, having respect to value, instead of in the manner provided. In respect to these matters, the decree will be reversed,

and in all other respects it will be affirmed, and the cause will be remanded to the circuit court of Randolph county for further proceedings in the manner herein indicated.

BRANNON, J., absent.

(69 W. Va. 481)

SMITH et al. v. MITCHELL.

(Supreme Court of Appeals of West Virginia. June 16, 1911. On Rehearing, Nov. 25, 1911.)

(Syllabus by the Court.)

1. STATUTES (§ 15\*)—ENACTMENT—READING OF BILLS.

A bill was introduced in the House of Delegates as House Bill No. 161, and the bill was introduced in the Senate as Senate Bill No. 99. The House bill was read duly and passed by the House and reported to the Senate. The Senate bill was read twice on different days, and on second reading the Senate substituted for it the House bill under the name of House Bill No. 161, and under that name it was read on another day and passed by the Senate. The bills were identical in title and matter. The bill passed by the Senate has been read in it three times as required by the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 12, 13; Dec. Dig. § 15.\*]

2. STATUTES (§ 15\*)—ENACTMENT—POWER TO RECONSIDER.

After a bill has been passed by the House of Delegates and reported to the Senate, and it has passed the Senate and been by its order sent to the House with report of its passage by the Senate, and the House refuses to return it to the Senate, the Senate cannot reconsider the vote passing the bill, as it has no possession or control over the bill, and its vote to reconsider will not impair the validity of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 12, 13; Dec. Dig. § 15.\*]

Poffenbarger, J., dissenting.

Petition by Homer Smith and others for mandamus to R. E. Mitchell, clerk of the County Court of Mason County. Denied.

Brown, Jackson & Knight, Mollohan, McClintic & Mathews, John L. Whitten, and Somerville & Somerville, for petitioners. Wm. M. O. Dawson, T. C. Townsend, and Rankin Wiley, for respondent.

BRANNON, J. Until the enactment of chapter 85 of the Acts of the Legislature of 1911, the council of the town of Point Pleasant had sole and exclusive power to grant license to sell spirituous liquors, without regard to the county court of Mason county; but that act took away this council power by the provision that "No license to sell at wholesale or retail spirituous liquors, wine, porter, ale, beer or drinks of like nature shall be granted by the council of said town. Such license shall only be granted by the county court in the manner prescribed by law." Upon the claim that this act is void, Homer Smith obtained from the town council a permit to obtain such a license, and, armed with this council order, he applied to R.

E. Mitchell, clerk of the county court, for a certificate of such license; but Mitchell refused to recognize the order of the council, and refused to issue the certificate requested. Thereupon Smith applied to the Supreme Court for writ of mandamus to compel Mitchell to issue to him the certificate to obtain such license.

In the argument before this court of this much contested case two grounds were urged for the contention that the act of 1911 is null and void, leaving still in force the former statute giving the council sole power to grant such license. One ground is that the bill was not read in the Senate on three days, as the Constitution requires; and the second ground is that the bill never finally passed the Senate so as to become a law.

[1] As to the claim that the bill was not read in the Senate on three days, the facts are: That a bill called "Senate Bill No. 99" was introduced into the Senate, and an exactly similar bill called "House Bill No. 161" was introduced into the House of Delegates. That House Bill 161 was regularly read and passed by the House, and reported to the Senate as passed by the House, is not questioned. Senate Bill 99 was read twice in the Senate. On its second reading the Senate substituted the House bill for the Senate bill, and under the name of House Bill No. 161 it was ordered to be read a third time, and on February 18th was read a third time and passed with its title. As stated, the title of the two bills were the same, the bodies the same, literally. For the purpose of the requirements that a bill shall be read three times, we may say that these bills are one, because they have the same title and the same enacting language. The purpose of this provision of the Constitution is to inform legislators and people of legislation proposed by a bill, and to prevent hasty legislation. The two readings of the Senate bill and the third reading of the substituted House bill did this, just as effectually as if the House bill had not been substituted for the Senate bill, and the Senate bill had been retained and read a third time and passed. Shall we give this provision so rigid a construction as to go beyond its purpose and defeat legislation? There is nothing so special in a constitutional provision as to justify this.

Will it be suggested that this was another bill, a substitute, not Senate Bill 99, and that this substitute should have been read three times? I would answer that we can hardly call it a substitute because it is identical in matter with Senate Bill 99. But, suppose even that the bills were not so identical, still the substitute bill, if so germane to the original bill as to be a proper substitute, would not have to go back and be read three times. A substitute is an amendment. "When a bill has been read and referred to a committee who have reported a substitute, having the same general princi-

ples, it is not necessary to the valid enactment of the substitute that it should be considered an original bill and read three times on the three different days." 28 Am. & Eng. Ency. L. 540. When a bill is amended, it does not call for re-reading. *People v. Thompson* (Cal.) 7 Pac. 142; 36 Cyc. 952; *State v. Dillon*, 42 Fla. 96, 28 South. 781; *Cleland v. Anderson*, 66 Neb. 261, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136.

*Capito v. Topping*, 65 W. Va. 588, 64 S. E. 845, 22 L. R. A. (N. S.) 1080, written by Judge Poffenbarger, is pointed authority for this. A bill having same title as act No. 40 of 1894 was introduced in the Senate as S. B. No. 23, read by its title, placed on the calendar for second reading, subsequently taken up upon second reading, read by title, and referred to a committee. The committee reported its action on Senate Bill No. 23, giving the exact title of the same. The committee reported the bill favorably by substitute. The bill was read by its title. Substitute adopted in lieu of original bill, and became S. B. No. 90. Bill as reported read by title. Subsequently S. B. No. 90 reported by the committee was put on its third reading, and read in full, then passed. Held, that the contention that S. B. No. 90 should have been considered an original bill, and read in the Senate three times on different days, once in full, was not well founded. *Board v. Fowler*, 50 La. Ann. 1358, 24 South. 809.

Take the case of *Miller & Gibson v. State*, 3 Ohio St. 475. "A bill after being read twice in the Senate was committed to a select committee, who reported it back with an amendment, to wit, 'Strike out all after the enacting clause and insert a new bill.' The bill as amended passed the Senate and House and became a law. The claim was made that the 'new bill' had but two readings in the Senate." The court said: "When it appears by the journals that a bill was amended by striking out all after the enacting clause, and inserting a 'new bill,' so called, it cannot be presumed that the matter inserted was upon a different subject from that stricken out, especially when the matter inserted is consistent with the title borne by the bill before amendment." The court relied upon a presumption that the substituted bill was the same with the original, and, being so, no three readings were required of the amended bill. In the present case the sameness of the Senate and House bills is apparent. The court further said in *Miller & Gibson v. State*, supra: "But for argument's sake, let it be admitted that the bill as amended was read but once in the Senate; is the act for that reason void? That, counting two readings before the amendment, and the final reading, the bill was read three times, is conceded, for these readings are shown by the journal, and it is also conceded that in



general three readings of an amendment are not necessary. But, inasmuch as the amendment in this case is styled in the journal a 'New Bill,' it is said that three readings were necessary. Why necessary? The amendment was none the less an amendment because of the name given it. It is not unusual in parliamentary proceedings to amend a bill by striking out all after the enacting clause, and inserting a 'New Bill.' When the subject or proposition of the bill is thereby wholly changed, it would seem to be proper to read the amended bill three times, and on different dates; but, when there is no such vital alteration, three readings are not required." That case is strong to show that such *ameness* dispenses with reading over again; strong to show that two readings of the Senate bill and one of the bill after substitution of the House bill make up three readings.

Nelson v. Haywood, 91 Tenn. 596, 20 S. W. 1, is of same effect. "A bill having been passed regularly by both houses was referred, upon a difference between the two houses as to certain proposed amendments, to a joint committee of conference. The committee reported as follows: 'Your committee of conference, to whom was referred S. B. No. 10, with House amendments, beg leave to report the accompanying bill in lieu of said bill and amendment, in which is embraced substantially all the provisions of both houses. Your committee deem it prudent to propose a bill in lieu, as the original bill has been much disfigured by amendment, interlineations, and erasures. Your committee asks that the bill offered be accepted and passed.' This redrafted bill of the committee of conference contained fewer sections and annulled some of the proposed amendments; the committee substituting compromise provisions therefor. The committee's report was concurred in by both the houses and the bill signed. The bill was not passed after its redrafting by the committee." "Held: The act was constitutionally passed and is a valid law. The committee did not report a new bill. They had authority to make such changes as would reconcile differences between the two houses. It was not necessary that this bill be passed upon three readings after the committee reported."

I believe it is not, and cannot be, claimed that the bill after passage by the Senate had to go back for concurrence of the House in the substitute, for the reason that the substituted House bill was not variant from, but identical in title and enacting matter with, House Bill 161. "An immaterial amendment need not in any way affect the substance. Where a reference to 'Thompson & Steger's Code' was stricken out, and the 'Revised Code of Tennessee' inserted in its place, both being the same book, it was held that there was not any substantial amendment requiring concurrence." Note 30. 36

Cyc. 956, citing Gaines v. Horrigan, 4 Lea

(Tenn.) 608. In our case there was no difference between the two bills save in name and number. Name and number are no part of the real bill, merely designating for convenience, and cease on passage, and do not appear in the published act. Judge POFFENBARGER lays down the rule that no bill can become a law in less than five days. 36 Cyc. 950, says: "A substantial compliance with a constitutional requirement as to the reading of bills is sufficient. \* \* \* The requirement that bills be read on different days in each house will not prevent the reading of a bill in one house on the day that it was passed by the other." A note there found says that, "when duplicate bills are introduced in both houses, the substitution and final passage of the House bill for the Senate bill on its order of third reading does not render the substitute bill obnoxious to the constitutional requisite that bills shall be passed on three different days in the Senate," citing Archibald v. Clark, 112 Tenn. 532, 82 S. W. 310. It is conceded that it may be read in one house the same day of its passage by the other. So held in Arkansas. 26 Am. & Eng. Ency. Law, 540, citing Chicot v. Davies, 40 Ark. 200. Does the requirement of three readings on different days in each house necessarily mean three days in one house, and three other days in the other house? May it not intend only that each house must have three daily readings, but the readings may be on the same days in each house, in case of a duplicate bill? When both houses have enacted the same words literally, why may we not say that both branches have agreed to the same words? The object is to let the members have notice of the measure by three daily readings. This is accomplished by three readings in each house, though on same days. The houses are distinct for this purpose. All that is required is the assent by the two bodies to the same thing. It has been constant practice in our Legislature to so proceed with duplicate bills. But we do not have to so say in this case.

Judge POFFENBARGER seems to say that our decision would allow a House bill to be read three days in the House, then go to the Senate, and there a substitute be adopted, and it then passed without three daily readings. By no means do we say so. In our case the duplicate bill was read three times in each house. The very same bill was so read. The bill for this purpose is not the mere piece of paper, but it is its contents that must be read. The contents are what is meant by the word "bill" in this provision of the Constitution. The duplicate was, under facts above stated, read three times on different days in each house. That is the case which we decided. Thus we come to the conclusion that the three readings required by the Constitution were had.

[2] Next, as to the second ground given for the invalidity of the act; that is, the

claim that the bill never became a law for want of final passage by the Senate. As stated above, the Senate passed the bill February 18th, and ordered its passage by the Senate to be reported to the House, and it was so reported. On February 20th the Senate adopted a motion to reconsider the votes by which it had ordered House Bill 161 to be read a third time and passed. The Senate passed an order requesting the House to return the bill to the Senate; but the House, in response to this request, on February 21st, refused to return the bill to the Senate, giving as its reasons that the bill had become a law, and passed beyond its jurisdiction. In response the Senate adopted a resolution insisting that its vote of reconsideration had the effect to undo its vote passing the bill, and insisting that the bill had not become a law, and insisting that it be returned to the Senate. The House did not order it returned to the Senate. On February 24th the Senate appointed a committee to call on the Governor and Secretary of State and request the return of House Bill 161 to the Senate, and to call on the House of Delegates and its Speaker and request such return. The committee reported that the Governor informed it that the bill had been delivered to him at 4:30 o'clock p. m. on February 20th, and that he had approved the bill and delivered it to the Secretary of State at 5:10 o'clock p. m., and, having so disposed of the bill, he had no further control over it. The committee further reported that it had demanded the bill of the Secretary of State, who replied in writing that he had surrendered it to the keeper of the rolls, and had no further custody or control over it. The committee further reported to the Senate that it had waited upon the keeper of the rolls, M. M. Neely, clerk of the House (who is ex officio keeper of the rolls), and informed him of the Senate's request for return to it of the bill, and he produced the bill, stating that he had that moment received it from the Secretary of the State, and stated that he would ask leave of the Speaker to return it to the Senate. The question whether it should be returned was again submitted to the House, and the House referred it to the judiciary committee, and it reported that it could not advise the House whether the bill had become a law, and that, whether a law or not, its validity could not be affected by retention of the engrossed bill. The House laid the report on the table. The House never ordered the bill returned. On February 20th the Speaker of the House wrote the Governor that the Senate had requested him to return engrossed House Bill No. 161 to the Senate; the Senate having reconsidered its action in passing it. The Governor on same date replied that the bill had been received by him at 4:30 p. m. on that date (February 20th) and approved by him at 5:10 p. m., and delivered to the Secretary of State.

So, the bill never returned to the Senate. After the Senate passed it, February 18th, it was on that date, by order of the Senate, reported to the House as passed by the Senate, and went to the joint committee of the two houses on enrolled bills, charged with duty to compare bills passed with their enrollment, correct errors, and present to the Speaker of the House and President of Senate, and then present them to the Governor for his action.

It seems that the bill was in the hands of this committee on the 18th after its passage by the Senate was reported to the House. Thus, it seems that this bill was passed by the Senate on February 18th, reported same date back to the House, went to joint committee same date for performance of its functions, was reconsidered by the Senate at 4 o'clock p. m. February 20th, presented to the Governor at 4:30 p. m. same day, approved and delivered to the Secretary of State at 5:10 p. m. same day, and on February 24th went to the keeper of the rolls. The question is: What is the effect of the action of the Senate reconsidering its passing House Bill No. 161? For Smith it is with confidence pressed upon us that such vote nullified the vote of the Senate passing the bill, and thus the bill wants passage by the Senate, and the bill never became an act, so as to be law. We do not question that a bill must be passed by both houses of the Legislature; but we say that this bill *was* so passed. This is so unless the vote of the Senate to reconsider did away with the Senate's passage of the bill. To sustain the view that such vote to reconsider works that result, we are cited to a provision of the Constitution, art. 6, § 24 (Code 1906, p. lix) that "each house shall determine the rules of its proceedings," and that under it there is a Senate rule saying that "it shall be in order for any member voting with the prevailing side to move a reconsideration of the same within two succeeding business days." That such motion may be made inside two days, under any circumstances. This rule has for its purpose a limitation of time upon reconsideration. It must be applied in practice conformably to general principles of parliamentary law governing reconsideration. A fundamental principle of that law is that, to enable a legislative body to reconsider a vote passing a bill, it must have control and possession of it. If it has performed its office upon the bill, and it has gone from its physical possession and control, it cannot reconsider. It has lost jurisdiction. The case is no longer in court. Neither a legislative body nor a court can act upon a matter not before it. This is fundamental. When the reconsideration in question in this case was voted, the bill had passed the House and Senate, had been sent back out of the Senate by its order to the House, and was in the files of the House,

which refused to return it to the Senate, or in the hands of the committee on enrolled bills, without power of return. The Senate had completed its function and ousted itself of jurisdiction. What is authority as to this? "This right to reconsider remains so long as the bill remains in the custody of the body proposing to reconsider, unless they have some special rule restraining the right to reconsider. The matter is still in fieri while pending before and without control of either house. And it is not an infrequent occurrence for one house, which has finally passed a bill and sent it to the other house, to request its return, *which being done*, the vote on its final passage is reconsidered. There must be a time when the right to reconsider terminates. And the same rule applies in the one case as in the other, and that is when the bill or law has passed from the custody or control of the department or body seeking to reconsider." *People v. Hatch*, 19 Ill. 283. In *Wolf v. McCaull*, 76 Va. 876, a joint resolution recalled a bill then before the Governor, but not acted on by him. The court held this recall void, the return of the bill by the Governor void because without authority, and the act had by operation of law become a law without approval. I have cited this case as authority for the proposition that to render reconsideration effective the bill must be yet in the possession of the body; the court saying: "When does the power of control over a bill passed by both houses close and determine? There must be a time in parliamentary proceedings when the controlling power of the legislative body must come to an end. If the General Assembly had the power to recall the bill, it must have been for the purpose of reconsideration, because no motion to reconsider it is in order unless the paper is before the body in which the motion to reconsider is made. Jefferson's Manual, 93." In *Allegany County v. Warfield*, 100 Md. 516, 60 Atl. 599, 108 Am. St. Rep. 446, conceding power of Governor to erase his approval, yet it is made dependent on the fact that the bill is yet in his custody. Jefferson's Manual of Parliamentary Law says: "After a bill, resolution, message, report, amendment, or motion upon which a vote was taken shall have gone out of the possession of the Senate," no motion to reconsider can be made. Section 42. I cite *People v. McCullough*, 210 Ill. 488, 71 N. E. 602, and *State v. Whisner*, 35 Kan. 271, 10 Pac. 852, for the proposition that, after the Governor has delivered the bill to the Secretary of State, he has lost power of recall. Why? The cases say he has no physical possession or control of the document. This is the test in such cases; so it is in our case. The cases are in principle subject to the same test.

For the proposition that to justify reconsideration by a legislative body it must still

have possession of the bill, a brief cites Croker's Procedure, 80, 182; *Hunneeman v. Grafton*, 10 Metc. (Mass.) 454; *Reed v. Acton*, 117 Mass. 384; *Bigelow v. Hillman*, 37 Me. 52; *Estey v. Starr*, 56 Vt. 690; *Marsh v. Scituate*, 153 Mass. 34, 26 N. E. 412, 10 L. R. A. 202; *Brown v. Winterport*, 79 Me. 305, 9 Atl. 844.

Great force is attributed in behalf of Smith to the case of *State v. Bank*, 79 Conn. 141, 64 Atl. 5. The case is widely different from our case, in that respect on which our decision as to this point rests, namely, the continued possession and control of the bill.

A bill passed both houses, but a motion to reconsider was made, pending and not disposed of, and, by mistake, without authority it was delivered by the clerk to the Secretary of State. The court as its reason said in words that: "While the bill was in the possession of the House and on the desk of the Speaker, the House had entertained a motion to reconsider." In our case the bill had left the Senate by its order; the Senate thus declaring that it had finished consideration of it.

Very clear it is that when a bill has passed both branches of the Legislature, and been approved by the Governor and filed with the Secretary of State, the bill cannot be later reconsidered or recalled by either or both branches, simply because the Constitution says that when so approved it is law. And further, after a bill has passed both branches and gone to the Governor for his action, it cannot be reconsidered or recalled by the Legislature, for the reason that it has ended its function and lost control and possession, the legislative department has acted on it, and it has gone to another department of the government, the executive, for its action. *Wolfe v. McCaull*, 76 Va. 876; 26 Am. & Eng. Ency. L. 548. The New York case of *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377, while the syllabus gives power to recall by the joint action of both branches, the opinion wholly denies the power. Under the last-mentioned principles, the reconsideration being abortive, the bill became an act, and no right to recall it by the Senate existed, and the bill became law.

Precedents or instances there are of the federal Senate and House where one body has, on request by another, returned bills or resolutions, just as there have been instances where Governors have returned bills presented to them, and the power silently conceded, as stated in 26 Am. & Eng. Ency. L. 548; but such concession would not make law. We have not before us what such bodies may do. We have the dry question of law whether, after the Senate had done with the bill, its vote to reconsider will nullify the passage of the bill; the House not consenting and refusing to return the bill, the Senate never repossessing itself of the bill. We thus do not have the question

whether the Senate could have affected the bill, had the House returned it. It had passed both houses. Could one alone nullify its past act of passage demanded by the Constitution, which passed act had taken legal effect by force of the Constitution? The well-considered case of *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377, and others cited in 28 Am. & Eng. Ency. L. 148, say one branch cannot recall from the Governor. Why can one branch, against the will of the other, recall from that other? It it does, it has no effect. We are not dealing with the question of courtesy between the houses, or what the House should have done. We know what it did do. It refused return of the bill.

As to "Recall" from the Governor. The House never joined in it, nor authorized the Speaker to do so. Where the Speaker's authority to do so? The Senate alone made a recall on February 4th. The bill had then been enrolled, signed by the Speaker and President of the Senate, approved by the Governor, filed with the Secretary of State. After all this, after all these proceedings, this court is asked to ignore it all and overthrow the act. We think this court would be going far, straining its legitimate powers, to do so.

Holding the act valid, we refuse the mandamus.

Above I have given the reasons moving the court in its decision of this case. Some time after writing those reasons, I became impressed, speaking for myself, with what was somewhat suggested in oral argument, and with a line of thought furnishing an additional argument or reason supporting that decision. An attorney for Mitchell made the point that the vote of the Senate passing the bill was never actually recalled. He said that, when the reconsideration was voted, the next question before the Senate was, "Shall the bill pass"; but that that question was never put, that vote never taken, and thus the original vote passing the bill stood. If so, that settles that the act is valid. At any rate, be that as it may, we have the fact that the Senate did once vote the passage of the bill; the fact that it did not by actual vote reject the bill after its vote to reconsider; the fact that the bill had before been reported back to the House as passed; the fact that it went to the joint committee and was enrolled and signed by the President of the Senate and Speaker of the House; the fact that it went to the Governor, and was by him approved, and, after the executive had finished its part in the enactment, was finally filed in the office of the Secretary of State; the fact that it went to the keeper of the rolls, the clerk of the House; and now, after passing through this curriculum or course of enactment, the court is asked, in a collateral proceeding, to overthrow the act. Without asserting that the failure to

vote a rejection of the bill left the original vote of passage still good, we do say that a court after such procedure cannot hold the act null and void. And further, if this is doubtful, then the rule, that before a court can hold an act invalid, the question must be clear, is alone enough to deny the mandamus.

If there had been no vote of the Senate passing the bill, the case would be different. While some cases say that a court cannot inquire whether a bill was passed by both legislative houses when approved by the Governor, the preponderance of law is that the judiciary may look to the journals to see whether the Constitution has been in this respect complied with; but that is not our case, for the journal of the Senate shows compliance with this requirement, everything regular, the only question being as to the effect of the vote to reconsider. We are asked to enter into details of procedure in the Legislature, to inquire into regularity or irregularity, and pronounce that the vote to reconsider, without further reconsideration, nullifies the Senate's former action, passing the bill; to pronounce that the action of the lawmaking powers, legislative and executive, is irregular not only, but goes to the extent of nullifying the act. A court cannot usurp this function. It is a well-known principle that, if a court has jurisdiction, mere irregularity or error in the course of procedure does not make its action wholly void. Shall we say that this irregularity avoids this act; that the Legislature having sole jurisdiction has erred, and thus rendered the act void? If a court cannot do this in judicial actions, much less can it review the various steps of a Legislature.

Mandamus refused.

POFFENBARGER, J. (dissenting). Deeming this decision and the opinion upon which it stands palpably unsound, and wholly unsustained by any real authority, I dissent, and would grant peremptory writs of mandamus in all of the nine cases, commanding the clerk of the county court to issue the certificates of license.

The question for this court is not one of license or no license. It is merely one of constitutional law, and nothing here involved calls for deviation from the plain letter of the Constitution or the settled construction thereof. The doctrine of the opinion has never been adopted by the Legislature of this state or any other, so far as I am able to see. On the question of reconsideration the two houses utterly disagreed; the Senate demanding the right always previously exercised by each house, with the acquiescence of the other, and the House denying it. That the action of the Senate, in the case of the bill here involved, was in accordance with settled practice, is not denied by anybody. It cannot be. That practice makes

legislative law, which this court has no right to ignore, nor to allow one of the two bodies to abolish without the concurrence of the other. Moreover, that practice and law seem to be uniform in all American legislative bodies, including the Congress of the United States. Those who will take the time to read this necessarily long opinion will find that nothing stands to the contrary of this conclusion, not even dicta, much less decision or reputable text.

I make no apology for the length of this opinion. Proper settlement, in a few words, of questions of the number, magnitude, and intricacy of those involved here, is impossible, and an attempt to do so amounts to a dismissal without adequate consideration or effort.

In discussing the first question, whether the bill on which the case turns, published as an act of the Legislature, had the three constitutional readings in the Senate, we must not lose sight of the purpose of the clauses of the Constitution, prescribing an exclusive mode of passing laws, nor the elements of that method. The Legislature consists of two separate and distinct, but co-ordinate, houses, each having its own membership, its own organization, its own records and journal, its own officers, its own exclusive place of deliberation and action, in which its authority is practically unlimited, and its own complete and exclusive jurisdiction within its sphere. They necessarily act separately in passing bills and resolutions. The jurisdiction of one necessarily excludes the other. They therefore cannot act upon the same thing at the same time. To become a law, a bill must pass both houses. Nobody can gainsay this. It cannot pass either house otherwise than in the constitutionally prescribed manner. It must be "fully and distinctly read, on three different days," or, "in case of urgency," this rule must be dispensed with "by a vote of four-fifths of the members present, taken by yeas and nays," and entered upon the journal as to any bill passed in a different way, and the rule cannot be so dispensed with for more than one bill at a time. This is indisputable. The purpose of these provisions is best shown by their inevitable results. First, the journals of the two houses, not one, must show the passage of any given act, or it is no act. It can stand on no other foundation. Full and complete journal entries of one house do not suffice. Passage by one is not enough. Neither the Legislature nor the courts can give an act any other foundation or provide it any other substructure. The journals are made by the organic law, the sole and exclusive evidence of the existence of a statute, when the question of its enactment is carried to a final test. While some courts deny these journals the status of evidence, to be considered on such a question, this court has sol-

emnly and repeatedly declared, not only that they are, but also that they are the best, controlling, and conclusive. In other words, some courts say they cannot go back of the signatures of the presiding officers of the two houses and the enrollment and impeach an alleged or apparent statute by showing lack of passage by either house; but that is not law in this state. Here, failure of the journal of either house to show passage of the alleged act is fatal. Passage by each house must affirmatively appear on its own journal and not otherwise. "Just as good" plans or schemes are inhibited. Substitution of equivalents is positively forbidden. Shilly-shallying, surprise, ambuscade, and uncertainty are completely, wisely, and justly fenced out. As these requirements are simple and apparently arbitrary, and the necessity or justification thereof is neither self-evident nor always perceptible by the masses of the people, occasional complaint of the restriction they impose is reasonably to be expected from interested and over-zealous people, when their hopes, purposes, and expectations fail by reason of noncompliance therewith.

The reason for the other clause of the Constitution, prescribing the mode of passage through each house, is likewise discernible in the result of its operation. The two houses are separate but co-ordinate bodies, as I have stated. The constitutional plan is to pass bills through these two houses successively. They do not act at the same time upon the same matter, and cannot in the nature of things. The jurisdiction of one excludes that of the other, for the time being, just as occupancy of space by one body excludes therefrom all others. The Constitution, therefore, plainly requires successive passage of bills through them. A bill originating in the House must have its three days there and then its three days in the Senate. This aggregate of six days for passage through the two houses may be cut to five by giving the House bill its first reading in the Senate on the day of its final passage by the House; but five days necessarily constitute the minimum period. This period of time and this order of action by the two houses are contemplated and imperatively required, unless the constitutional rule is set aside by a vote of four-fifths of the members present in one or the other of the two houses, and, when it is so set aside, the fact must appear by a yeas and nays vote entered upon the journal. One of two things must appear from the journals in the case of every statute. Five days must have been consumed in consideration thereof on the floors of the two houses, acting successively, or the requirement must have been dispensed with in a prescribed manner. Thus, in all ordinary cases, five days at least are required for the passage of a bill through both houses and as many

more as result from omission to bring it up in either house for consideration by reason of neglect, choice, or impossibility due to the pendency of other business. The obvious purpose of this is to compel devotion of a prescribed period of time and order of action to every bill that becomes a law, as a means of preventing hasty and inconsiderate action in the high and important function of making laws, affecting in every instance somebody's interests and in some way. Might a shorter period or a different course of action be as efficacious or sufficiently so? That is not a question for this or any other court, or the Legislature, or either house thereof. It was for the sole and exclusive determination of the people of this state in adopting the Constitution, and we have their decision. To hold compliance with this provision unnecessary, or to allow the Legislature to ignore or evade it, when the inhibitive power of the courts is properly invoked, is worse than judicial legislation, a thing wholly indefensible and unjustifiable. It amounts to judicial amendment of the Constitution itself, an assumption of power having no shadow or pretext of justification in law, reason, or morals.

The method of the alleged passage of House Bill 161, if sustained, reduces the minimum period for passage of a bill by both houses from five to three days, without a suspension of the constitutional rule in the constitutional way by either house. It may originate in one, have its three readings there on separate days and, on the day of its passage there, be transmitted to the other, there substituted for a similar or like bill, on second reading, and passed. This amounts to a plain, palpable, and radical violation of the constitutional plan. The public is thus denied two-fifths of the time allowed by the Constitution for aiding or resisting the enactment of laws. As I have said, somebody's interests are always affected in some way by every piece of proposed legislation. Those who are so affected have a perfect right to resist it by lawful methods. The Constitution guarantees to citizens the right of petition, and the clause thereof now under consideration was inserted to protect that right, as well as to prevent hasty action by either of the two houses of the Legislature. The new method breaks up and confuses both proponents and opponents in and out of the Legislature, dividing their time, attention, and efforts and cutting off two-fifths of the period of delay reserved by the Constitution for deliberation. To say this works no practical injury is not a logical or just answer to this obviously material abridgment or denial of a constitutional right, nor a reasonable exoneration from the charge of judicial amendment of the Constitution. The people made the Constitution and reserved to themselves the sole power of amendment thereof. To its provisions they made the legislative, the execu-

tive, and the courts subordinate, withheld from all of them the power of amendment, and allowed to the courts only the right and power of interpretation by the application of legal rules and principles. Though a man may be palpably guilty of deliberate murder by poison so that a jury could do him no possible good, the trial court could not deny him a jury for that reason. A plaintiff in ejectment would be allowed to recover a mere worthless hole in the ground a thousand feet deep, or an utterly valueless rock pinnacle, though it were apparent the recovery could do him no sort of good. Legal principles forbid such a reply. Even though it be conceded that three days are as good as five for the constitutional purpose, the courts cannot alter the rule. The senators opposed to the bill in question were entitled to two days more of time to make their efforts successful, and the Constitution required both friends and foes of the measure to let that time elapse before passing it. Had that been done, it might never have even ostensibly passed the Senate—certainly would not have done so, for, on the second day after its alleged passage, the sentiment of that body had so far changed as to carry a motion to reconsider the vote of alleged passage, and to have formally rejected the bill, if the House had returned it as it should have done. So the new method, if sustained, has passed a bill which could not have passed under the constitutional plan.

That House Bill No. 161 and Senate Bill No. 99 were identical in language and provision is a matter of no significance or import whatever. They were nevertheless separate, distinct, and strange bills. One was a House bill and the other a Senate bill. Until the date of the transmission of the House bill to the Senate, these two bills could by no possibility have been in the same house, notwithstanding the identity of their subject-matter and terms. They were as purely distinct as two bills in equity, identical in subject-matter and terms, filed in courts of different states. Identity of bill does not, cannot, result from identity of matter. That is a legal impossibility. The name and identity of a bill are determined by reference to the house in which it originates and in no other way. The House bill could not constitutionally pass the Senate otherwise than as a House bill. It was passed, if at all, under that name, number, and description. The Senate bill was laid aside—name, number, and all. As a House bill, the Constitution required three readings thereof on separate days in the Senate. The two previous readings of the Senate bill constituted no compliance with this requirement. Those readings were not readings of the House bill. The House bill was not then in the Senate and had not reached a legislative stage, authorizing it to be sent there. It was neither actually, legally, nor potentially in the Senate at that time. The utmost that

can be said is that, while the House was deliberating on its bill No. 161, the Senate partially considered another bill, having the same purpose. That was not action on the same bill. Obviously House Bill No. 161 had only one constitutional reading in the Senate, erroneously described as its third reading. Thus technicality, logic, and constitutional purpose all agree that the new method is unsound.

The possible suggestion of lack of express terms in the Constitution, inhibiting circumvention of its plain purpose, as opposing this view, is met by the stubborn fact that it fixes the period of deliberation, manifesting indubitable intent and purpose. What is within the intent of a statute or contract is a part of it and cannot be judicially eliminated. The same rule applies in the interpretation of Constitutions. That which is clearly within the intent of the people in adopting a Constitution can be neither legislated nor adjudicated out of it. Express terms are not necessary. "It is not always necessary, in order to render a statute invalid, that it should contravene some express provision of the Constitution; if the act is inhibited by the general scope and purpose of the instrument, it is as much invalid as though prohibited by the express letter of some of its provisions." 8 Cyc. 729. The soundness of this proposition is apparent, for the reason that the rule of liberal construction applies to Constitutions. The rule of strict construction is applied only to penal statutes and contracts. When the purpose of a constitutional provision, not penal in character, is ascertained, it must be enforced, just as in the case of statutes and contracts. A Legislature can no more defeat a constitutional purpose by shifts, devices, and subterfuges than it can nullify plain words by such makeshifts. "The established rules of construction applicable to statutes also apply to the construction of Constitutions." 8 Cyc. 729. The majority opinion narrows the purpose of this clause, saying it is only "to inform legislators and people of legislation proposed by a bill, and prevent hasty legislation." I say it does more than that. It gives legislators and people five days' time for effort, for and against the proposed legislation. Why give information without time to make the information subserve some purpose? We are not asked to give the provision a construction "so rigid as to go beyond its purpose, and defeat legislation." I am unable to perceive the harmony of these two quotations from the same opinion. If this five-day period was given to "prevent hasty legislation," the public and legislators are entitled to the whole thereof, not barely more than half of it. The provision contemplates more than mere notice. Each of the three readings required is for a purpose well defined in parliamentary law. If notice were the only purpose, that could be given more ef-

fectively in other ways, as by publication. The vital question here is whether there has been legislation, not whether legislation is to stand or fall.

An exhaustive search has disclosed but a single precedent for the position taken by my Brethren on this branch of the case, and that is a poorly considered decision in *Archibald v. Clark*, 112 Tenn. 532, 82 S. W. 310. The opinion in that case, on a question of such importance, consists of a few printed lines, in which no reference whatever is made to the purpose of the constitutional clause, the wide scope of its operation, or its wholesome effect as a safeguard against reckless legislation. The court contents itself with the simple observation that the legislative practice in that state justifies the construction it gives that clause. In so doing, it wholly ignores the legal principle inhibiting variation of plain terms in any instrument, even a simple contract, by conduct or contemporaneous or practical construction, and also the almost universally accepted doctrine that constitutional provisions are mandatory, and the obvious necessity of so regarding them, since to hold them merely directory is to authorize the Legislature to ignore them at will. This precedent is not binding authority upon this court nor in harmony with the principles applied here and throughout the country generally in the interpretation of Constitutions. The constitutional clause in question is mandatory. *Price v. Moundsville*, 43 W. Va. 523, 27 S. E. 218, 64 Am. St. Rep. 878; 26 A. & E. Enc. L. 539. "The great majority of all constitutional provisions are mandatory, and it is only such provisions as, from the language used, in connection with the objects in view, may be said to be addressed to the discretion of some person or department, that courts have held to be directory; and these provisions in most cases have been those addressed to the legislative department with reference to the mode of procedure in the enactment of laws as above stated. But provisions of this kind will be treated as mandatory if the language used justifies it, even though the proceedings to which they refer are but formal." 8 Cyc. 762. By every legitimate test, the provision of our Constitution, concerning the reading of bills, is mandatory. The effectuation of its obvious and high purpose demands the construction. It is mandatory in form, saying "no bill shall become a law until it has been fully and distinctly read, on three different days in each house," unless, etc. Then the requirement can be dispensed with in only one way. This is positive, direct, and emphatic language, leaving no room for evasion in any form. The doctrine of this court on this subject is expressed in *Capito v. Topping*, 65 W. Va. 587, 64 S. E. 845, 22 L. R. A. (N. S.) 1089, as follows: "Being organic in character, constitutional provisions stand on a higher plane than statutes, and, as a rule, are

mandatory, prescribing exact or exclusive times and methods of doing acts permitted or required." The following language of the opinion in that case applies well here: "It (the provision there under consideration) is alternative and emphatic, saying, if a certain thing is not done, another shall happen. Unlike many other provisions, it does not stop with the prescription of the affirmative act, leaving the consequence of failure to inference. It declares the sequence." That is the real meaning of the language of this clause. If a bill is read on three different days in each house and passed, it becomes a law; but, if this be omitted, it cannot do so, unless such readings are dispensed with in the prescribed manner. I here apply this doctrine or principle of construction, not in refutation of any express declaration in the Tennessee case, or the majority opinion in this case, to the effect that the clause is directory, but rather to demonstrate that the decision cannot be justified or sustained upon that ground, as well as to show the high and sacred character of constitutional provisions and the spirit in which they are dealt with by courts.

As already stated, the lone Tennessee case professedly stands upon the doctrine of practical, contemporaneous, or legislative construction. That doctrine cannot be justly invoked here for two reasons. The uniform legislative construction in this state has been the other way. Substituted bills, originating in the house other than the one making the substitution, have always been treated as separate or new bills in the substituting house and given their three readings on different days after substitution, until the session at which the bill in question here is alleged to have been passed. If the doctrine applies, this clause has been so construed as to make the action on this bill ineffective to pass it, for almost a half a century. In the second place, the language and purpose of the clause is clear, plain, and free from ambiguity, wherefore the principle is wholly inapplicable. *May v. Topping*, 65 W. Va. 656, 664, 64 S. E. 848.

The majority opinion raises a vital question as to the character of the action of the Senate in substituting the House bill, without pausing to settle it by the application of any legal principle, namely, whether, by that action, the House bill became an amendment to the Senate bill or a new or original bill in the Senate. Identity of terms in the body of the two bills is suggested as a ground of incompatibility with the theory of substitution. The opinion says, "We can hardly call it a substitute because it is identical in matter with Senate Bill? Then an hypothesis is stated and an assumption made. Supposing it to be a substitute, the opinion says "A substitute is an amendment," and then follows the legal proposition that a bill need not go back for repeated readings after an amendment. If identity

of matter precludes the legal view of substitution, it certainly precludes the legal theory of amendment. An amendment necessarily implies a change or alteration as to matter. Manifestly identity of matter is more inconsistent with the idea of amendment than that of substitution. Substitution does not necessarily involve an alteration as to matter, but amendment does. For mere convenience of expression, the action taken by the Senate may be, and such action often is called either or both, but, in substance and effect, it was neither. In law, fact, and logic, the Senate laid aside its own bill and proceeded to consider the House bill. If there was an amendment or substitution, it was not one, made in the form or under the conditions, attendant upon those considered in the opinions cited by Judge BRANNON. Every one of them was an amendment or substitute, made in the regular course of constitutional procedure. Not one of them was the substitution by one house of a bill passed by the other. In each and all the amended bill had its three readings in both houses, not three in one and only one in the other, as in this case. Such were the character and attendant circumstances of the substitute, to which the text incorrectly quoted from 28 A. & E. Enc. L. 540, applies. Such were the amendments and substitutes in *People v. Thompson* (Cal.) 7 Pac. 142; *State v. Dillon*, 42 Fla. 96, 28 South. 781, and *Cleland v. Anderson*, 66 Neb. 261, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136, and the text in 36 Cyc. 952.

Judge BRANNON says in his opinion the amended bill in *Board v. Fowler*, 50 La. Ann. 1358, 24 South. 809, had its three readings in the Senate, where it was amended by substituting a new draft of it made by a committee. Does he mean to say the other house had not previously, or did not subsequently, give the same bill its three readings? Of course he does not. He speaks only of what occurred in the Senate, assuming the procedure in the House to have been regular and unquestioned. Such was the character of the amendment or substitute involved in *Miller & Gibson v. State*, 3 Ohio St. 475. Judge BRANNON correctly says so. As the bill had had its three readings, the court said it was immaterial that its terms and provisions were altered in the course of the readings. Parliamentary readings are provided for the very purpose of perfecting bills by alteration. In that case, the court said the name given the substitute, "New Bill," was an immaterial matter. It was none the less an amendment. This language from the opinion makes the position of the court clear: "When the subject or proposition of the bill is thereby wholly changed, it would seem to be proper to read the amended bill three times and on different days; but, when there is no such vital alteration, three readings are not required." This says only that three readings after amendment



are not required. It does not say three readings or any readings of the bill may be dispensed with. *Nelson v. Haywood*, 91 Tenn. 596, 20 S. W. 1, involved nothing more than the validity of the adoption of a conference agreement by both Houses, settling differences between them, arising upon a bill regularly and successively passed by each, after its three constitutional readings in each. The only other authorities cited by Judge BRANNON, as applicable to this branch of the case, are note 30, 36 Cyc. 956, and *Gaines v. Horrigan*, 4 Lea (Tenn.) 608, dealing with the necessity of concurrence in an amendment. That has nothing to do with a case of the kind of substitution we have here. The doctrine is there applied to a bill that had had its three readings in the House of its origin and then three additional readings in the other.

Whether such of these decisions as dispose of substitute bills are sound may be very well doubted. A substitute is not a simple or ordinary amendment. What we have here is in reality neither a substitute nor an amendment, I repeat; but, if it were, it would be more than a mere amendment. In congressional procedure it is called an "amendment in the nature of a substitute," and treated as an original bill. "Under the practice of the House for many years, where a substitute is reported by a committee for a bill, the substitute alone is considered; the original bill being without objection laid on the table. If there be objection, then the original bill is sent to the proper calendar, and the proposed substitute treated as an 'amendment in the nature of a substitute.' The substitute is read a first and second time, is numbered, and becomes to all intents and purposes an original bill. This has been found much more convenient than the old practice when bills were not printed as now. Formerly it was the practice to treat a substitute as an 'amendment in the nature of a substitute,' viz., by striking out all after the enacting clause and inserting the matter proposed or recommended by the committee in lieu of that referred." *Con. Man. Dig. Rules & Pr. 2d Session 50th Cong. pp. 491, 492.* The details of the old practice are not so fully indicated as those of the new; but, as the new is simpler and involves additional readings as in the case of an original bill, the old must have involved that and something more. As general parliamentary law requires a substitute to be treated as an original bill, we may well say the framers of the state Constitution contemplated such treatment. In using the word "bill" they meant a bill in the parliamentary sense, and, as a substitute, wholly wiping out original matter, not merely altering it, is in parliamentary law the equivalent of an original bill, it cannot reasonably be assumed they did not intend a substitute to be so treated. Parliamentary law as defined and administered in the national Congress is generally

observed and applied in the state Legislatures. Our own Legislature adopts the rules of the national House of Representatives. So do other Legislatures, possibly all of them. The national Congress is confessedly the highest and best authority on the subject. Following it, I should say, notwithstanding the three or four state decisions, treating a substitute as an ordinary amendment, without even noting the radical difference between them, that a substitute is in all substantial respects an original bill, calling for the procedure on such a bill, and therefore a "bill" within the meaning of this constitutional clause.

While this conclusion as to the character of a substitute bill is, in my opinion, sound, it is not essential to the correctness of my view as to constitutional procedure on a bill passed by one house and substituted for another bill in the other house; but it harmonizes with the manifest intent and purpose of the constitutional provision and aids the effort to reach the true interpretation thereof. It expresses its reasons, intent, and spirit, constituting its substance. A bill passed by one house and substituted in the other is more than an amendment, more than a substitute, whatever the correct procedure as to amended and substituted bills may be. If an amendment or a substitute or both, it is in addition thereto a bill of the other house, falling under the constitutional rule requiring successive passage by the substituting house in accordance with a constitutional formula, to give the constitutional period of deliberation. Whatever we may say of the decisions relied upon in the majority opinion, not one of them shortens that period or violates the constitutional reservation of time. Therefore, conceding them to be sound, for the sake of argument, they constitute no basis for the position this court has taken. This very core or heart of the question is not noticed by the majority opinion.

This decision permits the Legislature to clip off 40 per cent. of the constitutional period of legislative deliberation, not for anti-saloon legislation only, but for all sorts of legislation, affecting life, liberty, industry, society, property, taxation, religion, and every other subject within the pale of legislative authority. This clause cannot be construed in one way for one class of legislative bills or acts and in a different way for other classes. Its interpretation for one is its interpretation for all. The people, in adopting the Constitution, put in this clause as a safeguard against hasty and inconsiderate legislation of all kinds, and so prescribed an arbitrary rule, deeming it to be necessary. This decision opens the door wide to the accomplishment of legislation by strategy, confusion in division of forces between the two houses, surprise, and accident. It displaces a single, plain, orderly, consistent and uniform method with a double, confused, indirect, and uncertain one. If

this does not amount to deviation, injury, and abridgment of constitutional right, I am unable to comprehend an infraction of a constitutional guaranty.

For these reasons, I am firmly of the opinion that the bill never constitutionally passed the Senate, nor became a law, nor reached a stage authorizing enrollment, or signature by the presiding officers of the two houses or the Governor, or publication as an act of the Legislature.

But, for the purpose of argument, conceding it to have had three readings in the Senate, as well as in the House, reconsideration by the Senate of the vote by which it had passed, within the time allowed therefor by Senate Rule 52, rendered it a bill unpassed by the Senate, and as ineffectual as if it never had been passed. The contrary of this conclusion is asserted chiefly on the ground or claim that the Senate had lost jurisdiction to reconsider by communicating its passage to the House and permitting it to be enrolled and signed by the Speaker and the President of the Senate. The contention is based upon what I am constrained to say, with due deference, is a misapprehension of the meaning of observations in Jefferson's Manual and certain decisions and some dicta, but no actual decision of any court. Jefferson's Manual was prepared by Thomas Jefferson between the year 1796, when he was elected Vice President and was soon to enter upon his duties as presiding officer of the United States Senate, and the expiration of his term, March 4, 1801. Those were embryotic days of American parliamentary law. It had not been settled or perfected in any sense. The Manual was a mere text-book, founded largely upon English parliamentary law, in which reconsideration was unknown, as the Manual itself says. Section 43. It is not to be expected that everything he then wrote on the subject of reconsideration has been accepted, and, in fact, it has not. To a limited extent only, his Manual was adopted by the House of Representatives September 15, 1837, and not earlier. Its principles and rules were adopted in all cases in which they were applicable and "not inconsistent with the standing rules and orders of the House and the joint rules of the Senate and House." That work recognizes the right of reconsideration under general American parliamentary law in the absence of a special rule on the subject. Whenever the general doctrine of the Manual conflicts with the special rule, the rule prevails. That is expressly provided by the resolution of adoption. Jefferson's view of the general law, not a rule such as is involved here, was stated as follows: "The rule permitting a reconsideration of a question affixing to it no limitation of time or circumstance, it may be asked whether there is no limitation? If, after a vote, the paper on which it is passed have been parted with, there can be no re-

consideration; as if a vote has been for the passage of a bill, and the bill has been sent to the other house." It was no more than mere speculation, conjecture, or opinion as to limitations then undefined. He cited no precedent and does not assert that a vote of passage cannot be reconsidered after the bill has been sent to the other house. He merely instances that as an example under his supposition or personal view. When, in the course of their legislative experience, it became necessary for the two houses of the Congress to settle and determine this question, both settled it in a manner contrary to Mr. Jefferson's view, by providing for reconsideration of any and all questions carried or lost, and have interpreted and applied these rules so as to include votes by which bills have been passed, after the bills have gone out of the possession of the houses. The House rule says: "When a motion has been made and carried or lost, it shall be in order for any member of the majority, on the same or succeeding day, to move for the reconsideration thereof," etc. The Senate rule says: "When a question has been decided by the Senate, any senator voting with the prevailing side may, on the same day or on either of the next two days of actual session thereafter, move a reconsideration," etc. Neither of these rules says in express terms the right of reconsideration thereunder shall extend to a vote by which a bill has passed, when the bill has gone out of the House, but both houses decide that the right extends to that class of votes and under those circumstances. See Con. Man. Dig. Rules & Pr. House Rep. 54 Congress, p. —.

Both houses of the national Congress, the best expositors of parliamentary law in America, have decided that there is no such implied limitation upon a rule making every question the subject of reconsideration, as this court here asserts, upon mere supposed dicta of courts, not deciding any such question, and acting in cases not involving it or a legislative decision thereof, and the observation of Mr. Jefferson in his discussion of general law and not the interpretation of any express rule on the subject. The second section of Senate Rule 13, assuming the general terms of the first section above quoted to be broad enough to include such a reconsideration as was had in this case, says: "When a bill, resolution, report, amendment, order or message, upon which a vote has been taken, shall have gone out of the possession of the Senate, and been communicated to the House of Representatives, the motion to reconsider shall be accompanied by a motion to request the House to return the same, which last motion shall be acted upon immediately, and without debate, and, if determined in the negative, shall be a final disposition of the motion to reconsider." This is a mere limitation upon the right to reconsider a vote of passage, after

communication of the fact to the House, arising under the first section of the rule, already quoted, saying any question decided may be reconsidered. Its purpose is to dispose of two questions by one vote in order to save time. Nor does it submit the question of recall to the House. On the contrary, it assumes duty and obligation upon the part of the House to return the bill, should the motion to reconsider prevail. The pleasure of the House is not considered. The House rule has no such additional provision. It reconsiders and then recalls the passed bill from the Senate. The digest of the Fifty-Fourth Congress expressly says this is the practice under the House rule in just such cases as this. It also says the House may reconsider without having the papers pertaining to the subject-matter of the vote to be reconsidered before it. The text of the digest I refer to says, in such case, the bill is recalled after the adoption of the motion to reconsider the vote by which it was passed, and then the form of the resolution of recall is given. This is plain, ordinary English, insusceptible of variation in meaning. These are the precedents of which the majority opinion says: "Precedents or instances there are of the federal Senate and House, where one body has, on request by another, returned bills or resolutions." They go beyond that, saying that, under rules such as the one here involved, as interpreted by the greatest bodies of parliamentarians in America, a motion to reconsider the vote by which a bill has been finally passed is in order and may be acted upon and adopted and made effective after the bill has gone physically out of the House or Senate, as the case may be, and before its return. They completely cut the foundation from under the majority opinion, and utterly destroy the basis of the decision. No case can be found actually deciding that a motion to reconsider a vote of passage after the bill has left the House is too late. No court says so. Legislative, parliamentary law and practice say it is not too late. I agree that the question is one of law, but we must use applicable law, actual law, not inapplicable decisions, not mere speculation aside from cases in hand. Parliamentary law must be in or entirely out on this question. If Jefferson's Manual is to come in, the legislative practice under it must be considered also. It is only in for what it is worth, and, as it has been interpreted and applied by reputable parliamentary bodies, it does not override an express inconsistent rule. The precedents say the action of the Senate, in reconsidering its vote of passage, destroyed that vote, and the bill thereby became an unpassed bill, even though it was not then in the custody of the Senate, and that there is no such implied limitation upon the rule, governing reconsideration, as is here asserted; wherefore the refusal of the House to return the bill was wholly immaterial.

It might, in violation of duty, refuse to do so, but could not thereby tie the hands of the Senate or destroy its constitutional powers. Such refusal could only prevent further action on the bill by the Senate. The Senate rule, authorized by the Constitution, reserved power in the Senate to undo its vote of passage, no matter where the bill was, even though it were in the hands of the Governor. So says the Congress of the United States. The Senate, therefore, had passed the bill, subject to its reserved right to rescind its action, and did rescind it. If the House did not choose to return it and allow its friends in the Senate to attempt to pass it again, so much the worse for the bill and its friends. It could not arbitrarily and of its own strength make it law by its mere claim or declaration of opinion. I do not say the Senate could have compelled the House to return the bill; but the refusal of the latter to do so could not abrogate nor render ineffectual the Senate rule, reserving power to nullify the vote of passage. The bill, after that annulment, had not passed. That being its condition, it was no law. I agree that a law once fully and finally passed, and gone beyond the period reserved for reconsideration, cannot be recalled or annulled by one house and probably not by both, otherwise than by a new act of repeal; but that is not this case. This bill had never reached that stage. The only pretext for the contention that it had is the assumption of an implied limitation upon the rule, reserving right of reconsideration, and I have shown there is no such limitation. There being none, the reconsideration killed the bill before it got out of the power of the Senate. It, therefore, never so far passed the Senate as to become a law, for the approval of the Governor or any other purpose. In common parlance, there was "a string" to the Senate's vote of passage, attached and retained by that body under authority conferred by the Constitution of the state, saying, "Each house shall determine the rules of its proceedings." Senate Rule 52 says "any question" may be reconsidered. Could any language be broader. In parliamentary law and practice almost everything is called a question. The term "question" is broader than "motion," "resolution," or almost any other that could have been used. The presiding officer brings on a vote of final passage of a bill by the explanatory announcement, "The question is on the passage of the bill," and then puts the question by saying, "Shall the bill pass?" Does not this fall technically, lexically, substantially, rationally, and conclusively within the terms of a rule reserving to itself power to reconsider the vote on "any question"?

That power to reconsider under this rule extends to a vote passing a bill is not denied by my Associates. They only deny applicability or availability of the rule, because the bill was not physically in the Senate at the

time. The rule makes no such exception. On the contrary, the terms preclude it, saying a motion to reconsider any question may be made at any time within two business days thereafter. The two-day limitation is the only one. Its presence impliedly says there shall be no other. The Senate, having formulated and adopted the rule, gave its attention to the subject of limitations upon the power of reconsideration, and inserted one only. Presumptively, therefore, it intended no other. If it had intended such a one as is here claimed, the rule would have been made to read, "A motion to reconsider any question within two business days thereafter shall be in order or may be made, provided the bill on which the vote to be reconsidered was taken has not passed out of the custody of the Senate." The reading of a rule, having no such limitation, as if it had, must arise from some sort of necessity. What legal principle justifies it? Does the Constitution require it? No, there is no pretense of any constitutional term, clause, provision, or purpose requiring such a limitation or forbidding the scope of the rule, as plainly indicated by its terms. Is there a rule of public policy requiring it? None at all. Nobody has suggested, or is able to show, anything of the kind? Has any parliamentary body, except the House of Delegates in this one instance and contrary to its own practice for half a century, ever construed such a rule as being subject to such an implied limitation? Not at all. There is no reference to any such thing or anything else, calling for it. Now I respectfully submit that an implication must stand upon some reasonable basis, something other than the mere *ipse dixit* of a court. It is not the province of the courts to make law for a Legislature, nullify its rules or otherwise restrain what are so plainly its powers and rights that no reasonable ground for denial thereof can be stated. To justify either a limitation or an enlargement, by implication, the probability of intent to make it must be so strong that the contrary thereof cannot be reasonably supposed.

The interpretation of the constitutional clause, commanding "each house" to "determine the rules of its proceedings," and the rules adopted, pursuant to that mandate, must be evolved from consideration of the constitutional purpose, and the reasonableness and necessity of the rules, if any, as a means of securing mature and careful consideration of, and action upon, proposed laws, correction of errors and inadvertencies, and consequent protection of public and private interests and rights. The Constitution by this provision as to rules and others makes each house sovereign in its own sphere. No power on earth can compel it to yield its assent to any proposed law. It may pass or reject any bill at its own pleasure. No provision says its assent may not be given conditionally or subject to the power of recall.

Its absolute unrestrained, unlimited, and uncontrollable power to give or withhold its assent necessarily includes the power to give a conditional or qualified assent. The whole includes every part, the greater, the lesser. This is a proposition universally recognized in the sciences, in logic, and in law. The rule, reserving right to reconsider any question within two business days after the decision thereof, logically and necessarily qualifies the assent of the Senate to any bill, resolution, or other measure it passes. It passes subject to this power, not of recall, but rescission or annulment of its vote of passage. That done, the Senate stands ready to further consider the measure and recalls it for that purpose. If the House, favoring the measure, refuses to return it, its action affects it and its measure only. It does not thereby hurt the Senate or restrain its powers. That body can redraft and pass a new bill on the same subject in the same or different form. This interpretation of the rule reserves to the Senate its sovereign power over a matter completely and necessarily within its province. The effect of this decision is to enable either house, notwithstanding express reservation of such power to correct errors of any kind by the other, to prevent the exercise thereof. Prevention of the enforcement of such a rule by refusal to return the bill is tantamount to denial of the right and power of such other house. What can it avail either house to possess a power the other can prevent the exercise of? Such a power is no power. This decision, interpreting the action of the House in refusing to return the bill as a nullification of the effect of the Senate's vote of reconsideration, makes the power of the Senate to adopt and enforce that rule no power at all in the very teeth of the Constitution and despite its plain and emphatic terms.

And it does this unnecessarily. The retention of the bill by the House can be sustained without denial or abridgment of the Senate's powers, as I have shown. It defeated further consideration of the bill, without annulling the action of the Senate. Is not a vote passing a bill a proceeding of the Senate? Is not the rule for reconsideration a rule for, or relating to, votes; votes being proceedings? Are not the terms of the rule broad enough to include all of the Senate's votes? Does not the Constitution say, "Each house shall determine the rules of its proceedings"? Can that be read as authorizing the House to say what the rules of the Senate shall be, or the Senate to say what the rules of the House shall be, or how either shall construe its rules? Does not this decision plainly allow the House to determine for itself and its purposes the meaning and effect of the Senate's rule? The House had no part in the making of the rule. Under the Constitution it could not have. That instrument does not confer power upon both houses to make the rules for each. It con-

fers that power upon each for itself and not for the other. It says each house shall determine (make and construe) the rules of its proceedings. The language is a command to the Senate to make its own rules and to the House not to interfere in that action, and vice versa. Under the same authority, the House adopted a rule for itself on the same subject, and each of them, for more than four decades, interpreted, acted upon, and applied its own rule, just as the Senate did in the case of this bill, and each recognized such interpretation by the other as sound and binding upon it. To hold both houses to this settled construction of the reconsideration rule is the mere application of indisputably established principles. Assuming the rule to be joint and ambiguous as to the right to reconsider, under the circumstances here stated, though it is neither, the conduct of the two houses for so long a time settles the question in favor of the conclusion of the Senate. If two parties make a contract uncertain in its terms and provisions, and then, by their conduct, agree upon its meaning, their conduct, as matter of law, determines its construction. This case is much clearer and stronger. We have no element of contract or agreement here. The Senate, being sole maker of this rule, has the sole right to expound it. Its interpretation thereof has been uniform from the beginning.

Is there any reason or necessity for a rule, reserving such power of review and correction? Denial thereof is the assertion of the infallibility of men, their inability to err in judgment, immunity from involuntary action as the result of deception and fraud, and impossibility of oversight of clerical errors. It is to assert of legislators a higher degree of sagacity, mentality, alacrity, industry, and ability of every sort, than the members of this or any other court of last resort in this country is deemed to possess. All of them have acknowledged power to reserve right to rehear cases, after decision, and annul final decisions, when such action is necessary to the proper application of the law and effectuation of the legal rights of parties. Wise and perfect as judges are supposed to be, it is a principle of universal law that any court, trial or appellate, may alter its decision at any time before the adjournment of the term at which it was rendered. It is the practice of this court to suspend all of its final orders, judgments, and decrees, rendered close to an adjournment, for the allowance of the filing of petitions for rehearing, after the adjournment. Nobody has the hardihood to question the necessity, wisdom, or justice of these reservations of power to correct errors in final dispositions of cases. These are all single cases, most of them affecting only two individuals. The action of the Senate or House, in passing a bill often affects all the citizens of the state and always a large num-

ber. It does not merely decide a case; it makes a law for the state. It is an infinitely broader and graver transaction than the mere decision of a controversy between two citizens. In so far as precedents make law, it is of the same character; but erroneous precedents may be set aside by the courts. Erroneous statutes cannot be. In this analogy, emphasized by the difference in character between the two functions or processes, absolute and undeniable necessity for reservation of corrective power is found. I do not read the majority opinion as plainly asserting the contrary. It merely ignores the subject, and, in effect, denies the proposition.

The theory of the opinion, though not stated, seems to be that a branch of the Legislature cannot or should not, for some reason, reserve this power of correction by a general rule, holding all final votes for a very limited time, two days in this instance, but must decide, once for all, instant and at its peril, on the passage of a bill, whether it desires, or probably will desire, to reconsider the vote, and pass a special resolution or adopt a special motion, forbidding the ministerial officers from taking the bill out of the House. This is simply an assumption of power on the part of the judiciary to make rules for the Legislature, or tell that body how it must make them, which amounts to the same thing, in the face of a constitutional provision saying, "Each house shall determine the rules of its proceedings." In conferring that jurisdiction upon the legislative houses, the Constitution denied it to the courts. Which of two plans for accomplishing a legislative purpose is the better is not a question for any court. Having unlimited discretionary power over the subject, the Senate or House may make its own choice, and the court should be more willing to respect its action in so doing than that of petty ministerial or judicial officers, the binding force of which is here acknowledged daily. Moreover, I do not see how a court could complain of the adoption, by a legislative body, of the corrective plan or method, employed for the purpose by the court itself, if it had supervisory power over such body. All court decisions are subject to correction until the end of the term. The courts do not take upon themselves the inconvenience and labor of specifying, as they go along, what particular decisions are so far beyond suspicion of error, as to be safely allowed to become final and irreviewable, and what are not and so ought to be held open, and thus expose themselves to liability to do irremediable injury to litigants. This court has never done so. Its practice is exactly the contrary. Its general rule is to hold all; the rare exception to let one go beyond recall without allowing time for a petition to rehear. Legislative experience has settled the relative merits of these two plans; but, if it had

not, the court has no jurisdiction of the subject-matter.

Carrying the inquiry as to reason and necessity further, I note the radical difference between legislative action and other kinds. Entry into a contract is wholly voluntary and free from compulsion in any form. So is the action of every court. The Governor, in approving or disapproving a bill, has the matter wholly in his own hands. In none of these instances are there rules by which the actor can be hurried or forced into a hasty decision. Nobody can act for him in any manner, form, or degree. He takes his own time and registers his own deliberate conclusion. He is not surrounded on every hand by other pending measures, backed by energy, industry, and skill, eager to push them forward at every opportunity. The situation of the legislator is different. His time is not his own. It is everybody's. He must watch a hundred things at one time. He is surrounded with dangers on every hand and burdened with things innumerable to be done within very little time. He is in constant war, and as often on the defensive as the offensive. Under the quorum and majority rules, his measures may be defeated or those of his opponents advanced or passed in his mere momentary absence. A bare majority of a bare majority, a small minority of the whole body, may, in the temporary absence of members, necessary and unavoidable, rush a ruinous measure through one house, send it out to the other, and make the action irrevocable against the will of a large majority of the whole body, under the doctrine declared by this decision. Thus it opens the door to a species of legislative trickery and fraud, abhorrent and degrading on its very face, and possible of achievement despite the utmost diligence and faithfulness on the part of members. In view of such differences in character, circumstances, and possibilities, the reasons for holding the deliberate contracts of parties and actions of Governors and courts binding and irrevocable, after stated periods, fixed by common or organic law, do not apply to legislative bodies. It cannot truthfully be said the conditions and circumstances are the same. Hence the reasoning cannot be the same, nor can the cases be assimilated.

No case decides the question we have here in accordance with the majority opinion. It never has been done. It has been held that a Governor, after passing on a bill and placing it out of his possession, cannot withdraw or annul his action; but that is not this case. For that holding, there are the reasons I have given, inherent in the difference in situation and circumstances, and an additional, conclusive one; the emphatic language of the Constitution saying the bill shall be a law as soon as he has signed it. It does not say a bill shall be deemed to have passed a house as soon as

a vote of passage shall have been taken therein. The Constitution leaves it to the House to say when and how its action shall become final, by authorizing it to determine the rules of its proceedings. As to the Governor, there is no such provision. The rule declared by my Associates would irrevocably bind the house first passing a bill and sending it to the other, notwithstanding its continued pendency in the Legislature, as mere proposed legislation, not law. This doctrine converts the Legislature into a hoisting jack or capstan, with its ratchet, cogwheel, and pawl, falling successively into the cogs, and making every act irrevocable, whether the result of error, trickery, fraud, or what not. Why? No reason has been, or can be, given for it, and no authority, while all reason and all authority are against it. For finality and irrevocability of the click of the pawl in the jack or capstan, there is imperative reason. For the use of the equivalent of such an instrument in legislation, there is no reason. It can effect nothing but unintentional wrong, injury, and public humiliation and shame, as it would in the administration of the law by the courts. What sustains or applies it here, in the opinion of a majority of this court? No decision, no precedent, nothing but a mere fiction, suggested by a few judges, without investigation, and arising from misapprehension of the true import of their words. As the law of mechanics permits the introduction or use of no instrument or appliance, not reasonably necessary or useful, so the civil law allows no fiction and adopts no arbitrary rule, except for the effectuation of just, reasonable, and useful purposes. Against the adoption of this injurious fiction, I set up here the legal principle, just stated, and cite the authority for it. *Hussman v. Durham*, 165 U. S. 144, 17 Sup. Ct. 253, 41 L. Ed. 664; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. Ed. 534; *State v. Lumber Co.*, 64 W. Va. 673, 697, 63 S. E. 372.

Failure of analogy, so much relied upon, to sustain the position of the majority here, is almost as obvious as that of reason and authority. Final judgment and adjournment of the court ends the jurisdiction. Presentation of a passed bill to the Governor may be the beginning of another, like the granting of an appeal. But the situation of this bill at the time of the reconsideration was by no means like that of the judgment or the presented bill. Transmission out of the House is not a final act, and does not convert a mere legislative proposition into law. The jurisdiction of the Legislature has not ceased. The session still continues, like a term of court, until adjournment. Legislative jurisdiction continues until that of the Governor begins. Could he force either house, or either house force the other, to present a bill to him, though it had passed both? By what process? Legislative jurisdiction not having ended, which house had it? Nec-

essarily both, for the Legislature is composed of both. After passage the bill was the bill of both. The passed bill in the hands of that committee, an agency of the Senate as much as that of the House, was in the control of the Senate as much as of the House. Alleged transmission back to the House was no transmission. It amounted only to notification of Senate action. Before that bill got out of the hands of the joint committee into those of the Governor, a motion to reconsider was made and adopted. This effectually tied the hands of that committee. There was then a proceeding, relating to the bill, begun and completed in the Senate, before legislative jurisdiction ended, or gubernatorial jurisdiction commenced, as in *State v. Savings Bank*, 79 Conn. 141, 64 Atl. 5. That committee had only ministerial powers. It was not a department of government, independent, co-ordinate, or subordinate. It was composed of members of the two houses, necessarily cognizant of every action of each, pertaining to any matter intrusted to them, and subject to the power of both. It could act only by authority of both; it being a joint committee. In case of disagreement between its two principals, as in this case, it necessarily stood powerless to act. Otherwise one house would be authorized, by the mere creation of a joint committee, to overrule and control the other, a result utterly repugnant to, and inconsistent with, the basic and fundamental theory of the relation of the two houses. Thus utterly failing as a prop or stay to the position of my Associates, the doctrine of analogy, on the other hand, emphatically condemns it. This court and others, after rendition of final judgment, in hundreds and thousands of cases, suspend the orders and so hold the judgments open for inspection and correction of error after adjournment of the term. This judicial practice has its counterpart and equivalent in the legislative reconsideration rule, but not general parliamentary law possibly. So say the dicta of the courts in *Wolfe v. McCaull*, 76 Va. 876, and *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377, and this notwithstanding the bill has not only passed both houses, but gone into the hands of the Governor.

Having thus fully discussed this subdivision of this branch of the case, from the practical, philosophical, and legal points of view, and stated what impresses me as a necessary and inevitable conclusion, arising therefrom, I now undertake to make good the charge of virtual nullity and inapplicability of the authorities, relied upon in the majority opinion. This language of the opinion, professing to be a quotation from Jefferson's Manual: "After a bill, resolution, message, report, amendment, or motion upon which a vote was taken shall have gone out of the possession of the Senate"—is no part of that treatise. It is in a book containing the Manual, but it is no part of the

Manual. That volume contains the Constitution of the United States; the Manual, a digest of decisions and the rules and practice of the House and some of the Senate rules and other things. The quoted language is taken from the second section of Senate Rule 18. Nor is it followed in that rule by the remainder of Judge BRANNON'S quoting sentence, or by anything of like or similar import, namely, "no motion to reconsider can be made." On the contrary, the remainder of that section of that rule necessarily implies that such a motion can be made. I here requote it: "And been communicated to the House of Representatives, the motion to reconsider shall be accompanied by a motion to request the House to return the same; which last motion shall be acted upon immediately, and without debate, and if determined in the negative, shall be a final disposition of the motion to reconsider." Plainly this is a limitation upon the power to reconsider, under such circumstances, reserved by the first section, not a denial thereof. That section gives power to reconsider any "question decided by the Senate"; but the second says, if the vote proposed to be reconsidered is one by which a bill has been passed, and the bill has gone to the House, the motion to reconsider shall be indirectly acted upon immediately. Disposition thereof does not await the convenience of senators or the Senate. The motion can be made at any time within the two days. The time is not cut down, nor need the motion be acted upon immediately further than to ascertain whether the Senate is willing to recall the bill. Nor does it say action on the motion must await the actual return of the bill. The plain object of this limitation is to prevent the bill from remaining out of the Senate, during the pendency of a motion made to reconsider its passage, which may be a period of weeks or months, that and nothing more. The rule of the House has no such provision, nor has rule 52 of the Senate of this state. They reserve the power generally, as does section 1 of the United States Senate Rule 18. The limitation in that rule is no part of general parliamentary law, and no part of the rule involved here, and, if it were, its terms permit immediate action on the motion to reconsider, after the adoption of the motion to request the return of the bill, and before it has been actually returned.

The text relied upon in 26 A. & E. Enc. L. p. 548, deals with an attempt on the part of the Legislature to recall a bill from the Governor, when the vote by which it passed has not been reconsidered by either house; its passage by both houses having been regular and complete in all respects, and the power to reconsider being absolutely gone by expiration of time. The cases cited in support of it are *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 377, *Wolfe v. McCaull*, 76 Va. 876, *People v. Hatch*, 19 Ill. 288, and two Texas

cases which I do not have at hand now. In *People v. Devlin*, the opinion of the court says: "All the constitutional requisites to pass the bill had been performed by the two houses of the Legislature; to make it a law required but the signature of the Governor, which it subsequently received. \* \* \* All that further appears by the journals of the two houses in relation to this bill raise this question: After the passage of a bill in the legal and constitutional form by both houses of the Legislature, and the same has been transmitted by them to the Governor in the manner provided by the Constitution, have the two houses exhausted their power over it? Or can they, or can either of the said houses without the consent of the other, recall the bill by resolution, and revest themselves with power to further act upon it? \* \* \* By rule 51 of the Assembly (Red Book of 1863, page 493) it is provided that 'no motion for reconsideration of any vote shall be in order unless on the same day or the following legislative day to that on which the decision proposed to be reconsidered took place.' No evidence is produced of a compliance with this positive law of the Assembly after the final passage of the bill before mentioned, and after receiving it back from the Governor." How could the court have decided the effect of the adoption of a motion to reconsider in a case in which it says there was no such motion? The language of the opinion and syllabus in that case must be read in the light of the facts and limited to the case in hand. It declined to say what its opinion or decision would have been, if either house had reconsidered the vote by which it had passed the bill, and the journal, showing it, could be regarded as evidence. Is that this case? Do we have any doubt that the journals of our Legislature are evidence? There were three distinguishing facts in that case: (1) Neither house had reconsidered its vote of passage; (2) the time for reconsideration had expired; and (3) the bill had been approved by the Governor. *Wolfe v. McCaull* was substantially the same kind of a case. The material facts are concisely stated in the syllabus, as follows: "The Legislature passed a bill, and presented it to the Governor under Constitution, art. 4, § 8; but, before he acted, it was recalled by a joint resolution. He returned it without approval or disapproval." No motion to reconsider was adopted. On the contrary, motions to reconsider the votes of passage had been made and voted down in each house. See the statement of this fact in the opinion, 76 Va. on page 884, near the bottom, and page 889, near the bottom. In *People v. Hatch*, both houses of the Legislature had regularly, completely, and formally passed a bill and presented it to the Governor. He approved it by mistake, and his approval thereof was announced to the House. Within 30 minutes thereafter, he sent a message to the House, stating the accident. On the same day he returned the bill with his veto message. These

are all the facts. There was no recall or attempted recall from the Governor, nor any motion to reconsider either made, adopted, or lost. The only question was whether the Governor could cancel or withdraw his accidental and unintended approval of the bill. No power, privilege, right, rule, or action of either house was at all involved or drawn in question. Judge BRANNON'S quotation from that opinion is not predicated on the case the court was deciding at all. It is applied to a hypothetical or supposed case. Just before the part quoted by him, the court said: "Take, for instance, a bill which has been returned to the House of Representatives by the Governor, with his objections, and has passed that house, notwithstanding the Governor's objections, and sent to the Senate, where, in like manner, it has passed, with all the forms of legislation. It has now received all the sanction which the Constitution requires to make it a law, and yet no one acquainted with the constant practice of legislative bodies will deny that it is perfectly competent for the Senate to reconsider the final vote, and then take from it that concluding act which has finally completed it; and" (here follows Judge BRANNON'S quotation). Every word of it is undeniably obiter dictum, if even that. The court had no such question before it for decision and did not profess to have. Moreover, what was there said on this subject was not germane to anything then before the court for decision or discussion. It was said by way of illustration only.

In *State v. Savings Bank*, 79 Conn. 141, 64 Atl. 5, another case relied upon for the court's proposition, the bill was in the House when the motion to reconsider was made. That decision is not one in a case in which the bill was not in the House, reconsidering its vote of passage. No such question was decided there or even discussed. Nowhere does the opinion say physical possession of the bill was necessary. *Allegany County v. Warfield*, 100 Md. 516, 60 Atl. 599, 108 Am. St. Rep. 446, *People v. McCullough*, 210 Ill. 488, 71 N. E. 602, and *State v. Whisner*, 35 Kan. 271, 10 Pac. 852, are all cases involving retraction of approval by the Governor and nothing else, and have no application whatever. The other batch of cases which Judge BRANNON says are cited in a brief to sustain his proposition involves no such question as we have here and decide nothing pertaining to it.

The court, in *People v. Hatch*, was speaking of general parliamentary law and practice, not altered or affected by a rule, such as the Senate here acted under. The quotation itself shows this by the use of the phrase "unless they have some special rule restraining the right to reconsider." Can the authority of either of our houses to have a special rule, enlarging the ordinary parliamentary law, under the constitutional provision so often referred to in this opinion, be denied? Would not an enlarging special rule alter the



general law as surely as a restraining one? Where are the terms forbidding enlargement? I challenge reference to them. This distinction is recognized in *Wolfe v. McCaull*. There the rules are stated as well as the general law and the distinction noted. Had Judge BRANNON gone one sentence further with his quotation from the opinion in that case, he would have had part of it in his opinion by adoption. Immediately after his quotation this is found: "But in Virginia the rules of both houses of the General Assembly fix the time and mode by which a bill passes may be reconsidered." Note the disjunctive "but," marking the distinction. The opinion then proceeds as follows: "By the Constitution each house is allowed to adopt its own rules. House Rule 70 provides that, 'when a question has been decided, it may be reconsidered on the motion of any member who voted with the prevailing side, provided the motion be made on the same day or the next two days of actual session.' Rule 61 of the Senate is to the same effect. See, also, Jefferson's Manual, p. 92, which is adopted by both houses as their guide. According to these rules, and the general practice, a motion to reconsider the same vote cannot be made twice, and, if made at all, must be made upon the day of the vote or upon one of the two ensuing days. In the case before us, a motion to reconsider was made in each house within the proper time and lost. See House Journal, 303, and Senate Journal, 261-267. After this was done, and after it was sent to the Governor, the Legislature had no further control over the bill." Certainly not, because there had been no adoption of a motion to reconsider, a second motion therefor could not be made and the two days had expired. The opinion in the case, however, carries on its face the proposition that, under the rules, but not general parliamentary law, the reserved power of reconsideration was valid and effective for two days, even though the bill had gone into the hands of the Governor. So does *People v. Devlin*, herein analyzed.

Rules adopted under that provision are laws of which everybody having relations with either the Senate or the House, including the executive and the other house, must take notice. They must also respect them, just as they do the powers and rights of other tribunals and officers. While these parliamentary laws are limited as to their sphere, they are sovereign and irrevocable within it. Otherwise a legislative body could not perform its constitutional functions. This would be impossible if one house could ignore the rules or laws of the other and the Governor those of both. For the same reason, each house is the sole interpreter of its own rules. They must be respected as it construes, applies, and enforces them, no matter whether its construction is correct or not. On this subject we have direct authority in *State v. Savings Bank*, 79 Conn. 141, 64 Atl. 5, in which the court both states and

applies this proposition in the following clear-cut, convincing language: "Courts are not warranted in setting aside, as void, action of a legislative body in respect to a matter clearly within its power, merely because that body may have violated or departed from its own rules of procedure. Such rules are the servants of the legislative body and are subject to its own independent authority." Syl. "There being no claim of a violation of any constitutional restriction, we cannot pass upon the regularity of these proceedings. The power of the House, directly after the passage of a bill, and on the day of its passage, to suspend the operation of that vote, to reconsider the vote, and to take different action, cannot be questioned. The Constitution declares that each house shall determine the rules of its own proceedings and shall have all powers necessary for a branch of a free and independent state. Rules of proceedings are the servants of the House and subject to its authority. This authority may be abused; but, when the House has acted in a matter clearly within its power, it would be an unwarranted invasion of the independence of the legislative department for the court to set aside such action as void, because it may think that the House misconstrued or departed from its own rules of procedure." Opinion. The action of the Connecticut House of Representatives, which the court refused to set aside in that case upon these considerations and legal principles, was the killing of a bill it had passed by reconsideration of its vote of passage, just the kind of action this court is setting aside. Here the Senate, not only construing its own rule, but construing it as it always had been construed, with the knowledge and acquiescence of the House, and as the House had always construed its own similar rule, with the knowledge and acquiescence of the Senate, both having been always in perfect accord and agreement upon that question, rescinded the vote by which it had passed the bill. It acted within its admitted province, and under a rule, susceptible of the construction it gave it, whether that construction was technically right or wrong, and the Connecticut court, the only one that has spoken directly upon the subject, absolutely the only case directly in point that has been found, says such action cannot be disturbed by a court, no matter whether the construction was right or wrong. Legislative action is not judicial, nor subject to review like that of inferior courts. Of course more arbitrary legislative action in a matter beyond its authority would be void, and its action in an arbitrary and groundless manner, within its province might be, but such was not the character of the action of the Senate involved here.

Another suggestion of possible ground for the position taken by my Associates is that, assuming the motion to have been made and acted upon within the time and under the circumstances allowing it, the passage of the

bill was not annulled or rescinded by the adoption thereof. No authority is offered for this. On the question of the effect of the adoption of a motion to reconsider a vote passing a bill, we have direct authority in *State v. Savings Bank*, 79 Conn. 141, 64 Atl. 5, in which the court held that the House rendered a bill it had passed an unpassed one by reconsidering the vote by which it had passed, and then indefinitely postponing consideration of the bill. It was not put on its passage and rejected after such reconsideration. Indefinite postponement had nothing to do with the question of passage, either prior or subsequent. The bill was killed after passage. Now what could have done that other than the adoption of the motion to reconsider? The obiter dictum in *People v. Hatch*, 19 Ill. 283, from which Judge BRANNON has quoted, says reconsideration alone rescinds or nullifies the vote reconsidered. We read: "And yet no one acquainted with the constant practice of legislative bodies will deny that it is perfectly competent for the Senate to reconsider the final vote and thus take away from it that concluding act which had finally completed it." Every text-book on parliamentary law that deals with this question says the same thing.

Finally, we have the conclusion of the majority opinion in these words: "Without asserting that the failure to vote a rejection of the bill left the original vote of passage still good, we do say that a court after such procedure cannot hold the act null and void." The "procedure" consists of the facts stated at the beginning of the opinion. For this conclusion no authority at all is given, and no legal principle is invoked, unless it be the one embraced in the sentence immediately following it, which says: "And further, if this is doubtful, then the rule that before a court can hold an act invalid the question must be clear is alone enough to deny the mandamus." The next sentence admits that, "if there had been no vote of the Senate passing the bill, the case would be different." Now, according to the only decision, directly in point on this question, the dicta of others and legislative practice in this state and the national Congress, this bill is in the same state and condition as if it never had passed the Senate. In *State v. Savings Bank*, 79 Conn. 141, 145, 64 Atl. 5, 7, the court actually decided, as the vital and basic question in the case, that "a bill retained by one house of the General Assembly to await its decision upon a motion to reconsider its action in passing it is not then in a situation to be presented to the Governor for his approval, nor can it be said to have 'passed both houses' within the meaning of that expression in article 4, § 12, of the Constitution of this state." In its opinion the court said it was immaterial that the bill had been transmitted to the Governor, apparently in regular order, but in fact by inadvertence. There

was no express order of retention to await action on the motion to reconsider. The agreement upon the facts in the case says: "As shown by the journal of the House on June 15th, the rule requiring the clerk of the House to hold bills and resolutions one day for reconsideration was suspended for the remainder of the session." Notwithstanding this, the court upheld the ruling of the House that a mere motion to reconsider, although tabled, amounted to a retention of the bill, notwithstanding the officers, including the Governor, interpreting the effect of the action of the House otherwise, had put the bill through all the usual subsequent procedure as if it had finally and irrevocably passed. The motion to reconsider having been tabled, they regarded that as final, and acted accordingly. The House decided the question otherwise, under its claim of authority to do so, and the court sustained its action, saying it mattered not whether, in acting as it did, that body correctly interpreted its rules, orders, or proceedings or not. That is what the Senate has done here, upon a slightly and immaterially different state of facts. *State v. Savings Bank* emphatically decides that reconsideration of a vote of passage renders the bill an unpassed one. Whether the Senate reconsideration here was too late is a different question, which I have discussed fully, showing conclusively that the motion was not too late. The status of the bill was, therefore, the same as if it never had passed the Senate. For this reason, the acts of presiding officers and clerks, or even of the Governor, if he had acted, before reconsideration, were futile and unavailing. They could not cure the fatal defect or omission of lack of passage by the Senate. Passage by both houses is confessedly indispensable. No bill can become a law without it. Nothing can be substituted for it. It is no answer to this to say the journal shows passage of the bill on a certain date. It just as clearly and emphatically shows rescission or nullification of that action. There is no ground of doubt here. Reason and authority completely exclude it. Nothing would be easier of accomplishment than the creation of doubt in any case, if a mere adverse assertion or claim constituted a basis therefor.

On a further examination of the authorities, in passing upon the petition for rehearing, I find in *Hinds' Precedents of the House of Representatives*, vol. 5, §§ 5666, 5667, and 5668, ample justification of my position, respecting the jurisdiction and power of the Senate, under its rule, to reconsider the vote by which it passed the bill in question, after that paper had left the Senate. In 1840, R. M. T. Hunter, Speaker, entertained a motion to reconsider, under such circumstances, overruling a point of order made against it, and, on an appeal, was sustained by the House. He based his decision upon the terms of the House rule,

providing that, "when a motion has been once made and carried in the affirmative or negative, it shall be in order for any member of the majority to move for a reconsideration thereof on the same or the succeeding day." In 1844, a like ruling under like circumstances was made by Speaker John W. Jones, and sustained by the House on an appeal. In 1846 Speaker John W. Davis (of Indiana) entertained a motion to reconsider the vote by which the House had agreed to resolutions, calling upon the President for certain accounts, made after the resolution had been delivered to the President, overruling a point of order, and, on an appeal to the House, his ruling was sustained. The principle was applied under conditions still less favorable to it in a ruling made in 1854 by Speaker pro tem. Geo. W. Jones. The House having agreed to a Senate amendment to a House bill, a motion was made to reconsider the vote by which the House had so agreed. A point of order was based upon the fact that the House had notified the Senate of the agreement in consequence of which the bill had passed beyond the control of the House. The Speaker overruled it, and, on an appeal, his ruling was sustained by the House. In 1840, a motion to reconsider the vote of passage by the House of a Senate bill, which had been sent back to the Senate and gone into the hands of the committee on enrolled bills, was both entertained and voted upon. Hinds, vol. 5, § 5705. That bill was in the hands of the committee on enrolled bills when the motion was made and voted on just as this bill was when the Senate entertained and acted upon its motion to reconsider. Here we have four specific instances of deliberate decision by the House of Representatives itself, not merely the Speaker, construing and applying a rule, in all substantial respects like that of the Senate of this state, as authorizing a motion to reconsider, under the circumstances attending the action of the state Senate now under consideration, and asserting reservation of jurisdiction and power of a legislative body, operating under such a rule, to rescind a vote of passage after the bill has left the body. Is it supposable the House would entertain such a motion without power to make it effective? Would it entertain the motion to be acted upon only in case the Senate should return the bill?

In these instances, the Senate was not consulted, though the absence of the bill and its possession by the Senate were urged in support of the point of order. In a note applicable here, Hinds says, "Where a bill thus reconsidered has been sent to the Senate or to the President, it is customary to send a request for its return." He does not say it is necessary, and the terms he uses import affirmative action upon the motion before the request is made, and this accords with the application of logic and principle. No court will entertain a case it cannot de-

cide. So it would be idle and ridiculous for a legislative body to entertain a motion it could not make effective. Moreover, every precedent found denies authority in a co-ordinate branch of a Legislature to refuse a request for the return of a bill, if precedents and practice mean anything, for no instance of the refusal of such a request can be found. There is no parliamentary precedent for the position that a legislative body cannot vote upon a motion to reconsider without having actual custody of the bill or other paper. If it be conceded that ordinarily such bodies do not do so, the fact does not argue inability to do so. What either house of Congress would do in a case of refusal by the other to honor its request for the return of a bill has never been decided, so far as we know. Its power to entertain the motion without custody of the bill settles the question of jurisdiction, from which power to make it effective by a vote on it necessarily follows.

Cushing's Law & Practice of Legislative Bodies, at section 1274, says the motion may be made, discussed, and decided in the affirmative, without the custody of the bill. We quote: "The first step, therefore, after a vote to reconsider, is to send to the other branch or to the executive, for the paper in reference to which the vote to reconsider passes, or otherwise to bring it before the House. Possession of the paper may also be obtained before the motion to reconsider is made." Here he distinctly says or assumes that the motion may be made and voted upon in the absence of the paper or bill.

Gilfry's Precedents, Decisions on Points of Order in the U. S. Senate, p. 411, mentions a case of refusal of the Senate to entertain a motion to reconsider a vote, recorded April 12, 1830, consenting to the appointment of an officer by the President, because the resolution confirming the appointment had been communicated to the President. At that time, the Senate had no such rule as the House had when the rulings above referred to were made, nor any such rule as our state Senate has. Its practice was in accordance with the ruling in the case mentioned by Gilfry; but it later adopted a rule abolishing the absurd and inconvenient practice. Says Hinds, vol. 5, § 5671; "On January 16, 1877, the Senate, while revising its rules, agreed to a rule providing that, when a motion to reconsider a bill that had been sent to the House should be made, it should be accompanied by a motion requesting the House to return the bill to the Senate. This was intended to obviate the difficulty experienced by the fact that the Senate usage did not permit a motion to reconsider after the bill had passed from out the possession of the body."

Gilfry, at page 493, puts a stronger case than any I have mentioned, showing how a motion to reconsider may be made in the

United States Senate after expiration of the time allowed for reconsideration, prescribed by its rule. To accomplish it, a senator, after having moved a recall of a bill passed by the Senate and sent to the House, in conformity with the Senate rule, asks unanimous consent to move to reconsider the vote by which it passes, and no objection being made the motion is entertained. Here is jurisdiction after expiration of the time allowed by the rule.

Having shown jurisdiction of the House of Representatives, operating under a rule like that of the state Senate, to entertain a motion to reconsider a vote of passage after the bill has gone to the Senate, I turn to the question of its effect, when made. Hinds says (section 5704): "When a vote whereby an amendment has been agreed to is reconsidered, the amendment becomes simply a pending amendment. A bill is not considered, in the practice of the House, passed or an amendment agreed to if a motion to reconsider is pending; the effect of the motion to reconsider being to suspend the original proposition. As to the result, when the Congress expires leaving unacted on a motion to reconsider the vote whereby a resolution of the House is passed: If a bill, before the disposal of a motion to reconsider the vote on its passage, should be enrolled, signed, and approved by the President, its validity as a law probably could not be questioned." In this section, Speaker Thomas B. Reed is quoted as follows: "Under our parliamentary system neither a bill nor an amendment is passed or adopted until the motion to reconsider is disposed of. The Speaker is not allowed to sign a bill during the pendency of a motion to reconsider. Consequently it still remains an inchoate affair. So that, if the motion to reconsider had not been disposed of at all, the amendment would probably still not be adopted. But it is not necessary to decide that to dispose of this matter, because there was a motion to reconsider and a motion that that motion to reconsider be laid on the table, which latter motion was defeated. Thereupon the Speaker put to the House the question of reconsideration, and it was carried, and the amendment became simply a pending amendment." Cushing, at section 1265, says: "And, if this motion prevails, the effect of the vote in question is abrogated, and the matter stands before the assembly in precisely the same state and condition, and upon the same question, as if the vote, which has been ordered to be reconsidered, had never been passed." At section 1278, he says: "When a motion to reconsider prevails, it has a twofold effect: First, it entirely abrogates the vote passed on the question, which is thereby ordered to be reconsidered; and, secondly, it again brings forward that question, to be discussed and decided in the same manner it was originally, for the consideration and determination of the assembly." It is true Mr. Cushing, at section 1274, says:

"If decided in the affirmative, it will be wholly ineffectual and inoperative until the paper in question is in possession of the House." But he cites no precedent or authority for that observation, nor does he clearly indicate what he means. Of course, further action on the bill cannot be had until it is again in possession of the House; but that does not argue lack of authority in the House to annul its vote of passage, and there is no precedent which says actual reconsideration in the absence of the bill does not do so. Mr. Cushing admits that the vote may be taken in the absence of the bill. This admits jurisdiction. Why should the house do an idle and futile thing? He says the vote has a double effect, one of which is abrogation of the vote reconsidered. By what process of logic can it be established that, because of some circumstance, the other consequence cannot follow, this one must fail? I repeat there is no decision or precedent for the observation of Mr. Cushing, if his language means what my Associates say it does; but that is not his meaning. What he means is that, after the adoption of a motion to reconsider, what follows is action on the bill or resolution, wherefore it must then come back into the assembly, if it has not previously done so.

In the view that a motion to reconsider suspends the vote to which it relates, and the adoption thereof rescinds or abrogates that vote, Roberts, Hinds, Cushing, and all authorities agree. Besides, it is the effect universally given to it in legislative bodies. As against these and authorities cited in the portion of this opinion prepared in advance of consideration of the petition for rehearing, I am not disposed to adopt the views of an inferior New York court (*Ashton v. Rochester*, 60 Hun, 372, 14 N. Y. Supp. 855), citing no authority for its contrary holding, and in this I am further confirmed by the opinion of the New York Court of Appeals (*Ashton v. Rochester*, 133 N. Y. 192, 30 N. E. 965, 31 N. E. 334, 28 Am. St. Rep. 619), in a case involving the same reconsideration that was passed upon in 60 Hun, 14 N. Y. Supp. The Court of Appeals said: "The vote on the resolution was reconsidered, and consequently the effect which it would otherwise have was lost."

Finally, it is not for this or any other court to say what the true parliamentary rule is, or whether the Senate properly construed its rule. Those were questions for the Senate itself, as I have already shown. The are not constitutional questions, and the courts have no right to interfere with legislative decisions of purely legislative questions.

Entertaining the views expressed here, I thought a rehearing should be granted and voted for it. I also voted for a modification of the judgments so as to allow costs in only one of the nine cases, for the reason that only one of them was really litigated; the

others having been submitted, without argument or full pleadings, under an agreement that the decision upon the merits in the one argued should govern and control in the others. The one return filed was agreed and ordered to be considered and treated as filed in all the cases or as the return in all. If a consolidation could not have been ordered by the court without the consent of the parties, it could have been done and was done upon their consent and agreement. It was a consolidation by consent of parties, with the same result as if it had been an involuntary one by order of the court. *Rosenthal v. Ives*, 2 Idaho (Hash.) 265, 12 Pac. 904; *Rodgers & Smith v. Dibrell*, 6 Lea (Tenn.) 69; *Howard v. Gregory*, 79 Ga. 617, 4 S. E. 881; *Burt v. Wigglesworth*, 117 Mass. 302.

On Rehearing.

PER CURIAM. Rehearing denied.

BRANNON, J. After a full discussion of a petition for rehearing this court refused it. I make this note to add some authority which I have met with to-day, as to the position taken in the above opinion that, the Senate having returned the bill to the House as passed, it had lost possession of the bill and could not reconsider. Cushing on the Law and Practice of Legislative Assemblies, § 1274, says that, "though a motion for reconsideration may be made and discussed in the absence of a paper to which it relates, yet, if decided in the affirmative, it will be wholly ineffectual and inoperative until the paper is in the possession of the House. The first step, therefore, after vote to reconsider, is to send to the other branch for the paper in reference to which the vote to reconsider passes, or otherwise to bring it before the House." For myself I do not see why the paper is not necessary on the motion to reconsider. Why? Because the members want to see it, so as to vote intelligently on that motion. Why necessary to have the bill present when reconsideration takes place? In order that the members may read it before voting. Precedents in Congress show that such was the understanding. The House requested the Senate to return a bill; "there being a motion pending to reconsider the vote by which the House passed the same." The Senate complied with the request. In the Senate the question was whether a motion to reconsider was in order inasmuch as the resolution announcing the decision of the Senate on the nomination of Isic Hill had been communicated to the President, and it was unanimously determined that the motion was not in order. The Senate recalled a bill from the House before reconsidering it. Decisions

on points of order in the United States Senate by Gilfry, 161, 411, 493: The Senator: I move that the House of Representatives be requested to return to the Senate (stating the number and title of the bill). In Senate Mr. Ingalls rose to a question of order and stated that a bill which passed the Senate on Thursday last had not been sent to the House, but had been retained by the Secretary for two days, at the request of a senator who desired to enter a motion to reconsider the vote on its passage; and asked the ruling of the chair upon the question whether under the rule it was competent for the Secretary to retain a bill, after its passage by the Senate, at the request of a senator for the purpose of a motion for reconsideration within the two days allowed for that purpose. The President stated that such had been the uniform usage of the Senate, inasmuch as the rule gives the right within two days after passage; but it submits to the Senate whether the practice hereafter shall be in conformity with usage or strictly conform with the rule. The Senate assented. Senator Ingalls was an able parliamentarian. He understood that it was necessary to have the bill in the possession of the Senate for reconsideration, and the whole Senate assented. Thus we have the ruling of that distinguished body. Why keep the bill in the hands of the Senate, if it was not necessary to act on a motion to reconsider? Same book, page 414. The same book, page 161, says: "There are many reasons that make it necessary for one House to request of the other the return of the bill. The following are sample cases"—giving reconsideration as an instance. The Senate may have said in the Hill Case that it could vote to reconsider in the absence of the bill, but did not say that it could finally act on it. In the original argument an attorney contended that the vote of the Senate was only one to reconsider; that the next question in order was, "Shall the bill pass"; that as no such question was put, and no vote taken upon it, the original vote of passage was not disturbed. It would seem upon some authorities that, when a vote to reconsider is carried, it is a withdrawal of the vote of passage, leaving the bill stand as if the body had never voted for its passage. It is not necessary to say how this is; but I find the case of *Ashton v. City of Rochester*, 60 Hun, 372, 14 N. Y. Supp. 855, holding that, without such a vote on the question of the passage of the bill, the original passage stands. The opinion also holds that a motion to reconsider "may be entertained if the House has control of the bill," thus sustaining the proposition that it cannot do so in the absence of the bill.

(69 W. Va. 686)

**WAGGY v. JANE LEW LUMBER CO.**  
(STOUT et al., Interveners).(Supreme Court of Appeals of West Virginia.  
Nov. 7, 1911.)*(Syllabus by the Court.)***1. CORPORATIONS (§ 553\*) — RECEIVERS —  
GROUNDS FOR APPOINTMENT—INSOLVENCY.**

Code 1906, c. 53, § 58, gives a remedy by receivership to any stockholder or creditor, for the vindication of his rights, if he shows sufficient cause for invoking that remedy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.\*]

**2. CORPORATIONS (§ 553\*) — RECEIVERS —  
GROUNDS FOR APPOINTMENT—INSOLVENCY.**

A receiver of the property and assets of a corporation may properly be appointed, at the suit of a stockholder or creditor, under Code 1906, c. 53, § 58, whenever the corporation has become so hopelessly insolvent that plaintiff's rights will suffer by depreciation and loss, arising from forced sales and large costs in the multiplicity of suits by creditors, if a receiver is not appointed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.\*]

**3. CORPORATIONS (§ 553\*) — RECEIVERS —  
GROUNDS FOR APPOINTMENT—INSOLVENCY.**

Mere insolvency is not sufficient ground for the appointment of a receiver of a corporation, but necessity to prevent impending depreciation and loss from insolvency so hopeless that the corporation can continue no longer in business, is sufficient ground.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2201-2216; Dec. Dig. § 553.\*]

**4. CORPORATIONS (§ 566\*)—RECEIVERS—JUDG-  
MENT—LIEN—PRIORITY.**

A judgment against a corporation, obtained after a receiver has been duly appointed for its property and assets in a suit to administer the same, does not become a lien taking priority over other claims.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283-2286; Dec. Dig. § 566.\*]

Appeal from Circuit Court, Braxton County.

Bill in equity by Henry Waggy against the Jane Lew Lumber Company, in which Ross F. Stout and others intervene. From the decrees, the interveners appeal. Affirmed.

Harvey F. Smith, for appellants. Haymond & Fox, for appellee.

ROBINSON, J. Waggy, a stockholder and creditor of the Jane Lew Lumber Company, a corporation, by this bill in equity prayed for the appointment of a receiver to take charge of the affairs of the company and to administer its assets. The bill showed that the company, by misfortune and mismanagement, had become so helplessly insolvent that the certainty of depreciation and loss by reason of seizures and sales at the suits of creditors then pending, and other suits that were sure to follow, could only be prevented by the interposition of a receiver. The court appointed a receiver as prayed for, and he took charge. The company, though duly notified, entered no re-

sistance to the appointment. Nor has it since appeared in the case. The bill has been taken for confessed. The company has completely admitted its helpless condition and has acquiesced in the handling of its affairs by a receiver for the benefit of its creditors. Evidently it has gladly accepted, at the initiative of a stockholder and creditor, that which it soon would have been compelled to bring about by its own act—a virtual assignment.

Ross F. Stout Lumber Company, a creditor of the insolvent concern, obtained a judgment on its claim after the appointment of the receiver. Prior to the date of its judgment, it had filed the simple contract claim on which that judgment was rendered, before the commissioner to whom the receivership cause had been referred for the purpose of ascertaining and reporting the debts. After obtaining the judgment, this creditor intervened by petition, asking that it be made a party to the cause and allowed to demur to the bill. No formal order admitting the petitioner as a party was ever entered, but the petition and the demurrer which it tendered were ordered filed and the demurrer was set down for argument. At a later date the demurrer was overruled. When the report of the commissioner was filed, this creditor, Ross F. Stout Lumber Company, excepted thereto because its judgment was not reported as a lien but as a mere simple contract debt. The court overruled the exception, confirmed the report of the commissioner, and decreed that the receiver make sale of the property of the insolvent concern for the payment of the debts as ascertained and stated in the commissioner's report. From the order overruling the demurrer and the decree fixing the debt as an unpreferred one, Ross F. Stout Lumber Company has prosecuted the appeal now under consideration.

Questions have been raised and argued relative to the propriety of admitting the petitioning creditor as a formal party to the suit and entertaining its attack by demurrer on the proceedings which support the receivership. Plaintiff submits that it was improper to admit the creditor as a formal party and to entertain the demurrer, particularly after the creditor had apparently acquiesced in the proceedings by filing the claim as an unpreferred one before the commissioner. However, we need not pass on these questions. Assuming that the demurrer was rightly entertained, we observe that it was properly overruled. The bill is entirely sufficient. So even if the demurrer were not in place, it could avail no more than if consideration thereof had been denied.

[1] The bill is a proper one under Code 1906, c. 53, § 58, which reads: "When a corporation expires, or is dissolved or before its

expiration or dissolution, upon sufficient cause being shown thereof, such court as is mentioned in the preceding section, may on application of a creditor or stockholder, appoint one or more persons to be receivers to take charge of and administer its assets; and whether such receiver be appointed or not, may make such orders and decrees and award such injunctions in the case as justice and equity may require." This is a remedial statute and should not be strictly construed. Broad equity powers are granted by it in the matter of receiverships for corporations. It is in derogation of the equity principles ordinarily applied to the appointment of receivers. It permits a complete sequestration of the property of a corporation by a receivership, even before expiration or dissolution. It authorizes this sequestration to be brought about by a mere stockholder or creditor, if he shows good cause therefor. By its very terms, it wipes out the usual principle that a common creditor cannot ask a receivership. It virtually says that any stockholder or creditor of a corporation may have an administration of the assets of that corporation, by the instrumentality of a receiver, whenever the full protection of his rights demands the same. It in fact allows a winding up of the affairs of a corporation by a receivership at the suit of a stockholder or creditor. Thus it allows that which is tantamount to a dissolution. It vests in the court much discretion; for the court is authorized to make such orders as equity and justice may require. Still the court must exercise sound discretion and by no means recklessly apply its power. The chancellor must proceed with caution, and only grant a receivership under this statute in a case plainly demanding that course. Good cause, judged from the rights of the parties and all the attendant facts and circumstances, must appear. The case must be one in which a receiver is equitably and justly called for; not one in which a receiver may safely be avoided. But where the fact is clearly shown, as it is in this case, that the situation of the corporation is such that impending loss to the plaintiff and other stockholders and creditors can only be averted by the appointment of a receiver, the court should not hesitate to appoint one.

[2] The statute gives plaintiff a remedy by receivership for the vindication of his rights as a stockholder and creditor, if he shows sufficient cause for invoking that remedy. That cause of course necessarily relates to a protection of his rights. He has shown that his rights will suffer by depreciation and loss of the assets of the hopelessly insolvent corporation, arising from forced sales and large costs in the multiplicity of suits by creditors, and that only by a receivership can such depreciation and loss be prevented. He has thus shown sufficient cause why a receiver should be appointed. The statute con-

templates the very case presented by plaintiff's bill. When a corporation has reached such a state of insolvency that it can continue business no longer and there is absolute necessity that its assets be administered by a receiver in order that impending loss to stockholders and creditors be prevented, surely good cause appears why that course should be pursued. In this case facts are alleged which must convince any mind that, by reason of the insolvent condition of the corporation, loss was certain to accrue to plaintiff unless there was an administration of the property by a receivership. These facts are denied by no one. They stand admitted. They justify the receivership. [3] We do not hold that mere insolvency is ground for the appointment of a receiver; for it is not. We do hold, however, that necessity to prevent certain depreciation and loss of the property and assets of the corporation, which depreciation and loss are sure to follow because of insolvency, is sufficient ground. *Kanawha Coal Co. v. Ballard & Welch Coal Co.*, 43 W. Va. 721, 29 S. E. 514. The following quotation aptly applies to this case: "While insolvency alone is not sufficient cause for the appointment of a receiver, where the proof of insolvency is clear and satisfactory and it appears there is no reasonable prospect that the corporation, if let alone, will be brought back to a condition of solvency, and the nature of the corporation, the character of the managers, the wishes of the creditors, and the general condition of corporate affairs are such as to warrant the enforcement and protection of the court for all interested and concerned, a receiver will be appointed." *Alderson on Receivers*, § 352.

This case is not of the character of those in which a plaintiff must show that he unsuccessfully sought redress by application to the corporation before bringing suit for a receiver. It is not a case based on misapplication of assets or mismanagement of affairs. It is one based wholly on the certainty of loss but for the interposition of a receiver. It is based on that which the corporation could not remedy even if it were asked to do so—hopeless insolvency and impending loss therefrom.

[4] The exception of *Ross F. Stout Lumber Company* to the report of the commissioner was properly overruled. The judgment did not become a lien on the real estate of the corporation or take priority over other claims. That judgment was taken after the property of the corporation had practically been converted into a trust estate for creditors. It could not, therefore, become a preferred lien. The character of the receivership forbade that it take priority. The appointment of a receiver for the complete administration of the assets of the corporation, under the circumstances of this case, was indeed tantamount to a dissolution. It was too late for liens to attach. There are cases

in which the pendency of a receivership does not prevent a judgment from attaching as a lien, but those cases do not involve a complete administration as this one does. See the general principles stated, and the cases cited, in 34 Cyc. 199, 221.

The decrees appealed from will be affirmed.

(99 W. Va. 671)

HALL et al. v. WILLIAMSON GROCERY CO. et al.

(Supreme Court of Appeals of West Virginia. Nov. 7, 1911.)

(Syllabus by the Court.)

**1. MORTGAGES (§ 171\*)—PRIORITY—RECORD.**

The mere recordation of a subsequent deed of trust is not notice to the holder of a prior one which has been duly recorded.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 171.\*]

**2. MORTGAGES (§ 171\*)—PRIORITY—NOTICE AFFECTING PRIORITY.**

The holder of a duly recorded deed of trust to secure future advances is affected only by actual notice of a lien subsequently acquired on the property, and for all advances made by him under his deed of trust and within its terms before receiving actual notice of a subsequent lien, his deed of trust is a valid and prior security.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 171.\*]

**3. MORTGAGES (§ 169\*)—PRIORITY—NOTICE AFFECTING PRIORITY.**

Knowledge by one secured under a deed of trust for future advances that his trust debtor intends to give a subsequent deed of trust to another creditor does not affect his security for advances made before he has notice of the actual execution of the subsequent deed of trust.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 169.\*]

Appeal from Circuit Court, McDowell County.

Suit by George P. Hall and others, partners as George P. Hall & Co., against the Williamson Grocery Company and another. From a decree for defendants, plaintiffs appeal. Affirmed.

J. Powell Royall, for appellants. M. O. Litz, for appellees.

ROBINSON, J. Sadie Price and husband executed a deed of trust, covering a town lot, to secure Williamson Grocery Company in a sum not to exceed eight hundred dollars for any and all future sales and deliveries of goods which should be made to her by the company within the period of two years. Some months later, the Prices conveyed a portion of this lot to Graves in consideration of seven hundred dollars cash. This amount was paid to the Grocery Company on an indebtedness of several hundred dollars that had arisen to it from Sadie Price for goods sold and delivered. In consideration of this payment, the Grocery Company released the deed of trust so far only as it affected the

portion of the lot sold to Graves. At about this time the Prices executed another deed of trust on the remaining portion of the lot to secure Geo. P. Hall & Company, plaintiffs in this suit, the payment of a bond for \$251.51. When the deed of trust to secure plaintiffs was made and recorded, the prior deed of trust to secure the Grocery Company, covering the identical property, had long been of record and as to that property was wholly unreleased.

When the Grocery Company sought to enforce its deed of trust, claiming an indebtedness in default thereunder, and the trustee had advertised a sale, plaintiffs brought this suit against the Grocery Company and the trustee. The bill alleges in substance that the seven hundred dollars received by the Grocery Company from Graves settled all indebtedness due under the deed of trust at the time that sum was received; that the indebtedness secured was then fully satisfied and the lien should have been released; that the Grocery Company had actual knowledge of plaintiffs' deed of trust at the time the same was executed; and that plaintiffs' deed of trust constituted a first lien on the property, in priority to any lien of the Grocery Company. Plaintiffs prayed that an enforcement of the deed of trust in behalf of the Grocery Company be enjoined, and that their debt be decreed to be a lien on the property taking priority over any indebtedness claimed by the Grocery Company.

A temporary injunction was awarded, the answer of the Grocery Company denying the material allegations of the bill was filed, depositions were taken, and the case was heard on its merits. The chancellor denied the relief which plaintiffs sought. The decree appealed from dissolved the injunction and dismissed the bill.

If, at the time the subsequent deed of trust was made to secure plaintiffs' debt, there was nothing due the Grocery Company from Sadie Price for goods sold and delivered under the first deed of trust, and the Grocery Company had actual notice of the subsequent lien, then claims for future advances made by the Grocery Company after that notice could not take priority of lien over the sum secured in plaintiffs' deed of trust. Under those circumstances plaintiffs would have the right to enjoin a trustee's sale which had for its object the payment of the Grocery Company claims in preference to theirs.

[1-3] The evidence, however, does not sustain the case urged by plaintiffs. The chancellor was justified in holding that the Graves payment did not wholly pay off the first deed of trust at the time the payment was made; that a considerable sum still remained under the security of the deed of trust; that many other advances were made thereafter by the Grocery Company on the faith of its deed of trust and within the terms thereof; and that



the Grocery Company did not have notice of plaintiffs' subsequent lien before making the future advances which it now claims as secured by the prior deed of trust in its favor. The mere recordation of the subsequent deed of trust was not notice to the holder of the prior one. Actual notice was necessary; yet actual notice that the subsequent deed of trust was duly and finally executed is not brought home to the holder of the prior lien. Plaintiffs did attempt to prove actual notice; but the evidence they offered in this particular does not prove the fact. That evidence goes no further than to show that the husband of Sadie Price told a travelling salesman of the Grocery Company that a subsequent deed of trust to plaintiffs was contemplated. Price says he told the salesman, on January 23rd, either that the deed of trust to plaintiffs was given or that it would be given. The deed of trust referred to was not executed until February 6th. So on the former day he could not have told the salesman that the deed of trust was given, for it was not then given. He must have stated the true one of the two facts the one or the other of which he says he may have stated; that is, merely that a deed of trust would be given to plaintiffs in the future. Even if the salesman was an agent of the Grocery Company of such character that notice to him was notice to it, a question we need not decide, the simple statement that a deed of trust in favor of plaintiffs would be given in the future was not actual notice of the due and final execution of the lien. The Grocery Company had a right to rely on its prior and unreleased deed of trust and to make advances on the faith of security thereunder, until a subsequent lien was indeed placed on the property, though it knew of an intention on the part of its debtor to execute a subsequent lien. *Craig v. Tappin*, 2 Sandf. Ch. (N. Y.) 78. The burden rested on plaintiffs to stop advances under the prior deed of trust by notice to the holder thereof that a lien in their favor had attached to the property. In any view, evidence that a thing is intended is not evidence that the thing exists.

Quite applicable and controlling in this case is the following quotation from a standard authority: "When a mortgage to secure future advances reasonably states the purpose for which it is given, its record is a constructive notice to subsequent purchasers and encumbrancers; they are thereby put upon an inquiry to ascertain what advances or liabilities have been made or incurred. The record of a subsequent mortgage or conveyance, or the docketing of a subsequent judgment, is not a constructive notice of its existence to such prior mortgagee. The prior mortgage, therefore, duly recorded, has a preference over subsequent recorded mortgages or conveyances, or subsequent docketed judgments, not only for advances previously made, but also for advances made

after their recording or docketing without notice thereof. As the record of the second encumbrance does not operate as a constructive notice, it requires an actual notice to cut off the lien of the prior mortgage; and the subsequent encumbrancer may, by giving actual notice, at any time prevent further advances from being made to his own prejudice." 3 Pomeroy's Equity Jur. (3d Ed.) § 1199.

Another eminent author discusses the same subject: "A prior mortgagee is affected only by actual notice of a subsequent mortgage, and not by constructive notice from the recording of the second mortgage, and for all advances made by such mortgagee before receiving such notice of a subsequent incumbrance his mortgage is a valid security. Such, it is conceived, is the rule supported by reason and the weight of authority. \* \* \* Whether the mortgage intended to secure future advances discloses the nature of the transaction or not, there is no good reason why it should not remain a valid security for all advances that may be made until the mortgagee receives actual notice of subsequent claims upon the property. The burden of ascertaining the amount of an existing incumbrance should rest upon him who takes a conveyance on the property subject to the mortgage. He has notice by the record of the existence of a mortgage for the full amount of the intended advances; and if he wishes to stop the advances where they are at the time of recording his subsequent deed, it is only reasonable to require him to give actual notice of his claim upon the property; otherwise he should not be heard to complain that the prior incumbrance amounts at any future time to the full sum for which it appeared of record to be an incumbrance." Jones on Mortgages (6th Ed.) § 372.

Plaintiffs, when they obtained their lien, failed to protect themselves against the rights of the Grocery Company under its deed of trust, though they were bound to take notice thereof by the record. They took their subsequent lien subject to all rights that had accrued and could thereafter lawfully accrue under the prior deed of trust. The Grocery Company has shown that an indebtedness was secured by its deed of trust at the time plaintiffs took a subsequent lien on the property. It has also shown that advances since that time have become secured to it by the force of its deed of trust, unaffected by the lien of plaintiffs. Thus the fact appears that the aggregate of the indebtedness existing when plaintiffs took their lien and the advances made since that time without notice, the fixed sum of which is shown in the record, constitute a first lien on the property. Since the Grocery Company is entitled to a first lien on the property, for a definite sum, the decree permitting it to proceed with the enforcement of that lien is clearly right. Plaintiffs have no right to stay a sale by the

holder of the legal title on the facts appearing in this case. They have nothing by their deed of trust but the mere equity of redemption. They show no proper cause for equitable interference with the trustee's sale. The decree will be affirmed.

(69 W. Va. 676)

**DANIELS et al. v. RANDOLPH COUNTY COURT.**

(Supreme Court of Appeals of West Virginia.  
Nov. 7, 1911.)

*(Syllabus by the Court.)*

**1. HIGHWAYS (§ 194\*)—INJURIES FROM DEFECTS—CARE REQUIRED.**

Where an old road or way, becomes dangerous to travel, is abandoned for a new location, established, public authorities in charge of the work must put up barriers or warnings to protect persons traveling thereon, acting upon the belief, justified by appearances, that the old way is still open, and it is negligence not to do so.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 486; Dec. Dig. § 194.\*]

**2. HIGHWAYS (§ 197\*)—INJURIES FROM DEFECTS—CONTRIBUTORY NEGLIGENCE.**

While persons traveling on a public highway in the night time are required to exercise such ordinary care and caution, as a reasonably prudent man would exercise under the circumstances, and in view of the darkness, they have the right in the absence of knowledge to the contrary, to act on the assumption that such highway is in a reasonably safe condition for travel by night as well as by day, and are not bound to anticipate dangerous defects therein without some notice or other precaution taken for their protection.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 491-493, 498-503; Dec. Dig. § 197.\*]

**3. HIGHWAYS (§ 197\*)—INJURIES FROM DEFECTS—CONTRIBUTORY NEGLIGENCE.**

Where a highway containing a plain well-beaten track is discontinued, it is the duty of the public authority responsible therefor, to give such notice or warning, or erect such barriers as will prevent its use by travelers by night as well as by day, and in the absence of such notice travelers have the right to presume that such highway has not been discontinued or obstructed.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 491-493, 498, 503; Dec. Dig. § 197.\*]

**4. HIGHWAYS (§ 213\*)—INJURIES FROM DEFECTS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

A case in which the evidence of prior knowledge of the discontinuance of or defects in an old road is not sufficient to show, as matter of law, contributory negligence of plaintiffs, injured while traveling thereon in the night time.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 535-537; Dec. Dig. § 213.\*]

Error to Circuit Court, Randolph County.

Action by M. L. Daniels and others against the Randolph County Court. Judgment for plaintiffs, and defendant brings error. Affirmed.

H. G. Kump, for plaintiff in error. Samuel T. Spears, for defendants in error.

MILLER, J. Plaintiffs recovered against defendant, on the verdict of a jury, a judgment for \$304.50, damages for personal injuries alleged to have been sustained by Mrs. Daniels, while traveling with her husband over a public road. The correctness of that judgment is brought in question by the present writ of error.

[1] The demurrer to the declaration, in two counts, we think was properly overruled. The action of the court thereon is assigned as error here, but does not seem to be seriously relied upon. The negligence of the defendant, alleged to have resulted in the injuries sustained by the wife, is that it permitted the public road, known as the Files Creek road, at a place where it crosses Files Creek in said county, to become and remain out of repair; that at a short time prior to the date of her injuries very high waters in said Files Creek had washed, excavated and dug away a large portion of said road, where the same crossed said creek, producing a steep and perpendicular descent into said creek, rendering the road impassable, and exceedingly dangerous to persons using the same, particularly in the night time; that some time thereafter, and before Mrs. Daniels sustained her alleged injuries, the surveyor of said road pretended to change the location thereof where it crossed said creek, and to abandon that portion of the old road where it crossed said creek, and where the washout occurred, but had left the old road washed, excavated and dug out as aforesaid, open to the use of the public, and had neglected to erect any guard, fence or barrier, so as to give warning and notice that such pretended change had been made, as it is alleged it was his duty to do, whereby and by reason whereof, it is alleged, said plaintiffs, together with their two children, then lawfully on said road and in the exercise of due care, in the night time, suddenly and without any warning or notice of any kind, that said public road was so out of repair, were precipitated over said descent and into said creek, whereby and by reason whereof the plaintiff Carrie Daniels sustained the injuries of which the plaintiffs complain.

The facts are few, and there is little, if any, material conflict in the evidence. The accident occurred on the night of August 31, 1907, about nine o'clock. The evidence is that the night was very dark. The plaintiffs were on their way from Beverly to the home of the father of M. L. Daniels, who lived on Files Creek, within some three hundred yards of the place of the accident. Plaintiffs lived at Elkins, and, so far as the record shows, they knew nothing of the condition of the road at this crossing. They had heard of high waters occurring about July 17th, and that the roads had been washed out in places, but did not know of the

condition of this road, or that any portion of it had been abandoned and a new location made. The old road, the abandoned part, ran south from Beverly, in the direction in which plaintiffs were traveling, around the foot of a hill to the point where it crossed the creek. This new road was made by simply laying down the fence enclosing an adjoining meadow, removing some rocks in the way, and by making fills in one or two places. After it was opened, the evidence shows the public generally used the new way, the old one being abandoned because impassable, where it crossed the creek.

Defendant denies negligence, but the principal defense is contributory negligence on the part of plaintiffs.

The evidence of the road surveyor, and of one or two other witnesses, tends to show that some rubbish washed in the road by the flood, and some brush and a pole put up across the abandoned way served as a barrier to travel on the abandoned way; but other witnesses, including the road surveyor of an adjoining section, who did the work of opening the new way, say there was no barrier or pole erected across the old way. The evidence makes it quite certain that on the night of the accident there was no pole there and no barrier or warning sufficient to obstruct the passage of the plaintiffs over the abandoned road. The evidence is that it was old and worn, and easily seen, while the new way could not be seen in the darkness, by persons traveling in vehicles.

The authorities seem to be quite uniform in holding that where an old and dangerous road or way is abandoned for a new one established, public authorities in charge of the work must put up barriers or warnings to protect travelers, acting upon the belief, justified by appearances, that the old way is still open, and that it is negligence not to do so. 2 Elliott on Roads & Streets (3d Ed.) section 901; *Bills v. Town of Kaukauna*, 94 Wis. 310, 68 N. W. 992, and cases cited; 37 Cyc. 291, and notes; 28 Cyc. 1403-1405, and cases cited in notes.

[2] But were plaintiffs guilty of contributory negligence, barring recovery? Contributory negligence, when it depends on facts and testimony, is a question for the jury. *Snoddy v. Huntington*, 37 W. Va. 111, 18 S. E. 442. Our decisions say, however, that where the facts and evidence show as matter of law, that plaintiff was guilty of contributing to his injuries the court should, on motion of defendant, exclude all the evidence from the jury. *Slaughter v. Huntington*, 64 W. Va. 240, 241, 61 S. E. 155, 16 L. R. A. (N. S.) 459, and cases cited. The rule is also well settled in this and other states that a traveler on a public highway can not close his eyes to open and patent defects and dangers. If plaintiffs had been traveling in the day time, with the new way and the dangers of the old plainly in sight, as the

evidence shows they were, the authorities say they could not recover. Travelers on a highway must use their senses, and are not permitted to shut their eyes to open and obvious defects and dangers in the way. For injuries thus sustained, due to negligence on their part, damages for injuries sustained can not be recovered. *Hysell v. Central City*, 68 W. Va. 769, 70 S. E. 767, and cases cited.

What is the rule, however, where persons are using a public road in the night time? It is well stated, with copious citations, in 28 Cyc. 1431, as follows: "A person traveling on a street or public way in the night time is required to exercise such ordinary care and caution as a reasonably prudent man would exercise under the circumstances, and in view of the darkness; and ordinary care in the night time may call for greater caution than in the day time. In exercising ordinary care a traveler at night, in the absence of knowledge to the contrary, has the right to act on the assumption that the street or way is in a reasonably safe condition for travel by night as well as by day, and is not bound to anticipate that he will encounter excavations, without having some notice thereof by lights, or without other precautions taken for his protection. A failure to use prudence commensurate with obvious conditions constitutes negligence."

[3] Tested by this rule can we say as matter of law that plaintiffs were guilty of negligence precluding recovery? Unless we can do so, the question then being one of mixed law and fact for jury determination, on proper instruction by the court, we should not disturb the verdict and judgment of the court below. As particularly pertinent to the case at bar, it was decided in *Wisconsin*, in *Bills v. Kaukauna*, supra, that, "Where a highway containing a plain and well-beaten track is discontinued, it is the duty of the town to give such notice or warning or erect such barriers as will prevent its use by travelers by night as well as by day; and in the absence of such notice travelers have a right to presume that such a highway has not been discontinued or obstructed."

[4] To reverse the judgment below, defendant relies on the admissions of plaintiffs that on the night of the accident in question they knew that floods had prevailed in Flies Creek and in other creeks, some two weeks previous, and that the roads had been washed in some places; and that before reaching the place of the accident, Mrs. Daniels had suggested to her husband that he had better walk ahead and see if there were any wash-outs, and to which he replied, that the roads had been used, that wagons had gone over it, and that it was all right. He proved, however, that he had no reason to believe this road, if damaged by the floods, had not been repaired in the mean time, or that it was unsafe. Mrs. Daniels' testimony is as follows: "Q. Now, Mrs. Daniels, it was dark

when you left Beverly, or about so? A. Yes; it was getting dark I remember. Q. And you told your husband you thought it was dangerous to go, or he had better not go? A. I don't remember about that. Q. You said something before you got well started on the road? A. While we were on the road I mentioned to him perhaps there was some danger. I don't remember whether it was after we were going up that road, or not. Q. And he still thought it was merely a woman's weakness, and that you were afraid? A. He didn't pay any attention to me I know. Q. Now then you got up to the ford of Files Creek there? A. Yes. Q. This left hand prong that comes down by the Beverly Road. Do you remember now whether you told him again that he had better get out and see if it was safe? A. No, I didn't say anything to him. He made the remark to me that there was the fence. He says it is all right. Here is the fence that goes along the road. Q. Then you were looking out for difficulties when you saw that? A. When we saw that we just drove on. Q. But you must have been looking for difficulties when he said, 'All right, there is the fence.' A. That is what he said. Q. But you were looking out for difficulties. A. I was uneasy, I admit, but I don't think he was. Q. He was very willing to take the risk. Now, Mrs. Daniels, how far was that below the ford that he remarked, 'There is the fence?' A. I don't remember. He says, 'There is the fence that goes around, and it is all right.' I don't know whether the fence is still there or not."

We do not think this evidence sufficient to show negligence on the part of the plaintiffs or either of them. True they had heard of high waters in the creeks, and Mrs. Daniels appears to have had some apprehensions that the road might be dangerous; but her husband, familiar with the road, and knowing that some two weeks had elapsed, after the high waters had subsided, and who appears to have been driving cautiously, had the right to assume, as the authorities hold, that if the road had been damaged, it had, in the mean time, been made reasonably safe for travel by night as well as in the day time; or if rendered dangerous, and any part of it had been abandoned for a new location, that some sign or warning would be given to protect travelers upon the road.

For the reasons given we are of opinion to affirm the judgment.

(69 W. Va. 694)

#### BURKHART v. SCOTT et al.

(Supreme Court of Appeals of West Virginia.  
Nov. 7, 1911.)

(Syllabus by the Court.)

#### 1. INJUNCTION (§ 27\*)—NATURE OF REMEDY—EXISTENCE OF REMEDY AT LAW.

Equity will not entertain a bill, brought to enjoin the use of a writing evidencing a settle-

ment between parties to a pending action at law, and offered as evidence to procure a dismissal of the action, notwithstanding such writing was procured by fraudulent and deceitful means. The law court has full power to prevent injustice in such case.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 27.\*]

#### 2. ATTORNEY AND CLIENT (§ 190\*)—COMPENSATION OF ATTORNEY—PROTECTION AGAINST COLLUSIVE SETTLEMENT.

An attorney who has brought a suit, pursuant to an agreement that he is to have a certain per centum of the judgment that shall be recovered, as his fee for services, has an inchoate right in the chose in action, and may avoid a collusive settlement, made between the defendant and his client, for the purpose of defeating his fee.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412-417; Dec. Dig. § 190.\*]

#### 3. ATTORNEY AND CLIENT (§ 190\*)—COMPENSATION OF ATTORNEY—PROTECTION AGAINST COLLUSIVE SETTLEMENT—NATURE OF REMEDY.

An attorney's remedy in such case is not in equity by injunction, but he can apply to the court in which the action is pending, and ask to have the case proceed to final judgment in the name of his client, for his own benefit.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 412-417; Dec. Dig. § 190.\*]

Appeal from Circuit Court, Randolph County.

Action by Harrison Burkhart against C. H. Scott and others. From a judgment for plaintiff, defendant Scott appeals. Decree reversed, and original bill and cross-bill dismissed, without prejudice to rights of parties to pursue remedies at law.

W. B. Maxwell, for appellant. James Coberly, for appellee Wamsley.

WILLIAMS, P. Harrison Burkhart, a resident of Pennsylvania, employed J. L. Wamsley to bring an action of assumpsit against C. H. Scott, in the circuit court of Randolph county, W. Va., and agreed to give him one-half of the amount recovered as an attorney's fee. Wamsley brought the suit, and on the 28th of January, 1904, the jury rendered a verdict against Scott for \$315. Scott thereupon moved to set aside the verdict, and for a new trial. That motion is apparently still pending. Scott then went to Pennsylvania, and on the 13th of January, 1905, effected a compromise of the suit with Burkhart, and took from him a writing, whereby Burkhart agreed that the action should be dismissed at his cost. Shortly thereafter Burkhart brought a suit in equity against Scott, to enjoin him from making use of said writing for the purpose of procuring a dismissal of the action at law, alleging in his bill that the compromise agreement had been procured by means of false and fraudulent representations, made to him by

Scott. Wamsley was made a party defendant, and his contract for a contingent fee was averred in the bill. Upon the filing of the bill, in April, 1905, in term, a temporary injunction was granted, restraining Scott from making use of the writing for said purpose. On the 12th of September, 1905, Scott appeared, demurred, and tendered his answer to the bill, denying the fraud, and moved a dissolution of the injunction. At the same time, Wamsley also tendered his answer, in the nature of a cross-bill, in which he avers that Scott and Burkhardt had fraudulently combined and conspired together to defeat his attorney's fee to which he was entitled under his contract with Burkhardt, and of which agreement for a contingent fee he alleges Scott had knowledge. Ed D. Wamsley, who was Burkhardt's bondsman for costs in the assumpsit action, and Charles Sheriff and Charles F. Sheriff, to whom it is alleged Burkhardt had assigned his interest in the claim against Scott, were also made defendants to said cross-bill answer. The prayer is that his answer be treated as a cross-bill; that the injunction be perpetuated; that judgment in the action at law be entered upon the verdict; that the rights of all parties be ascertained; and that Scott be required to pay the full amount of the verdict. Scott also tendered written exceptions to the cross-bill, and Wamsley excepted to Scott's answer to the original bill. On the hearing, the court overruled Scott's demurrer to the original bill, and his exceptions to Wamsley's cross-bill, and overruled Wamsley's exceptions to Scott's answer, and held the compromise agreement between Scott and Burkhardt to be fraudulent and void as to all parties to the suit, and perpetuated the injunction. From that decree, Scott has appealed.

[1] The original bill states no cause for injunction. The law court can determine whether or not the compromise was fraudulently made to defeat Wamsley's fee, and, if it should find that it was in fact fraudulent, it has the power to reject the paper as evidence. *Harvey v. Fox*, 5 Leigh (Va.) 444; *Haden v. Garden*, 7 Leigh (Va.) 157; *Evans v. Taylor*, 28 W. Va. 184; *Gall v. Bank*, 50 W. Va. 597, 40 S. E. 390; *Hogg's Eq. Prin.* § 45. Injunction is one of the extraordinary remedies, and equity will not relieve by injunction when there is a plain and adequate remedy at law. In fact, it is essential, to confer jurisdiction by injunction, that it must appear that no adequate relief exists in law on the facts averred, and a bill which fails to show the want of such legal remedy is fatally bad. *Shepherd v. Groff*, 34 W. Va. 123, 11 S. E. 997; *Shay v. Nolan*, 46 W. Va. 299, 33 S. E. 225.

[2] Wamsley's cross-bill alleges facts, not averred in the original bill, but facts which relate to the same subject-matter, and prays affirmative relief thereon. Consequently a demurrer thereto is proper pleading. Scott's

written exceptions are, in legal effect, a demurrer. And, so regarding them, they should have been sustained, and the cross-bill dismissed, for the same reasons which we have given for holding that the original bill stated no cause for equitable relief. The law court has the power to determine the truth of the facts averred in the cross-bill, and if it finds them true Wamsley should be permitted to proceed with the trial of the case to judgment, in the name of his client, for his own benefit. While it is generally true that courts not only favor, but encourage, the settlement of doubtful claims out of court, and while it is also true, as a general proposition, that clients have absolute control over their suits, and may dismiss them without the consent of their attorneys, still these general rules are subject to some exceptions, which the courts have established in the interest of justice, and for the protection of rights of attorneys. An attorney is a licensed and sworn officer of the court, and has a right to make reasonable contracts with his client for his fees for legal advice and services rendered and to be rendered, and the law will not uphold a collusive and fraudulent settlement between parties, made for the purpose of defeating the rights of the attorney. Wamsley's agreement for a contingent fee, payable out of the judgment, in the event one is recovered, may not amount to an assignment of an interest in the chose itself, still the effect of it is to give him such an inchoate right therein, after the suit is brought, as cannot be defeated by a collusive settlement between the parties. 3 A. & E. E. L. (2d Ed.) 466.

[3] The cross-bill avers that the settlement was collusive and fraudulent, and was made to defeat the collection of his fee, and also avers that Scott knew his contract for a fee was contingent upon the recovery of a judgment. If those averments are true, Wamsley is entitled to protection. But his remedy at law is adequate and full. The law court can determine the truth or falsity of the facts alleged, and if it finds them true it can direct the trial to proceed, for Wamsley's benefit, in the name of his client, to final judgment. The demurrer to the cross-bill should therefore have been sustained, and the cross-bill dismissed.

In discussing the right of an attorney to avoid a collusive settlement between parties, after suit has been brought, made for the purpose of defeating his fees, the Court of Appeals of New York, in its opinion in *Coughlin v. Railroad Co.*, 71 N. Y. at page 447, 27 Am. Rep. 75, says: "There are many cases where this has been allowed to be done. It is impossible to ascertain precisely when this practice commenced, nor how it originated, nor upon what principle it was based. It was not upon the principle of a lien, because an attorney has no lien upon the cause of action, before judgment, for his costs; nor was it upon the principle that his services

had produced the money paid his client upon the settlement, because that could not be known, and in fact no money may have been paid upon the settlement. So far as I can perceive, it was based upon no principle. It was a mere arbitrary exercise of power by the courts; not arbitrary in the sense that it was unjust or improper, but in the sense that it was not based upon any right or principle recognized in other cases. The parties being in court, and a suit commenced and pending, for the purpose of protecting attorneys, who were their officers and subject to their control, the courts invented this practice, and assumed this extraordinary power to defeat attempts to cheat the attorneys out of their costs. The attorney's fees were fixed and definite sums, easily determined by taxation, and this power was exercised to secure them their fees."

In *Hanna v. Island Coal Co.*, 5 Ind. App. 163, 31 N. E. 846, reported in 51 Am. St. Rep. 246, Mr. Freeman has added a number of valuable notes on the question of the rights, and the remedy, which the law affords to an attorney who has been prevented from fulfilling his agreement with his client by a collusive settlement between the parties, made for the purpose of defeating his fee; and in one of these notes that distinguished writer says that the proper course for the attorney to pursue is to proceed with the cause to judgment, in the name of his client, for the purpose of collecting his costs. In support of this proposition, he cites numerous authorities.

In *Randall v. Van Wagenen*, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828, it was held that the attorney for plaintiff cannot maintain an independent action against the defendant in such suit, on the ground that a collusive settlement was made before judgment, which defeated him of the fruits of his agreement with his client for a fee, which was contingent upon recovery of a judgment. But it was there held that the attorney could proceed to judgment in the original suit in the name of his client. See, also, on this subject, the following authorities: 4 Cyc. 1022; *Nat. Exhibition Co. v. Crane*, 167 N. Y. 505, 60 N. E. 768; *Matter of Regan*, 167 N. Y. 338, 60 N. E. 658; *Jones v. Bonner*, 2 W. H. & G., Exch. Rep., 229; *Talcott v. Bronson*, 4 Paige (N. Y.) 501; *Cole v. Bennett*, 6 Price's Exch. Rep. 15; *Morse & Holder v. Cooke*, 13 Price's Exch. Rep. 473; *Potter v. Mining Co.*, 19 Utah, 421, 57 Pac. 270; *McDonald v. Napier*, 14 Ga. 89; *Carpenter v. Myers*, 90 Mich. 209, 51 N. W. 206; 1 *Jones on Liens*, § 224, 225; *Weeks on Attorneys*, § 377.

For the reasons herein given, the decree of the lower court will be reversed, and both the original bill and the cross-bill will be dismissed, but without prejudice to the rights of the parties to pursue any appropriate remedy, or remedies, at law.

(39 W. Va. 632)

H. C. HOUSTON LUMBER CO. et al. v.  
WETZEL & T. RY. CO.

FRICK & LINDSAY CO. v. SAME

(Supreme Court of Appeals of West Virginia.  
Nov. 7, 1911.)

(Syllabus by the Court.)

1. MECHANICS' LIENS (§ 149\*)—PROCEEDINGS TO PERFECT—STATEMENT OF AMOUNT DUE—SUFFICIENCY.

The "just and true account of the amount due," required by section 4, c. 75, Code (1906) to preserve a lien for labor, or material furnished, given by section 2, of said chapter, if the contract therefor be made directly with the owner of the property, need not state the account by items giving the year, month and day, though it is proper, and the better practice to do so.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 256-259; Dec. Dig. § 149.\*]

2. MECHANICS' LIENS (§§ 152, 271\*)—PROCEEDINGS TO PERFECT—STATEMENT OF AMOUNT DUE—SUFFICIENCY—PLEADING.

And although it is essential to the validity of such lien that said account be filed in the clerk's office within sixty days after the lienor ceases to labor or furnish material, it need not show affirmatively on its face that it was so filed within the time prescribed. In a suit to enforce such lien, however, this fact with all other facts necessary to a valid lien must be alleged and if controverted fully proven.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 212, 509; Dec. Dig. §§ 152, 271.\*]

3. MECHANICS' LIENS (§ 277\*)—ENFORCEMENT—BILL—EFFECT.

If the bill to enforce such a lien alleges the existence of all facts essential to a valid lien for labor or material, and these allegations are not controverted, they must for the purposes of the suit be taken as true, unless some exhibit filed therewith and vouched for the truth thereof, impugns the truth of some one or more of the material facts alleged.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 546-554; Dec. Dig. § 277.\*]

4. MECHANICS' LIENS (§ 277\*)—ENFORCEMENT—BILL—VARIANCE.

The fact of the filing of such account in the county clerk's office within the time required by said section 4, c. 75, Code (1906) when so alleged in the bill, and proven or not controverted by answer, is not impugned by the original of such account filed as an exhibit with the bill, which does not show on its face the year the last material was furnished, or by the endorsement by the clerk on the back thereof showing the date of the filing thereof and the book and page where recorded, which does not appear to be signed by such clerk.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 546-554; Dec. Dig. § 277.\*]

5. RAILROADS (§ 159\*)—LIENS—PROCEEDINGS TO PERFECT—STATEMENT OF CLAIM—DESCRIPTION OF PROPERTY—SUFFICIENCY.

A lien for material furnished a railway company for constructing its railway which described the property on which the lien is claimed, as "the railway of said corporation situate in the counties of Wetzel and Tyler and extending from the city of Sistersville in Tyler county to the town of Brooklyn in Wetzel county," is "sufficiently accurate" for identification, and

satisfies all requirements of said section 4, c. 75, of the Code.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 477, 486-504; Dec. Dig. § 159.\*]

**6. APPEAL AND ERROR (§ 267\*)—PRESENTATION OF QUESTIONS IN LOWER COURT—EXCEPTIONS—NECESSITY.**

If error of law appear on the face of a decree, or the report of a commissioner, though not excepted to, it may be corrected on appeal to this court by the party aggrieved thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1572-1581; Dec. Dig. § 267.\*]

**7. MORTGAGES (§ 151\*)—PRIORITY—MECHANICS' LIENS.**

A mechanic's lien begins from the time the labor or the furnishing of material begins, and has priority over a deed of trust subsequently executed on the same property.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 151; Mechanics' Liens, Cent. Dig. §§ 358-370.]

*(Additional Syllabus by Editorial Staff.)*

**8. RAILROADS (§ 159\*)—LIENS—APPLICATION OF GENERAL LAW.**

Code 1906, c. 75, § 2, gives mechanics and materialmen, who furnish labor or material for constructing or repairing a house or other structure under contract of the owner or his authorized agent, a lien to secure payment upon such house or other structure and upon the interest of the owner in the lot of land on which the house or structure may stand. *Held*, that such a lien may be enforced against a railroad.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 488; Dec. Dig. § 159.\*]

Appeal from Circuit Court, Wetzel County.

Actions by the H. C. Houston Lumber Company and others and by the Frick & Lindsay Company against the Wetzel & Tyler Railway Company. From an adverse decree, and a decree denying their motion to reverse and set aside the former decree so far as it affected their claim, plaintiffs W. F. White and another appeal. Affirmed in part, reversed in part, and rendered.

Neal & Strickling and Thos. P. Jacobs, for appellants. S. Bruce Hall, for appellees Mercantile Trust Company and others. E. L. Robinson, for appellees First Nat. Bank and others.

MILLER, J. Appellants, White Bros., plaintiffs below, complain of two decrees of the circuit court, the first, pronounced February 24, 1908, adjudicating the principles of the cause, denying them any relief, and decreeing a sale of the property of the defendant corporation to satisfy other debts and liens proven and decreed thereon; the second, pronounced February 10, 1909, denying their motion and refusing, on appellants' petition filed, to reverse and set aside said former decree so far as it affected their claim.

Appellants sought to establish and have decreed against the property of the defendant company a lien for certain materials alleged to have been furnished by them to it, under contract, to be used, and which the

bills allege were used by it in the erection and construction of its said railway in Wetzel and Tyler counties, and the same property mentioned and described in their account therefor filed with and made a part of said bills.

So far as we can see the averments of the original and amended bills satisfy all requirements of a bill to enforce such a lien, viz.: The existence of the contract; the terms thereof; that the material was furnished pursuant to the contract; the filing of just and true account of the amount due thereon to them with the clerk of the county court within the time required by law; a description of the property against which the lien is asserted; the name of the owner thereof, and that the suit was brought within the time required by law, and the existence of the debt. *Lunsford v. Wren*, 64 W. Va. 458, 63 S. E. 308, and cases cited.

These bills were not demurred to, nor were the allegations thereof controverted by any of the answers filed. Both bills specifically allege that within sixty days from the time appellants ceased to furnish said material they filed with the clerk of the county court of said Wetzel county a just and true account of the amount due and owing them from said railway company after allowing all credits, together with a description of the property intended to be covered by said lien, duly sworn to January 19, 1904, and which was duly recorded in Mechanic's Lien Book, as would more fully appear from said account filed as "Exhibit F" therewith. These allegations, therefore, being well pleaded, and for the purposes of the suit stood for confessed, and by the very terms of the statute, section 36, c. 125, Code 1906, no further proof was required.

[1] The correctness of the decrees below depend on the construction that should be given our statute, section 4, c. 75, Code (1906). It provides: "Every lien provided for in the second and third sections shall be discharged unless the person desiring to avail himself thereof shall, within sixty days after he ceases to labor on, or furnish material or machinery for such building or other structure, file with the clerk of the county court of the county, in which the same is situated, a just and true account of the amount due him, after allowing all credits, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner or owners of the property, if known, which account shall be sworn to by the person claiming the lien, or some person in his behalf." Appellants' lien, "Exhibit F" with the bill, apparently the original account filed with the clerk of the county court, is dated January 1, 1904, and is sworn to January 19, 1904. The account

purports to be itemized, beginning September 3, and running through September, October, November and ending December 16, and showing a total balance, after allowing credits, of \$2,920.37; but at no other place in the account, except the date January 1, 1904, does the year appear. On the back of the account there is this endorsement: "Clerk's Office, County Court, Wetzel County, W. Va. Filed for record this 19th day of Jan'y. A. D. 1904, at 10:40 o'clock A. M. Recorded in Book 1, of page 396." In the return of the clerk to a writ of certiorari, bringing up this memorandum, he certifies this note to be by the clerk, and a part of the record of the cause. It does not appear to be signed by the clerk. [2, 3] If, however, the facts alleged in the bills be not impugned by this exhibit, or the memorandum thereon, they must be regarded as facts established for the purpose of this suit. The contention of appellees, however, is that as the lien does not show *affirmatively*, on its face, as they contend it must, every fact necessary to be alleged and proven to make it a good and valid lien on the property, the lien must fail. They say that by the omission of the year over or opposite the items therein the account fails to show affirmatively "when the work was performed and material furnished," wherefore fatally defective; and that it is not shown on the face of the exhibit, nor at all, except by allegation, which they say is not sufficient, that it was filed in the clerk's office as the statute requires, within sixty days after appellants ceased to furnish said material. Does the "just and true account of the amount due" required by our statute call for an itemized statement, with years, months, and days, when the contract is made directly with the owner? The authorities, or the great weight of them, we think, say No. 27 Cyc. 184. This authority says: "Under a statute requiring the claim to state the time when the materials were furnished or the work done the omission of the year is fatal, although the months and days are stated; but under a statute requiring merely 'a just and true account' the omission of the year is not fatal when the months and days on which the items were furnished are stated. Where the year is stated only at the head of the account but the paper itself shows that such year refers to the days and months placed opposite the items it is sufficient." Boisot on Mech. Liens, section 411, says: "The claim need not contain an itemized account of the lien debt, in the absence of any language in the statute expressly or by necessary implication requiring it." And in section 418 this writer says: "Where the statute expressly requires the claims to set forth the times when the material was furnished or the labor performed, an omission of such allegations in the claim renders the lien void. \* \* \*

But, where the statute does not

expressly require the claim to give the dates of the account, such dates need not be stated." See also Id. section 412; Doane v. Clinton, 2 Utah, 417; Cook v. Rome Brick Co., 98 Ala. 409, 12 South. 98. Prior decisions of this court we think support this view. O'Niel v. Taylor, 59 W. Va. 370, 53 S. E. 471; Grant v. Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36. The second point in the syllabus in the latter case, says: "When the basis of such lien is work and labor, and the recorded paper shows the kind, amount and price thereof, failure to enter each month's, day's or year's service, as the case may be, as a separate item of charge, and credit each payment as a separate item, with the date thereof, will not vitiate such paper, if, on its face, it discloses with reasonable certainty the kind, amount and contract price of the service and time of performance." This point also says that, "Itemization in form is unnecessary, if it appear in substance and effect." And the third point is: "To determine the sufficiency of such an account and claim, the account proper and the sworn statement appended to it, may be read together and considered as a whole." The sixth point is that, "If a bill and its exhibits, read together, show all the facts necessary to be alleged in a bill sufficient in law, a demurrer thereto is properly overruled." The exact point we have for decision in this case was not directly involved or decided in that case. The point seems to have been more or less directly involved however in O'Niel v. Taylor, supra. In the account in that case no dates were given for any of the jobs of work done on the building, and it was said, in point three of the syllabus, that "A general statement of the demand of such contractor showing its nature and character, and the amount due or owing thereon, after allowing all credits is a compliance with the statute." And reviewing the Virginia case of Shackleford v. Beck, 80 Va. 573, construing the statute of that state, and differentiating it from our own, it is said, that under the Virginia statute, "the lienor is required to file, within the time specified after the completion of the work, in the clerk's office among other things, 'a true account of the work done or material furnished,' while our statute requires 'a just and true account of the amount due him.'" The statutes of other states are also differentiated from ours. And at page 378 of 59 W. Va., at page 474 of 53 S. E., it is observed that, "In some of the cases cited by defendant's counsel the dates of performing the work and furnishing the material are required by the statutes to be given," but that the only date material under our statute, is the date when the work was completed, or the last material furnished. This exact point is the subject of sections 421 and 422, Boisot on Mech. Liens. In section 421 he says: "Mechanic's



lien statutes usually, if not invariably, limit the time within which the claim may be filed. In many cases this time runs from the completion of the work. The question therefore arises whether a lien claim should *affirmatively* show that it is filed within the required time, or whether that may be left to be proved at the trial. While it undoubtedly is the better practice to have the claim show this fact *affirmatively*, yet there are numerous decisions to the effect that it is not necessary to do so." The cases supporting this view, cited and reviewed, are from Alabama, California, Connecticut, Missouri, New Jersey, New York, and Utah. Those opposing it, referred to in section 422, are from Nebraska, Pennsylvania, and Minnesota. Our statute certainly does not require the account to show *affirmatively* that it was filed within sixty days after ceasing to furnish material; and it seems to us that we should not read into a statute, providing as ours does for continuing or perpetuating such lien, and which begins at the time the work is commenced or the first material furnished, a requirement not specifically provided or clearly implied by the terms thereof. The owner with whom the contract is made is necessarily charged with actual notice of the terms of his contract, the dates of performing the labor or furnishing the material under the contract, and the time when the contractor ceases to labor or furnish material; and the filing of "a just and true account of the amount due," if in fact filed within the time required by statute, is certainly sufficient to give notice of a lien though the fact may not affirmatively appear on the face of the account, and if the bill alleges all the essential facts, entitling the lienor to his lien, and these facts are either admitted or proven, this, under our decisions, is all that should be required. The statute should be given a fair and liberal construction. *Blowpipe Co. v. Spencer*, 40 W. Va. 698, 21 S. E. 769.

[4] It has been suggested, however, that the exhibit contradicts the allegations of the bills, in that it fails to show on its face, or by the certificate of the clerk, that it was filed within the time prescribed and that although the allegations of the bill be sufficient and be taken for confessed, the exhibit contradicting them must be looked to rather than the bill itself to sustain the lien. The law undoubtedly is, that in cases of conflict between the instrument sued on, or vouched for the allegations of the bill, the instrument itself and not the bill will be looked to for its correct interpretation, and the facts alleged as appear therein. *Richardson v. Ebert*, 61 W. Va. 523, 56 S. E. 887; *Board of Education v. Berry*, 62 W. Va. 434, 59 S. E. 169, 125 Am. St. Rep. 975; *Loar v. Wilfong*, 63 W. Va. 306, 61 S. E. 323; *Lea v. Robeson*, 12 Gray (Mass.) 280; *Dillon v. Barnard*, 21 Wall. 430, 22 L. Ed. 678; *Land Co. v. Maxwell Land Co.*, 139 U.

S. 569, 11 Sup. Ct. 656, 35 L. Ed. 278. But there is nothing upon the face of "Exhibit F" contradicting the allegations of the bills, and though the endorsement thereon, brought up on certiorari is not signed by the clerk of the county court, and is a part of the record, it in no way contradicts the averments of the bills. So far as this endorsement is evidence at all it tends to support the bills. The principles enunciated in the authorities cited are not applicable, we think, to the facts in this case.

[5] But it is said the description of the property on which the lien is claimed is too indefinite. As we have seen the statute requires the description to be sufficiently accurate only for identification. The description of the property given in the lien is, "the railway of said corporation situate in the counties of Wetzel and Tyler and extending from the city of Sistersville in Tyler county to the town of Brooklyn in Wetzel county." Because of the character of a railway, traversing as it does in this case the streets and roads of a town and county, the notoriety which is necessarily given such a work of internal improvement, the description in this lien is sufficiently accurate we think for identification.

[8] Another point not presented or argued by counsel, though suggested in council, is that perhaps public policy would forbid the laying of a mechanic's lien upon railways of this character. Mr. Bolsot, section 204, discusses this subject, referring to the conflicting decisions. After a brief review of the cases he says in conclusion, that "the better reason would seem to show that mechanics' liens may be enforced against street car companies under the laws giving liens on railroads." Our statute does not in specific terms give such a lien on railroads, but we think the subject is covered in general terms by section 2, c. 75, Code (1906), giving mechanics or materialmen, who furnish any labor or material "for constructing, altering, repairing or removing a house, mill, manufactory, or other building, appurtenances, fixtures, bridge, or other structure, by virtue of a contract with the owner or his authorized agent, \* \* \* a lien to secure the payment of the same; upon such house or other structure, and upon the interest of the owner in the lot of land on which the same may stand or to which it may be removed." Is not a railway a structure upon land, and does not the owner have an interest in the land or lot on which the railway is built, even though it be built on a public road or street? The Circuit Court of Appeals of the United States, for this judicial circuit, has held with respect to the same railroad involved here, that section 7 of the same chapter gave to a corporation employed to supervise the construction of defendant's railway by means of the personal services of its officers and servants, a lien therefor on the

property of the railway company, such corporation being within the words of the statute, such "other person" entitled to such lien, section 17, c. 13, subd. 9, Code (1906), providing that: "The word 'person' includes corporations, if not restricted by the context." *Wetzel & Tyler Ry. Co. v. Tennis Bros.*, 145 Fed. 458, 75 C. C. A. 266; *Id.* (C. C.) 140 Fed. 193. If said section 7 gives to the class of persons described therein a lien on the property of a street railway company, what reason, either on principle or grounds of public policy, can be assigned for denying the like right to the class of persons protected by sections 2 and 3 of the same chapter? We can perceive none.

The question remains, what order of priority should be given appellants' lien? In his report, not excepted to by appellants, the commissioner placed it, along with other mechanic liens, sixth in order of priority, after the bonded indebtedness. On exceptions by Belford and Guyton, and the Best Manufacturing Company, however, who held liens of the same character, and given the same order of priority, the court below properly corrected the commissioner's report by giving them third place in the order of priority, immediately after the vendor's lien of E. A. Pollock. If appellants' lien is valid, as we have decided it is, it is entitled to the same order of priority as those of Belford and Guyton and the Best Manufacturing Company.

[8] Appellants did not except to the report of the commissioner, however, and in a petition filed by them in the court below, for a rehearing of the final decree of February 24, 1908, they represented that their lien had been reported and given its proper and appropriate place in the order of priority. Why they did not except, and why in their petition, after said decree, they should express satisfaction with the order of priority given their lien is not apparent. It is only explainable on the theory of oversight, or inadvertence. The error in the report is pointed out for the first time in this court, and we are urged to correct it. Can we properly do so? The admissions of the petitioners in the court below, we do not regard as concluding them. The order of priority to which they are entitled is a purely legal question presented on the face of the decree or record. Our decisions say that "Although no exceptions are filed to a commissioner's report, and the report is confirmed, if the decree of confirmation, upon its face, shows material error as to matter of law, prejudicial to the appellant, for such error the decree should be reversed." *Reitz v. Bennett*, 6 W. Va. 417; *Ruhl v. Berry*, 47 W. Va. 832, 35 S. E. 896; *Haymond v. Murphy*, 65 W. Va. 616, 64 S. E. 855. If the court below had not, on exceptions to the commissioner's report, denied appellants their

lien on the railway property, it would no doubt, in rearranging the order of priority of the several debts and liens reported, have given appellants their proper place in the order of priority.

[7] It has been suggested in argument, however, that as the record shows appellants had not furnished all the material charged in their mechanic's lien, prior to the date of the execution and recordation of the deed of trust securing the bonds, and prior to the delivery of some of said bonds, the lien is not good for the material furnished subsequently. It seems to be the settled law of this state that a mechanic's lien attaches from the time the performance of the work and furnishing the material begin, and has priority over a deed of trust subsequently executed on the same property. *Cushwa v. Imp. L. & B. Ass'n*, 45 W. Va. 490, 32 S. E. 259; *W. Va. Bldg. Co. v. Saucer*, 45 W. Va. 483, 31 S. E. 965, 72 Am. St. Rep. 822; *Charleston Lumber Co. v. Brockmyer*, 18 W. Va. 586; *Bank v. Dashiell*, 25 Grat. (Va.) 616.

We are of opinion therefore that the court below erred in its decree of February 24, 1908, in sustaining exceptions to the report of the commissioner in favor of the appellants, and that this decree to this extent, as well as the subsequent decree of February 10, 1909, in so far as it may be regarded as affecting the rights of appellants to said lien, be reversed and annulled; and the decree which the circuit court should have entered will be entered here, overruling the said exception, and giving decree for the amount of said lien, to be paid third in the order of priority along with the liens of said Belford and Guyton and the Best Manufacturing Company.

(39 W. Va. 699)

COBERLY v. GAINER et al.  
(Supreme Court of Appeals of West Virginia.  
Nov. 7, 1911.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§§ 62, 90\*)—CONTRACTS—VALIDITY—INDIVIDUAL LIABILITY OF OFFICERS.

All three members of a board of education met outside of their school district, on the 7th September, 1904, and signed their names, without giving their official designation, to a contract for "7 sets of The New Education," to be furnished to the public schools of their district, agreeing to pay therefor by warrant to be drawn upon the sheriff, "and not to be presented until the fall of 1905."

Held:

(1) That said agreement was an attempt to create an obligation on the school district, payable out of the levy to be made for the fiscal year 1905, and was therefore in violation of section 45, c. 45, Code of West Virginia 1899 (section 45, c. 45, Code 1906), the law then in force, and created no charge upon the public fund of the district.

(2) That said contract was made by the board

of education in its official capacity, and, notwithstanding it was in excess of authority, the law then in force imposed no individual liability on account thereof.

(3) That said contract was not the personal agreement of the members of the board of education, and that they did not thereby bind themselves individually.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 145, 148, 211, 213; Dec. Dig. §§ 82, 90.\*]

## 2. OFFICERS (§ 114\*)—INDIVIDUAL LIABILITY.

In the absence of a statute imposing individual liability upon a public officer for attempting to create a public debt in excess of his authority, he cannot be held personally liable therefor, except upon his agreement.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 187-192; Dec. Dig. § 114.\*]

Error to Circuit Court, Randolph County.

Action by C. C. Coberly against S. W. Gainer and others. Judgment for defendants, and plaintiff brings error. Affirmed.

James Coberly and Cunningham & Stallings, for plaintiff in error. Talbott & Hoover and E. A. Bowers, for defendants in error.

WILLIAMS, P. On the 7th of September, 1904, A. G. Keller, J. W. Courtney, and S. W. Gainer, composing the board of education for New Interest district, in Randolph county, purchased, by written contract, from James J. Ellis, for the public schools of their district, seven sets of *The New Education*, at the price of \$262.50, payable by warrant upon the sheriff, to be presented in the fall of 1905. On the 26th of November, 1904, the board of education made an order, directing said sum to be paid to the order of said James J. Ellis out of the building fund to be levied for the year 1905. Ellis then assigned the order to C. C. Coberly, secretary of said board of education. The order was not paid, and, in April, 1907, Coberly sued the members of the board of education before a justice of the peace, in their individual capacity, and recovered judgment. Defendants appealed to the circuit court of Randolph county, and the case was tried by the court, in lieu of a jury, upon agreed facts, and on the 4th of March, 1909, the court rendered final judgment, dismissing plaintiff's action, and plaintiff obtained this writ of error.

[1] The contract is expressly made a charge upon a future levy, and in making it the board of education exceeded its authority, and plaintiff relies upon sections 3 and 4, c. 16, Acts 1904 (Code 1906, c. 17, § 10a), as fixing individual liability upon the members of the board of education. But this statute did not take effect until the 9th of November, 1904, a little more than two months after the debt had been contracted, and therefore does not apply. Section 45, c. 45, Code 1899 (section 45, c. 45, Code 1906), is the only law, then in force, which

imposes personal liability on a board of education for creating a public obligation when it has no fund with which to pay it, and it does not include the case of a debt to be paid out of the levy for a future year. That section reads in part as follows, viz.: "If the trustees of any district, or any board of education, shall make any agreement for the employment of a teacher in violation of this section, or for any other object concerning free schools under their charge, so as to occasion thereby the aggregate of the just claims against the board of education of the district, or independent school district, in any year, to exceed its aggregate receipts, as aforesaid, for such year, such board of education, or trustees, shall be individually responsible to the teacher, or other person with whom such agreement is made." It will be noticed that this provision, creating individual liability upon the members of the board of education, is restricted by its language to cases of overdrafts upon funds levied for a particular year, and does not include the case of an obligation expressly made payable out of the levy of a future year. The first part of the section quoted from forbids a board of education to contract a debt to be paid out of the levy of a future year, but provides no penalty in case it attempts to do so. The section forbids two things: (1) Creating a debt, payable out of the levy for a future year; and (2) creating debts, payable out of the levy of a particular year, the aggregate of which shall be in excess of the funds at the disposal of the board of education for that year. For exceeding its authority in the first particular, the statute under discussion does not expressly provide a remedy; but for exceeding its authority in the second instance a remedy is given to the party contracted with by making the members of the board individually liable. Why a liability was created in the one instance, and not in the other, it is not necessary for us to inquire. The Legislature may have reasoned that, as no one could be deceived by a contract creating an obligation, payable out of the levy of a future year, every one dealing with the board of education being chargeable with knowledge of its lawful powers, it was not necessary to give a remedy in that case; while in the case of an obligation, payable out of a fund then at its disposal, no one should be held to a knowledge of the condition of the public accounts, and therefore might easily be deceived with reference thereto, and might innocently accept such overdraft. But, whatever may be the reason for it, the statute has provided a remedy in one instance, and not in the other. In respect to creating individual liability, the statute is penal, and must therefore be strictly construed; and, so construing it, we must say that the law in force on 7th September, 1904, created no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

individual liability upon the members of the board of education for attempting to create an obligation to be paid out of a future levy.

[2] But the fact that the individual members were not made liable by law, for exceeding their powers, does not preclude the possibility of their individual liability by agreement. The question is then presented, Did they assume personal liability by signing the contract as individuals, and without official designation? We think not, because it is evident, from both the nature of the transaction and the language of the contract, that it was executed in an official, and not a private, capacity. The articles purchased were for the use of the public schools of their district. The transaction is free from fraud, and the contract was signed at a meeting at which all three were present. True it was signed outside of their district; but the board of education is not forbidden by law to meet and transact business outside of its district. Hence the fact that the contract was signed in the city of Elkins, outside of New Interest district, does not affect its character as being an official act. The agreement shows on its face that the debt was created for a public purpose, and the fact is agreed that it was signed by all three members at a meeting at which all three were present. That gives it the force of official action, and if it was official action it negatives intention to assume personal responsibility. The manner in which the obligation was to be paid—that is, by warrant upon the public treasury—also clearly indicates that there was no intention to assume individual liability by the manner of signing it. The board of education acted in its corporate capacity in making the contract, and the fact that each member signed his name to it, without official designation, does not imply intention to bind himself individually. 35 Cyc. 910; Mackenzie v. Board of Trustees, 72 Ind. 189; Lyon v. Adamson, 7 Iowa, 509. Public officers will not be held personally liable on contracts made on behalf of the public, even though such contracts be made in excess of their authority, unless a clear intention to assume personal liability is shown. 29 Cyc. 1446, and numerous cases cited in note 15.

The creation of a debt by a board of education, to be paid out of a future levy, is expressly prohibited by section 45, c. 45, Code 1899, which was the law in force when the debt sued for was contracted, and the attempt to create such an obligation is an act ultra vires, and therefore void. Shinn v. Board of Education, 39 W. Va. 497, 20 S. E. 604.

The principle of law by which the agent of a private individual may be held personally liable when he exceeds his authority, or when he acts for an undisclosed principal, does not apply in the case of a public officer,

acting in his official capacity. The board of education must act strictly within the powers conferred on it by law, and those who deal with it must take notice of the extent of its powers. Honaker v. Board of Education, 42 W. Va. 170, 24 S. E. 544, 32 L. R. A. 413, 57 Am. St. Rep. 847; State v. Chilton, 49 W. Va. 453, 39 S. E. 612.

The contract shows on its face that it was in excess of power, and is therefore void, because it expressly states that the warrant for the debt was not to be presented until the fall of 1905, which means that it was payable out of the levy for 1905, and the order for the warrant itself so states. Shinn v. Board of Education, supra.

The order, made on 26th November, 1904, directing the issuance of a draft in favor of Ells, notwithstanding said order was made after chapter 16, Acts 1904, became operative, does not affect the case. That order is only a step in the process of making payment, a matter merely incidental to the attempted discharge of a pre-existing void obligation, and to which it can give no vitality. Jurisdiction was exceeded by making the agreement on 7th September, 1904, and the order for the warrant, made November 26, 1904, was not a separate act by the board of education, distinguishable from the original obligation, so as to bring it within chapter 16, Acts 1904. That act is not retroactive.

The contract was ultra vires, and therefore void, and created no liability upon the public fund of the school district, or upon the individual members then composing the board of education.

For the foregoing reasons, the judgment will be affirmed.

(156 N. C. 653)

#### STATE v. DOVE.

(Supreme Court of North Carolina. Nov. 15, 1911.)

#### 1. HOMICIDE (§ 300\*)—SELF-DEFENSE—INSTRUCTIONS.

The evidence showed that accused and decedent quarreled while drinking, and decedent fell to the floor with accused on top. When they both got up, and accused turned to leave the place, decedent struck him on the head. Decedent then ran past him and toward a buggy, when accused kicked at him, and ran around the buggy, and met decedent on the other side, where they continued fighting, and decedent was cut. Held, that accused was an aggressor by continuing the difficulty, and could not claim that the cutting was in self-defense, so that a requested charge as to right to repel force by force in defense of his person was properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

#### 2. HOMICIDE (§ 112\*)—SELF-DEFENSE—PROVOCATION.

One who provokes a fight by unlawfully assaulting another will at least be guilty of manslaughter, if he kills the other person, though

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

at the exact time of the homicide it was necessary for him to kill to save his own life.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. § 112.\*]

### 8. CRIMINAL LAW (§ 380\*)—CHARACTER EVIDENCE—PARTICULAR INSTANCES.

A witness testifying to accused's good character in a murder case cannot be cross-examined as to his knowledge of particular facts or occurrences tending to accused's character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 843, 845; Dec. Dig. § 380.\*]

### 4. WITNESSES (§ 387\*)—CROSS-EXAMINATION—REBUTTAL.

A witness who had testified as to accused's good character could be asked on cross-examination whether he had not stated to the officer who was required to arrest accused that accused was a bad man and dangerous when drunk, and might kill him, such evidence tending to contradict witness' character testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1228-1232; Dec. Dig. § 387.\*]

Appeal from Superior Court, Granville County; Daniels, Judge.

G. Houston Dove was convicted of manslaughter, and he appeals. Affirmed.

Indictment for murder tried at February term, 1911. At the conclusion of the testimony, the solicitor made formal announcement that the state would not ask for conviction of murder in the first degree. The court thereupon charged the jury, and verdict was rendered not guilty of the felony and murder charged in the bill of indictment, but guilty of manslaughter. Judgment on the verdict, and the prisoner excepted and appealed.

V. S. Bryant and B. S. Royster, for appellant. The Attorney General and Geo. L. Jones, Asst. Atty. Gen., for the State.

HOKE, J. It was chiefly urged for error that his honor declined to allow the jury to consider the plea of self-defense, being of opinion that there were no facts in evidence tending to support such a position. The homicide was shown to have occurred near Benehan, at about 8 o'clock at night, on January 27, 1911; and it appeared: That the prisoner, the deceased, and others were at a near beer stand, when the two had a quarrel, closed in a scuffle, and prisoner got deceased down and was on him. That deceased begged pardon. The parties got up, and more beer was ordered at prisoner's expense. The latter turned to go out when deceased struck him on the side of the head, knocking him out of the door, and flat down on his face. As he rose and got up, deceased ran by him and under a horse, which was hitched to a buggy, standing seven or eight feet from the door. That the prisoner kicked at deceased as he darted under the horse, then ran around the buggy, and pursued the deceased down the road. Fighting was heard between them, and deceased was heard to say, "Lord have mercy. He has cut me to death." One witness testified to this ex-

clamation, and said, further, that he heard a voice, which he took to be prisoner's, reply: "If I haven't, I will." That after this, and in about two minutes from the time the two had disappeared down the road, the prisoner returned to the beer stand, saying deceased had gone home. When prisoner came back, he was very bloody, was bleeding himself from a cut in the neck or side of the head, apparently made by the bottle, and was very bloody on his shirt and both sleeves; the right sleeve being the bloodiest. In this connection a witness stated that prisoner said: "The blood on my arm didn't come out of me. It came out of the other fellow." The body of the deceased was found the next morning, with the throat cut; the doctor testifying that the wound was sufficient to cause death. Another witness said that the cut seemed to have been done from behind. About 150 feet from the beer stand, 30 or 40 feet from the road, in the direction the prisoner and deceased had gone, there was found a pool of blood and signs of a struggle, and the shoe of the prisoner fitted in some of the tracks near this place and going to it and returning to the road, and some little distance beyond this point was the place where the body was found, and there was the track of one person, that of deceased, from the place where the last struggle occurred to the body.

The prisoner, testifying in his own behalf, admitted having entered into the struggle in the beer stand, having kicked at deceased as he went under the horse, and having followed him around the buggy, and had a few licks with him, but denied having followed him down the road or having done the cutting; the prisoner's statement being, in part, as follows: "Joe said: 'Let's go to the beer stand.' Four or five of us went, and I treated the crowd. Then Joe treated. While drinking beer, he said, 'Some one told me you were going to throw some beer in my face,' and I said, 'If you did, I was going to fight you.' I said it didn't amount to anything. Another time he said, 'Don't throw that beer in my face.' I told him that I would not, and whoever told him that I would told a lie. He said whoever called him a liar had to fight. I caught him by the coat, and he fell on the floor; turned on his side; tried to get up. I told him to wait. I believe he proposed to fight, and I did not want to fight; but, if nothing else would do, I could accommodate him. I told Mangum to give him beer. I turned to go home, and, as I turned to step out, he struck me on the side of the head with a beer bottle, and knocked me out of the door. The buggy was five or six feet from the door. As soon as I recovered, I jumped up and looked back in the house. Then looked, and saw him going under the horse. I turned and kicked at him. I ran around buggy, and met him on the other side.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We passed several licks. Several people were there then. We went a little further off, and somebody cut me on the neck. I ran far enough around to get out of the way, 5 or 10 steps, then turned, and came back in the door. I saw that I was bleeding when I got inside, and don't know what cut me. Mangum said it was the beer bottle. I didn't feel the cut until I was outdoors near the buggy, knocking. The doctor came. I washed my neck before he came, and I didn't tell any one that the blood on my coat sleeve came from the other man. I don't remember having any knife. Joe said something about fighting and cutting, and took out his knife. I did take my knife out, but don't know what became of it. I did not open it. I told them that they might find my knife at the door where the fight occurred."

There were other facts tending to establish guilt, and, on perusal of the entire testimony, there is no room for doubt that the prisoner killed the deceased, and it is equally clear that his honor correctly ruled that there was no evidence to support the plea of self-defense. According to his own statement, and whether the occurrence is held to consist of one fracas or two, the prisoner was an aggressor.

[1] In the first place, "he caught the decedent by the coat when he fell to the floor," and, in the second place, he kicked at the deceased as he fled, and then, going around the buggy, renewed the difficulty when there was no necessity for him to do so, real or apparent, for his own protection, and in either aspect the principle of self-defense is excluded, and the prisoner is guilty of manslaughter at the least.

[2] The doctrine applicable, as it obtains in this state, is stated in *Garland's Case* as follows: "It is the law of this state that where a man provokes a fight by unlawfully assaulting another, and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life." *State v. Garland*, 138 N. C. 678, 50 S. E. 854, citing with approval *Foster's Crown Law*, p. 276, and *State v. Brittain*, 89 N. C. 481. Apart from the testimony as to the origin of the difficulty, there is no error to prisoner's prejudice certainly in the verdict convicting him of the crime of manslaughter. *State v. Kendall*, 143 N. C. 659-665, 57 S. E. 340; *State v. Peter Johnson*, 48 N. C. 266. And this view of the homicide is the sufficient answer to another objection, earnestly insisted on by the prisoner, that his honor declined to give his prayer for instruction No. 8, as follows: "A man may repel force by force in defense of his person against one who manifestly intends, or endeavors by violence or surprise, to commit a known felony such as murder and the like. In such cases he is not obliged to re-

treat, but may pursue his adversary until he has secured himself from all danger, and, if he kills him in so doing, it is called justifiable self-defense"—the prayer citing *State v. Dixon*, 75 N. C. 279. The decision in *State v. Dixon* announces a correct principle of law of the facts as they are there presented, but it has been several times referred to as sustaining a doctrine of "rare and dangerous application," and is never permissible except when actual assault is being made with a present purpose to kill, and with the present ability, real or apparent, to carry out the felonious purpose. *State v. Kennedy*, 91 N. C. 572; *State v. Blevins*, 138 N. C. 670, 50 S. E. 763. In this last case, speaking to the position, the court said: "True, as said in one or two of the decisions, this is a doctrine of rare and dangerous application. To have the benefit of it the assaulted party must show that he is free from blame in the matter, that the assault upon him was with felonious purpose, and that he took life only when it was necessary to protect himself. It is otherwise in ordinary assaults, even with deadly weapons. In such case a man is required to withdraw if he can do so, and to retreat as far as is consistent with his own safety. *State v. Kennedy*, 91 N. C. 572. In either case he can only kill from necessity. But in the one he can have that necessity determined in view of the fact that he has a right to stand his ground; in the other, he must show as one feature of the necessity that he has retreated to the wall."

In this case the evidence tends to show that the prisoner went around the buggy to renew the assault on the deceased, followed him down the road, and killed without necessity. Therefore it is that the right of self-defense and the manner and extent of it, as correctly stated and approved in *State v. Hill*, 141 N. C. 769, 53 S. E. 311; *State v. Hough*, 138 N. C. 663, 50 S. E. 709, and *State v. Dixon*, supra, may not be allowed to avail the prisoner. Nor can the exceptions to the rulings of the court on questions of evidence be sustained. It appears that on the trial one J. H. Keith, a witness for the prisoner, had testified to his good character, and the state, over objection, was allowed to show declarations on the part of witness after the occurrence and before the trial made to the officer charged with the duty of arresting the prisoner, that the latter was a "bad man, dangerous when drunk, and might kill him," etc.; the prisoner relying upon *State v. Holly*, 71 S. E. 450, at the last term, in support of the objection.

[3] In that well-considered opinion by Associate Justice Allen, it was correctly held that a witness who had testified to the good character of a prisoner being tried for murder could not be cross-examined as to his knowledge or having heard rumors of particular facts or occurrences which tended to impeach such character for the purpose of

weakening the force of the witness' testimony, but the evidence admitted is not of that character.

[4] On the contrary, it consisted of declarations from the witness himself, having a direct tendency to contradict the testimony he had given in prisoner's favor, and was clearly admissible under the principles approved in the Holly Case and the other decisions there cited.

There is no error in the record, and the judgment of the superior court is affirmed.

No error.

(157 N. C. 81)

### TROLLINGER v. FLEER.

(Supreme Court of North Carolina. Nov. 15, 1911.)

#### 1. MASTER AND SERVANT (§ 6\*)—CONTRACT OF EMPLOYMENT—ACTION FOR BREACH—SUFFICIENCY OF EVIDENCE.

Evidence in an action for breach of contract by which defendant agreed to employ plaintiff and his sons on defendant's farm *held* to show such a contract as claimed by plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 6.\*]

#### 2. MASTER AND SERVANT (§ 40\*)—WRONGFUL DISCHARGE—ACTIONS—BURDEN OF PROOF.

The burden was upon defendant in an action against him for breach of a contract to employ plaintiff to show that plaintiff was rightfully discharged after his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 47; Dec. Dig. § 40.\*]

#### 3. MASTER AND SERVANT (§ 73\*)—DISCHARGE—WAGES.

Where plaintiff was employed by defendant, he could not recover wages stipulated by the contract, if he was rightfully discharged by defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 99; Dec. Dig. § 73.\*]

#### 4. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS.

If the instructions were not as explicit as defendant desired, he should have requested special instructions to make them so.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

#### 5. CONTRACTS (§ 16\*)—ASSENT OF PARTIES—NECESSITY.

Parties to a contract must assent to the same thing in the same sense.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 72; Dec. Dig. § 16.\*]

#### 6. PRINCIPAL AND AGENT (§ 92\*)—CONTRACTS—ASSENT BY AGENT.

The party to a contract may assent thereto by an agent.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 92.\*]

#### 7. PRINCIPAL AND AGENT (§§ 8, 14\*)—EXISTENCE OF RELATION.

An agency may be conferred by express authority given by the principal or by the principal's conduct in holding the agent out as such.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 16, 27½; Dec. Dig. §§ 8, 14.\*]

#### 8. PRINCIPAL AND AGENT (§ 25\*)—ESTABLISHMENT—RELATION—AGENCY BY ESTOPPEL.

One who by word or conduct represents that another is his agent is estopped to deny such agency as against a third person dealing

with the purported agent on the strength of such representations.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 42; Dec. Dig. § 25.\*]

#### 9. PRINCIPAL AND AGENT (§ 20\*)—EXISTENCE OF RELATION—EVIDENCE.

In an action for breach of a contract employing plaintiff as a farm manager claimed to have been made by defendant's brother as agent, the fact that defendant put his brother in general charge of his business with apparent right to make contracts of employment was admissible upon the question of his agency to make the contract with plaintiff.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 20.\*]

#### 10. PRINCIPAL AND AGENT (§ 170\*)—ACTS OF AGENT—RATIFICATION.

A principal by assenting to the acts of one who acts as his agent without authority is bound by way of ratification.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 638-643; Dec. Dig. § 170.\*]

#### 11. PRINCIPAL AND AGENT (§ 23\*)—AGENCY—EVIDENCE.

Evidence in an action for breach of a contract employing plaintiff as a farm manager, claimed to have been made by defendant's brother as his agent, *held* to sustain a finding that the brother was authorized to make the contract.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 23.\*]

#### 12. PRINCIPAL AND AGENT (§ 173\*)—RATIFICATION—SUFFICIENCY OF EVIDENCE.

Evidence *held* to sustain a finding that defendant ratified the act of his brother in employing plaintiff to act as farm manager.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 173.\*]

#### 13. APPEAL AND ERROR (§ 1002\*)—FINDINGS—CONCLUSIVENESS.

It is for the jury in the trial court to decide questions upon conflicting evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Appeal from Superior Court, Davidson County; Lyon, Judge.

Action by R. H. Trollinger against F. H. Fleer. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought by the plaintiff for loss of wages for himself and his two sons for 12 months, alleging that he made a contract to work for the defendant on his farm near Thomasville for one year from July 1, 1909, at the price of \$1,200 and \$1 per day for each of plaintiff's sons, said payments to be made monthly, and also for expenses of moving his furniture to the defendant's farm, and for loss incurred in giving up his position, which he claimed he filled, with some other parties. The defendant denied that he had ever hired either the plaintiff or his sons, and alleged that the proposal to hire them was altogether tentative, and was dependent upon his interview with the plaintiff at the defendant's farm, as appears in the last clause in defendant's letter to plaintiff, dated June 22, 1909, in which he says: "I will look for an immedi-

ate reply, after receiving which, I will make it convenient to meet you at an early date." The defendant further alleges that the plaintiff had made certain representations as to his qualifications to do the work required with machinery, which he ascertained were not true, as he could not operate the machinery with which the defendant expected to farm. The defendant further denied that he had made any contract for the hire of the boys, but the court treated the hiring of the plaintiff and the two sons as an entire contract. The plaintiff and his sons were discharged by the defendant and, they allege, without just cause or excuse. The defendant contended at the trial that there was no sufficient contract of hiring between the plaintiff and himself, and that his brother, M. L. Fleeer, who actually hired the plaintiff and his boys upon the terms mentioned, had no authority from him to do so. This requires a summary of the testimony. On June 7, 1909, plaintiff mailed to the defendant, from Seneca, S. C., a letter, in which he proposed to hire himself as manager, and his boys as laborers, to the defendant, who owned and cultivated a farm in Davidson county, making a formal application for the positions. Defendant answered, June 16, 1909, as follows: "I believe you would be the man for the job, and if you will tell me what pay you expect I am willing to take the matter into consideration. Figure upon straight wages by the month, or year, as I do not care to share crops. Your reply should be sent to my Phila. office to reach me promptly. Use the enclosed envelope." To this letter plaintiff replied, proposing to hire himself, as manager, at \$1,200 a year, and each of his boys at the wages of "a common day laborer." Defendant acknowledged the receipt of this letter June 22, 1909, in a letter of that date, and then proceeded as follows: "I am very favorably impressed with the statement you make regarding your ability, and I have no doubt that if I were to engage you, we could get along nicely. The only house I have in which it would be practical for you to live, in order to have the place under supervision, is the tenant house now occupied by a colored man. This only has four rooms, but could be enlarged by a second story, whereby it would be large enough to accommodate you. I should like to send the present tenant of this house away not later than July 1st, if you could be ready to move in by that time with only part of your family. I would then immediately start to erect an addition large enough to accommodate you all. It would require one or two of your boys to take care of the work around the barn and place, and they should come along with you at once. The wages for common farm labor around our parts is \$1.00 per day, and your boys will have to start at that price. If you, yourself, could start in on July 1st, I should like to have an immediate answer

by telegraph, in order to give the colored man now in the tenant house a chance to look for work elsewhere, and make other necessary arrangements." In answer to this letter, plaintiff wired defendant, June 28th, as follows: "Will start to work July 1, with one boy. Will be here to-day." Plaintiff testified: That on June 30, 1909, he went to the farm with one of his sons for the purpose of making preparations to move into the house with his family, and to do the work assigned to them. He found there M. L. Fleeer, defendant's brother, who had entire charge and control of the farm, defendant being absent and at his home in Philadelphia, Pa. That M. L. Fleeer directed the work on the farm, kept the time of the employes, and paid them their wages, issuing checks for F. H. Fleeer. He then stated that M. L. Fleeer told him "to move into the house," and also put him and his son to work. When he first met M. L. Fleeer at the farm, he said to plaintiff: "This is Mr. Trollinger, is it?" to which the plaintiff replied, "Yes." He then said: "I was looking for you. Had a letter from Brother that you would be here to-morrow to go to work; and where are the boys?" to which witness replied that he had not agreed to bring but one, and he was with him. M. L. Fleeer also told him that he had the house cleaned up ready for him to move into, but he was to have two boys. Witness told him he would furnish the other one later, that he had wired to the defendant that he would bring one, and he had him with him. Plaintiff testified further as follows: He had worked nine days, and was taken sick and had to go to bed, but before he went to bed the defendant came, but he had no conversation with him except with regard to work; talked to him frequently about the work; was working just as a hand with the rest. The defendant was on the farm only two days. The second day he was there the plaintiff went over to see him, and spoke to him, and the defendant said, "I am afraid I have made a mistake and hired a sick man," to which the plaintiff replied, "Yes, I am sick. I guess I will get well or die off your hands." That the defendant then excused himself, and he has never spoken to him since. He left for Philadelphia that night. There was evidence tending to contradict the plaintiff's proof as to the authority of M. L. Fleeer to make the contract, and as to what the defendant had said to the plaintiff when he was sick; the general trend of the evidence on the part of the defendant being to show that no contract was made unless by the letters which passed between the parties, and there was also evidence on the part of the plaintiff tending to show that he and his boys had complied with the contract to the date of their discharge, and that the discharge was wrongful, and evidence on the part of the defendant to the contrary.



The judge substantially charged the jury to find whether the contract of hiring was entered into by the parties, as alleged by the plaintiff, and that if the plaintiff and his boys, after the telegram of June 28th was sent to the defendant, went to the farm and were put to work by M. L. Fleer, and he was the agent of the defendant for that purpose, the plaintiff would be entitled to recover the contract price, less what he and his sons had since received for their services elsewhere, unless the jury should find that they were rightfully discharged, the burden to prove that fact being upon the defendant, and if the jury found that there was no contract, or if there was one and the plaintiff and his sons were rightfully discharged for a breach thereof, their verdict should be for the defendant. There was a verdict for the plaintiff and judgment thereon. Defendant appealed.

A. F. Sams, F. C. Robbins, and Watson, Buxton & Watson, for appellant. T. J. Jerome and E. E. Raper, for appellee.

WALKER, J. (after stating the facts as above). [1-3] There was ample evidence to show that a contract for the hire of plaintiff and his sons had been made by the defendant, and we think the case was fairly submitted to the jury, with proper instructions as to the law. The motion to nonsuit and the prayer for peremptory instructions were therefore properly overruled.

[4] The charge may not have been as full or as explicit as defendant may have desired it to be, but, if not so, they should have asked for special instructions so that it might be made so. *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513; *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225; *State v. Yellowday*, 152 N. C. 793, 67 S. E. 480. We have no doubt that the learned judge would promptly have complied with any such request.

We need not decide the case by an answer to the question whether the letters constituted a definite offer and the filing of plaintiff's telegram an acceptance thereof as of the date of such filing, without regard to the fact, if true, as defendant testified, that he did not receive the telegram before he left Philadelphia, or to any loss or delay in transmission, or to any other casualty which prevented a receipt of plaintiff's notice of acceptance. This subject is fully discussed in *Clark on Contracts* (2d Ed.) pp. 25-27; 1 *Wharton on Contracts*, § 18; 1 *Parsons on Contracts* (9th Ed.) \*pp. 475-485, all citing and commenting upon the celebrated case of *Dunlop v. Higgins*, 1 H. L. Cases 381.

[5, 6] There is, of course, no contract unless the parties assent to the same thing in the same sense, but it is not necessary that the assent should be given by the party himself, as it may be given by his agent, and it

was in this way that the case was submitted to the jury.

[7] The real question then is, Was there evidence in the case that M. L. Fleer was the agent of the defendant to make the contract, and this agency could be established by express authority given to him or by the conduct of the defendant in holding him out as an agent for that purpose. He was certainly willing to contract with the plaintiff upon the terms stated in the letter of June 21st and 22d. The evidence tends to show that he had left M. L. Fleer in full charge of his farm, with apparent authority to act for him in the premises, and there was also evidence that he afterwards recognized him as his agent by ratifying what he had done and with knowledge of the facts.

[8] "Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt on the faith of such representation with the person so held out as agent, even if no agency existed in fact." *Tiffany on Agency*, p. 34.

[9] This has been called an agency by estoppel, but, whether the defendant was estopped or not, the fact of the defendant's having put M. L. Fleer in general charge of his business with the apparent right to make contracts of employment is competent to be considered by the jury upon the question whether an agency existed or not. The rule is thus stated in *Reinhard on Agency*, §§ 89a-92, especially in section 91: "The doctrine of estoppel as applying to agency may, therefore, be summarized that where a party holds out another as his agent, or has knowingly allowed such person to act for him in one or more similar transactions without objection, he will, as a general rule, be estopped to deny the agency, whether it in fact existed or not, if a third party, without knowing the real state of the matter, and acting in good faith, and as a reasonable man would act from the appearance of things as created by the supposed principal, relies upon the existence of the agency and deals with the supposed agent as such, if the transaction be within the real or apparent scope of the authority exercised."

[10] But "it is not necessary, however, that the principal's assent or sanction be given in advance of the performance of the transaction which constitutes the subject-matter or purpose of the agency. If his assent be obtained after the transaction by a confirmation of the assumed relation, it is equally binding and efficacious. Such a confirmation of the authority of the supposed agent is called a ratification." *Reinhard on Agency*, § 96. This assent is equivalent to prior authority. "The relation of principal and agent is created by ratification when one person adopts an act done by another person, assuming to act on his behalf, but

without authority or in excess of authority, with the same force and effect as if the relation had been created by appointment." Tiffany on Agency, p. 46.

[11, 12] There were facts and circumstances which the jury might well have found from the evidence to exist, and which would reasonably induce a careful and prudent person to suppose that M. L. Fleer was clothed with sufficient authority to make the contract of hiring, and certainly there was ample evidence to support a finding that the defendant had ratified his acts.

[13] There was a direct conflict between the plaintiff and the defendant in their testimony upon this question, but it was for the jury to pass upon the evidence, and to find the truth of the matter. If defendant held his brother out as his agent, and thereby induced others to act to their prejudice, upon the assumption that he had full authority to represent him, it is the same in law as if he had expressly authorized him to do so, or, if he ratified what he did, it is the same as if he had actually and expressly conferred the requisite authority. In either case, he is bound. Bank v. Hay, 143 N. C. 326, 55 S. E. 811. This covers all the exceptions to evidence, refusal to nonsuit, refusal to instruct as requested, and to the charge as given. It is to be noted that the exceptions to the charge were taken to instructions which had already been given without exception; in other words, to the repetition of those instructions. But, waiving that defect, we place our decision upon another ground. The question was really one of fact, which the jury have found against the defendant. They believed the plaintiff's version.

A careful review of the case leads us to the conclusion that the learned judge committed no error at the trial.

No error.

(157 N. C. 591)

#### STATE v. NEVILLE.

(Supreme Court of North Carolina. Nov. 15, 1911.)

#### 1. CRIMINAL LAW (§ 1173\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In a prosecution for the theft of a mule, where it appeared that accused and his nephew met at a certain place for the avowed purpose of trading horses, that accused left his nephew, and was gone some time, and returned with the prosecuting witness' mule, and that he gave his nephew some money and a pistol, and told him to take the mule and sell him in an adjoining state, and the court instructed the jury that they should consider accused's recent possession of the mule as only a circumstance as passing upon his guilt, the failure of the court to charge that the recent possession of the property raised a presumption of guilt did not injure accused; the instruction given being more favorable to him.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1173.\*]

#### 2. LARCENY (§ 51\*)—PROSECUTION—EVIDENCE—POSSESSION OF STOLEN PROPERTY.

Recent possession of stolen property is a circumstance tending to show the guilt of the possessor on his trial for stealing such property.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 144-146; Dec. Dig. § 51.\*]

#### 3. CRIMINAL LAW (§ 784\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

In a prosecution for stealing a mule, where it appeared that accused and his nephew, with the ostensible purpose of trading horses, went to a point near the barn of the prosecuting witness, and that accused left his nephew and returned with a mule belonging to prosecuting witness, and gave his nephew money and a pistol, telling him to sell the mule in an adjoining state, these facts being testified to by the nephew, a special charge upon circumstantial evidence was unnecessary; the case depending upon the credit given the testimony of the nephew.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 784.\*]

#### 4. CRIMINAL LAW (§ 784\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

In a criminal prosecution resting upon circumstantial evidence, there is no necessity for a formal charge upon the value of circumstantial evidence, it being sufficient that the jury be clearly instructed that unless, after due consideration, they are satisfied beyond a reasonable doubt of the guilt of defendant, they should acquit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883-1888; Dec. Dig. § 784.\*]

#### 5. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR.

In a prosecution for stealing a mule, where defendant's nephew, who had been convicted of receiving the mule from defendant knowing it to be stolen property, testified that he wrote a letter to the sheriff stating that he had not stolen the mule, the testimony was not prejudicial to defendant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.\*]

#### 6. CRIMINAL LAW (§ 401\*)—EVIDENCE—BEST AND SECONDARY—COLLATERAL MATTERS.

In a prosecution for stealing a mule, a letter written by defendant's nephew, who had already been convicted of receiving the mule, knowing it to be stolen property, and who testified against defendant, which stated that the nephew did not steal the mule, was collateral to the issue, and its contents could be shown without producing the original.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 884; Dec. Dig. § 401.\*]

#### 7. WITNESSES (§ 414\*)—IMPEACHMENT—CORROBORATION.

Where a witness has been impeached, evidence of declarations similar to his testimony given at the trial is admissible in corroboration.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 414.\*]

#### 8. CRIMINAL LAW (§§ 1166½, 1171\*)—APPEAL—HARMLESS ERROR.

In a prosecution for larceny, where an accomplice testified against accused, and the solicitor stated that he would not ask the jury to convict upon the sole and unsupported testimony of the accomplice, and the judge repeated that remark in his charge to the jury, such remarks were in no way prejudicial to defendant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 1166½, 1171.\*]

3. CRIMINAL LAW (§ 510\*)—PROSECUTION—EVIDENCE—WEIGHT.

A conviction of larceny may be had on the unsupported testimony of an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.\*]

Appeal from Superior Court, Alamance County; Daniels, Judge.

Richard Neville was convicted of larceny, and appeals. Affirmed.

The defendant was indicted in the court below for the larceny of a mule, the property of Walter Shepherd. The mule was last seen by its owner the fourth Sunday night in August, at about sundown, and it was not missed from the stable until the next day at about 4 o'clock a. m. He was found by Shepherd several weeks afterwards, near Martinsville, Va., with a saddle belonging to W. L. Spoon and a bridle belonging to the defendant, who lived with Spoon. After the mule was stolen, the defendant left home.

John Cole, a witness for the state, who had been convicted of receiving the mule from the defendant, knowing it to have been stolen, testified: That the defendant came to him when he was working for one Joe Cobb, and told him that he wanted him to assist in some horse trading. Cole at first said he could not go, but finally assented, and it was agreed that he would meet the defendant on the following Sunday, which he failed to do, but they did meet afterwards at Burlington on the night the mule was stolen. They rode in a buggy to a bridge over the creek, which is two miles from the home of W. L. Spoon, the brother-in-law of the defendant and an uncle of Cole, and three miles from the house of the prosecutor, from whose stable the mule was taken. Cole, being on unfriendly terms with Spoon, refused to go nearer the house than the bridge, and stopped there to wait for the defendant's return; the defendant having told him that he was going to get a mare and a colt which he had in Spoon's barn. When the defendant returned, he had a mule, which was identified as the one taken from the stable of Shepherd that night. The defendant told Cole to take the mule and trade or sell it, and he could have all over \$50 that he could get for it. The defendant at the same time gave him a pistol to carry with him for protection, and \$2.50 in money, and suggested that it might not be a bad idea for him to change his name after he had left with the mule, in order that he might not have any trouble. Cole took the mule to Virginia and sold him, receiving \$5 in cash and a note for \$60. On his return he told the defendant what had been done, and gave him the pistol which had been borrowed and \$2.50 in money. A few days after Cole's return from Virginia, the defendant went to see him, and told him that a warrant had been issued for him for stealing the mule, and advised him to "hit the bushes." He

asked Cole for the pistol, and it was given to him. There was evidence tending to show that the prosecutor traced the mule from his home to the bridge by tracks which were made both by the mule and the man who had taken him, which tracks were made by the same number of shoes as those worn by the defendant. The defendant introduced evidence tending to contradict the witness for the state, and to show that he was not at the bridge with Cole on the night the mule was stolen, nor at any other time, and each side introduced testimony in corroboration of its witnesses. It was admitted on the trial that the mule had been stolen from Shepherd, but the defendant denied that he was the thief, and offered evidence as to his good character.

There was a verdict of guilty, and from the judgment thereon the defendant appealed.

Parker & Parker and Long & Long, for appellant. Attorney General Bickett and Geo. L. Jones, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] We will have to deal, in this case, largely with the question as to the nature of the evidence and its legal significance, and it is therefore necessary to examine the testimony introduced by the state and the defendant in order to ascertain if, in any view of it, the defendant was entitled, without asking for them, to special instructions upon the law relating to recent possession and circumstantial evidence. We do not think the case called for specific instructions of the kind defendant now contends should have been given. The evidence, when properly viewed, tended either to acquit or convict the defendant without the necessity of any special consideration of the probative force of recent possession or of evidence by circumstances. The proof on the part of the state, briefly stated, was that the defendant and Cole, his nephew, it must be understood being younger than he was, and naturally under his influence, had agreed, at the defendant's solicitation, to meet at a certain place for the purpose of trading horses, but really with the design of stealing the mule, as the gravely suspicious circumstances strongly indicate. They met in Burlington, according to agreement, or by accident, which makes no difference, and drove in a buggy to the bridge over the creek two miles from W. L. Spoon's and three miles from the prosecutor's home. There was evidently a conspiracy to steal the mule, and that would seem to have been the sole object of the journey, the swapping of horses being a mere sham or pretense, as the jury apparently found it to be. The defendant left John Cole, the state's witness, and went to W. L. Spoon's home, where he got a saddle and bridle. He then went to the stable of the prosecutor and got the mule,

and rode him to the meeting place at the bridge, where he told Cole that he had swapped the colt for the mule. He then sent Cole on his way to Virginia with the mule, for the purpose of selling or trading him, armed him with a pistol for protection, and supplied him with money for the journey, and when he returned, after the sale of the mule, he received a part of the money and the pistol from Cole. Upon this statement of the facts we do not see how the defendant could have been benefited by a charge from the court as to the weight which they should give to the fact of recent possession. If Cole told the truth and the jury believed him, the possession of the mule by the defendant was about as recent as it was possible for it to be, but the judge, instead of instructing the jury that, owing to its nature, the law raised a presumption of guilt from such a possession, he told the jury that they should consider it as only a circumstance in passing upon the defendant's guilt, for he nowhere charged the jury that there was any presumption either of law or fact as to the defendant's guilt. This charge was much more favorable to the defendant than it would have been if the court had told the jury, in accordance with the rule of law, that special weight should be given to the fact of recent possession.

[2] The charge is sustained by the case of *State v. Hullen*, 133 N. C. 656, 45 S. E. 513, in which the court said: "Recent possession of stolen property has always been considered as a circumstance tending to show the guilt of the possessor on his trial upon an indictment for larceny. It is not necessary that we should here draw any nice distinction concerning the presumptions of guilt based on recent possession as being strong, probable, or weak, because the court in its charge, to which there was no exception, instructed the jury that the recent possession of the defendant was only a circumstance to be weighed by them in passing upon his guilt, and this charge is sustained, we believe, by all the authorities. *State v. Graves*, 72 N. C. 482; *State v. Rights*, 82 N. C. 675; *State v. Jennett*, 88 N. C. 665; *State v. McRae*, 120 N. C. 608 [27 S. E. 78, 58 Am. St. Rep. 808]."

The rule in regard to recent possession of stolen goods was thus stated in *State v. Graves*, 72 N. C. 482, by Chief Justice Pearson: "The rule is this: 'When goods are stolen, one found in possession so soon thereafter that he could not have reasonably got the possession unless he had stolen them himself, the law presumes he was the thief.' This is simply a deduction of common sense, and, when the fact is so plain that there can be no mistake about it, our courts, following the practice in England, where the judge is allowed to express his opinion as to the weight of the evidence, have adopted it as a rule of law, which the judge is at liber-

ty to act on, notwithstanding the statute which forbids a judge from intimating an opinion as to the weight of the evidence." It is said in that case that this presumption of law is subject to some qualifications, depending upon the recency of the possession and the other facts and circumstances of the particular case. We need not decide whether the presumption of guilt was strong or weak in this case as a matter of law, as the judge simply gave to it the force and effect of a bare circumstance against the defendant, to be considered by them in passing upon the question of his guilt or innocence. In *State v. McRae*, 120 N. C. 608, 27 S. E. 78, 58 Am. St. Rep. 808, it was held that the presumption of guilt arising from recent possession of stolen property is strong, slight, or weak, according to the particular facts surrounding any given case, and the cases are very rare in which the presumption of guilt can be held as matter of law to be strong, though the presumption in this case is stronger than usual, owing to the other facts and circumstances, as the possession of the defendant when first discovered by Cole was very recent after the theft had been committed, and the circumstances of the case surrounding it tended very strongly to convince a reasonable man that the defendant was the thief. It is unnecessary, though, to consider this question any further, as the charge of the court was as favorable to the defendant as he had a right to expect, nor do we think it was necessary for the court to charge specially as to the rule in regard to circumstantial evidence.

[3] There was no chain of circumstances in this case which required the court to tell the jury that each circumstance which constituted a link in the chain should be established to their full satisfaction. A chain is no stronger than its weakest link, it is true; but there is no series of facts in this case necessary to be considered by the jury in order to convict the defendant. The case was without complication, and depended mainly upon the credit which the jury should attach to the testimony of John Cole, the witness for the state, when considered in connection with the other evidence in the case.

[4] In *State v. Adams*, 138 N. C. 688, 50 S. E. 765, we said: "No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed that, unless after due consideration of all the evidence they are 'fully satisfied' or 'entirely convinced' or 'satisfied beyond a reasonable doubt' of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a 'formula' for the instruction of the jury by which to 'gauge' the degrees of conviction has resulted in no good." These are the words

used by Chief Justice Pearson in *State v. Parker*, 61 N. C. 473, which we quoted and approved in the *Adams Case*, as "they present in a clear and forceful manner the true principle of law upon the subject."

[5, 6] There are some questions of evidence in the case which we will briefly consider. The witness, John Cole, was permitted to refer to the contents of a letter written by him to the sheriff without the letter being produced and offered in evidence. He stated that in the letter he said to the sheriff that he had not stolen the mule. This did not tend to prove anything prejudicial to the defendant, and, besides, it was collateral to the issue, and the contents of the letter could be shown without producing it. *State v. Ferguson*, 107 N. C. 846, 12 S. E. 574; *State v. Sharp*, 125 N. C. 631, 34 S. E. 264, 74 Am. St. Rep. 663.

[7] What Joe Cobb, a witness for the state, testified as to his conversation with John Cole in regard to the arrangements he had made with the defendant, was corroborative of Cole's evidence, and was therefore competent; Cole having been previously examined as a witness. *State v. Freeman*, 100 N. C. 434, 5 S. E. 921; *State v. Maultsby*, 130 N. C. 684, 41 S. E. 97. In *Freeman's Case*, *supra*, it is said: "This is in consonance with adjudications in this state, which, whenever the witness is impeached and in whatever manner, even if it is done in the cross-examination, permits his credit to be sustained by proof of declarations made to others similar to the testimony given in and assailed, and these may be proved by the witness who made them."

[8, 9] It seems that the solicitor in the course of the trial had stated that he would not ask the jury to convict upon the sole and unsupported testimony of John Cole, who was an accomplice, and the judge repeated the remark of the solicitor in his charge to the jury, and the defendant entered exception thereto. We do not see how this was prejudicial to the defendant, even if it was error, for the jury could properly convict upon the unsupported testimony of John Cole, if they found that he had told the truth in regard to the matter, even though he was an accomplice of the defendant. The judge virtually told the jury by referring to this remark of the solicitor that they should not convict the defendant unless they believed that John Cole's story of what had occurred between him and the defendant, and as to what he saw at the bridge, had been supported by other evidence.

The other exceptions are without merit, and, besides, the rulings of the court were harmless, if erroneous. We have carefully reviewed the entire record, including the great volume of evidence sent up to this court, by question and answer taken down

by and recorded by a stenographer, and have failed to find any error committed by the court in the trial of the cause.

No error.

(157 N. C. 44)

KING v. ATLANTIC COAST LINE R. CO.  
(Supreme Court of North Carolina. Nov. 15, 1911.)

1. MASTER AND SERVANT (§ 100\*)—RELIEF FUND AGREEMENTS—ACCEPTANCE OF BENEFITS—EFFECT.

An acceptance by an injured employé of benefits from a relief fund maintained by the employer, who has not contributed anything to the fund, but who merely guarantees to fulfill the obligations incurred in consequence of the maintenance of a relief department under his absolute control with power to determine the amount of the contributions of the members of the department, does not constitute a consideration moving from the employer for a release of a claim for the injuries, and the employé may sue therefor under the rule that a release must be founded on a valuable consideration.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 166-170; Dec. Dig. § 100.\*]

2. MASTER AND SERVANT (§ 100\*)—RELIEF FUND AGREEMENTS—PAYMENT OF PART OF BENEFITS—EFFECT ON RIGHT OF ACTION.

A payment to an employé of a part of the benefits to which he is entitled under a relief fund agreement in consequence of injuries sustained does not bar a recovery for the injuries, in the absence of an express stipulation that the acceptance of the part shall have that effect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 166-170; Dec. Dig. § 100.\*]

3. MASTER AND SERVANT (§ 100\*)—RELIEF FUND AGREEMENTS—VALIDITY.

An agreement by an employé of a railroad company maintaining a relief fund for injured employés that he will accept benefits from the fund in accordance with the rules of the company controlling the fund in discharge of any claim which may accrue to him for damages for personal injuries is valid where the employé merely agrees to elect after sustaining an injury whether to sue therefor or to accept the benefits; and an injured employé voluntarily and without fraud electing to accept the benefits is bound thereby.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 166-170; Dec. Dig. § 100.\*]

4. MASTER AND SERVANT (§ 100\*)—RELIEF FUND AGREEMENTS—VALIDITY.

A railroad company maintaining a relief department for the payment of benefits to injured employés who become members is not thereby engaging in the insurance business, and an agreement by an employé that he will accept benefits from the fund in discharge of any claim for personal injuries is not invalid on that ground.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 166-170; Dec. Dig. § 100.\*]

5. MASTER AND SERVANT (§ 100\*)—RELIEF FUND AGREEMENTS—ACCEPTANCE OF BENEFITS—VALIDITY.

The court in determining whether an injured employé accepting benefits from a relief fund maintained by the employer in discharge of any claim for the injuries voluntarily and

without fraud elected to take such benefits, instead of electing to sue for the injuries, will scrutinize the evidence in view of the fact that the employer has great influence in determining the conduct of its employees, and that he may use such influence to their injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166-170; Dec. Dig. § 100.\*]

**6. MASTER AND SERVANT (§ 100\*)—RELIEF FUND AGREEMENTS—ACCEPTANCE OF BENEFITS—FRAUD—UNDUE INFLUENCE.**

Where an injured employé of a railroad company was induced by fraud or undue influence to accept benefits from a relief fund in discharge of his claim for personal injuries, he could recover damages therefor without returning the benefits, but they must be allowed in reduction of the damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166-170; Dec. Dig. § 100.\*]

Clark, C. J., dissenting.

Appeal from Superior Court, New Hanover County; Whedbee, Judge.

Action by La Fayette King against the Atlantic Coast Line Railroad Company. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial granted.

The plaintiff brings this action to recover damages for personal injuries caused, as he alleges, by the negligence of the defendant. The defendant denies negligence, and alleges, as a defense, that the defendant maintains a relief department, that the plaintiff was a member thereof, and that, after he was injured, he accepted benefits from said department which under its rules and regulations bars a recovery. Evidence was offered by the plaintiff in support of his contention. The defendant introduced evidence in rebuttal, and also introduced the rules and regulations of said department, which are very fully stated in the report of *Barden v. Railroad*, 152 N. C. 318, 67 S. E. 971. Section 4 of the rules and regulations provides: "The company shall have general charge of the department, guarantee the fulfillment of its obligations as determined by these regulations, take charge of all moneys belonging to the relief fund, and be responsible for their safe-keeping, pay into the fund interest at the rate of 4 per cent. per annum on monthly balances in its hands, supply the necessary facilities for conducting the business of the department, and pay all the operating expenses thereof." No evidence, however, was introduced that the defendant had contributed any money to the funds of the department or for its maintenance. There was evidence that the plaintiff was entitled to be paid benefits for a period of eight months, and that he was paid for about four months.

It appears from the rules and regulations:

(1) That the relief department is a department of the defendant.

(2) That the rules and regulations thereof are prescribed by the defendant.

(3) That under these rules and regulations the defendant has control of the department and of its money.

(4) That the rules and regulations can be changed by the defendant without the consent of the members of the department, and that they cannot be changed except with the consent of the defendant.

(5) That the object of the department is the establishment and management of a fund, to be known as the "Relief Fund," for the payment of definite amounts to employés contributing thereto, who are to be known as "members of the relief fund," when under the regulations they are entitled to such payment by reason of accident or sickness, or, in the event of their death, to the relatives or other beneficiaries designated by them, with the approval of the superintendent. The relief fund will consist of contributions from members thereof, income derived from investments and from interest paid by the company, and advances by the company, when necessary, to pay benefits as they become due.

(6) That the defendant is not a member of the department, but it is provided the company shall have general charge of the department, guarantee the fulfillment of its obligations as determined by these regulations, take charge of all moneys belonging to the relief fund, and be responsible for their safe-keeping, pay into the fund interest at the rate of 4 per cent. per annum on monthly balances in its hands, supply the necessary facilities for conducting the business of the department, and pay all the operating expenses thereof.

(7) That all employés of the company who under the regulations are contributors to the relief fund shall be designated as "members of the relief fund." There shall be five classes of members. The highest class in which an employé may be a member shall be determined by his regular or usual monthly pay, as follows:

Monthly Pay.	Highest Class.
Less than \$35.00.....	1st.
\$35.00 or more, but less than \$55.00.....	2d.
\$55.00 or more, but less than \$75.00.....	3d.
\$75.00 or more, but less than \$95.00.....	4th.
\$95.00 or more.....	5th.

For employés paid by the hour, trip, piece, or in any other way than by the month the highest class shall be determined by the usual amount of earnings in a month.

(8) That the word "contribution," wherever used in these regulations, shall be held and construed to refer to such designated portion of the wages payable by the company to an employé, as he shall have agreed, in his application, that the company shall apply for the purpose of securing the benefits of the relief fund, or to such cash payment as it may be necessary for a member to make for said purpose. Contribution for full member-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ship shall be made monthly in advance at the following rates: First class, 75 cents per month; second class, \$1.50; third class, \$2.25; fourth class, \$3; fifth class, \$3.75.

(9) Wherever used in these regulations, the word "disability" shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word "disabled" shall apply to members thus physically unable to work. The decision as to when members are disabled and when they are able to work shall rest with the medical officers of the department. The decision as to whether disability at any time shall be classed as due to sickness or due to accident, and as to whether any disability shall be considered a relapse or an original disability, shall rest with the medical officers of the department.

(10) That the following benefits will be paid to members or beneficiaries entitled thereto in accordance with the provisions of these regulations: Payment for each day of disability classed as due to accident for a period not longer than 52 weeks, as follows: To a member of the first class, 50 cents; second class, \$1; third class, \$1.50; fourth class, \$2; fifth class, \$2.50; and at half these rates thereafter during the continuance of disability. Also payment to or in behalf of the members of such amounts for necessary surgical treatment as may be approved by the chief surgeon, and provision by the department for free surgical treatment of the member in one of the hospitals under its control when requested by a medical examiner of the department and authorized by the superintendent or chief surgeon. No member shall have authority to contract any bills against the department, and nothing herein shall be held to mean or imply that the department shall be responsible for the payment of such bills as a member shall contract or his surgeon may charge. Bills for surgical attendance, to be considered by the department, must be made out against the member, and must be itemized. Payment, in accordance with the conditions prescribed in the regulations, upon the death of a member, as follows: To the beneficiary of a member of the first class, \$250; second class, \$500; third class, \$750; fourth class, \$1,000; fifth class, \$1,250; also payment of \$250 for each additional death benefit of the first class to which the beneficiary is entitled.

(11) That employees are required to sign a written application before joining the relief department in which it is provided: "I also agree that, in consideration of the amounts paid and to be paid by the said company for the maintenance of said relief department, and of the guaranty by said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company, and all other companies associated therewith in the administration of their relief

departments, for damages arising from or growing out of said injury; and, further, in the event of my death, no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of said relief department of all claims against said relief department, as well as against said company, and all other companies associated therewith, as aforesaid, arising from or growing out of my death, said releases having been duly executed by all who might legally assert such claims; and, further, if any suit shall be brought against said company, or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said relief department and of said company created by my membership in said relief fund shall thereupon be forfeited without any declaration or other act by said relief department or said company."

(12) That section 62 of the rules and regulations is as follows: "62. In case of injury to a member he may elect to accept the benefits in pursuance of these regulations, or to prosecute such claims as he may have at law against the company or any companies associated therewith in the administration of their relief departments. The acceptance by the member of benefits for injury shall operate as a release and satisfaction of all claims against the company and all other companies associated therewith as aforesaid for damages arising from or growing out of such injury; and, further, in the event of the death of a member, no part of the death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of all claims against the relief department, as well as against the company and all other companies associated therewith as aforesaid, arising from or growing out of death of the member, said releases having been duly executed by all who might legally assert such claims; and further, if any suit shall be brought against the company or any other company associated therewith as aforesaid for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the relief department and of the company created by the membership of such member in the relief fund shall thereupon be forfeited without any declaration or other act by the relief department or the company; but the superintendent may, in his discretion, waive such forfeiture upon condition that all pending suits shall first be dismissed. If a claim for damages on account of injury to or death of a member shall be settled by the company, or any company associated therewith as aforesaid, without suit, or by compromise,

such settlement shall release the relief department and the company from all claims for benefits on account of such injury or death."

At the conclusion of the evidence, his honor stated that he would charge the jury "that the defendant company, having paid a part of the relief money to the plaintiff and the plaintiff having accepted it, whether it was the full amount or not, if he accepted any part of it, he could not recover," and in deference thereto the plaintiff submitted to judgment of nonsuit, and appealed.

Kellum & Loughlin and Herbert McClammy, for appellant. Davis & Davis and Geo. B. Elliott, for appellees.

ALLEN, J. (after stating the facts as above). The plaintiff having introduced evidence tending to prove that he was injured by the negligence of the defendant, it follows that there was error in the ruling of his honor, unless the acceptance of benefits from the relief department by the plaintiff after his injury operates to release the defendant company from liability. We think it does not have this effect under the evidence in this case, for two reasons:

[1] (1) It does not appear that there is any consideration for the release moving from the defendant. The answer alleges that the defendant has expended large sums in maintaining the relief department, and in contributions to the fund from which benefits are paid to members, but these are matters of defense, and under our system of pleading are deemed to be denied by the plaintiff, and no evidence was introduced in support of the allegations of the answer. The evidence does not disclose that the defendant has paid one dollar for operating expenses or otherwise, or that the plaintiff has received anything that he has not paid for by his own contributions. The only reference in the evidence to the payment of any sum by the defendant is in the following question and answer: "I ask you if all this money that has been paid into the relief department, and upon which the relief department has been operated, has not been the wages taken out of the laborers of the Atlantic Coast Line? Ans. No, sir." The authorities are uniform that a release must be founded on a valuable consideration, and that the plea is not good, unless the consideration is alleged. 18 A. & E. Ency. Pl. & Pr. p. 92; Story, Eq. Pl. § 797; 1 Don. Ch. Pr. 670; Hale v. Grogan, 99 Ky. 173, 35 S. W. 282; Maness v. Henry, 96 Ala. 458, 11 South. 410; Swan v. Benson, 31 Ark. 730; Scott v. Scott, 105 Ind. 584, 5 N. E. 397. In *Crawley v. Timberlake*, 38 N. C. 350, Chief Justice Ruffin says: "A court of equity does not sustain these shorthand bars, such as a release, a stated account, and the like, unless they be pleaded as not only existing instruments, but also as being fair and wise, and proper

to be equitably enforced. \* \* \* So, with respect to this particular subject of a release now before us, Lord Redisdale states (in *Hughes v. Kearney*, 1 Sch. & Lef.) that the plea of release must set out the consideration upon which it was made, if it be impeached in that point. \* \* \* In other words, the release, unless fairly obtained and on a proper consideration, ought not to preclude the court from going into the case, and dealing out justice to the parties according to its real facts." This case was approved in *Shaw v. Williams*, 100 N. C. 281, 6 S. E. 196, and in *Boutten v. Railroad*, 128 N. C. 341, 38 S. E. 921, the court quotes with approval this language from *Shaw v. Williams*, supra: "And so every release must be founded on some consideration, otherwise fraud must be presumed." Some of the authorities speak of transactions of this character as a release, and others as an accord and satisfaction, but, by whatever name it is called, it is pleaded by the defendant as a binding contract existing between it and the plaintiff; and a promise without consideration cannot be enforced. If it is necessary to a good plea to allege the consideration, the party relying on the defense assumes the burden of proving the allegation as made. He is not required to prove a full consideration, but it must be valuable, and as such must not be so small as to cause one of ordinary discretion and judgment to say he paid nothing. *Fullenwider v. Roberts*, 20 N. C. 420; *Worthy v. Caddell*, 76 N. O. 86.

The defendant contends, however, that, in the absence of evidence proving the payment of a consideration, the guaranty by the defendant to fulfill the obligations of the department, and its agreement to supply the necessary facilities for conducting its business and to pay all the operating expenses, furnishes a consideration. Ordinarily this would be true, but we cannot concede its sufficiency, standing alone, to support a release of the plaintiff's cause of action, when considered in connection with the other regulations of the department. The department has been established by the defendant, and its rules and regulations made by it. Under these rules and regulations, it retains the control of the department, with the power to make changes as it sees fit, and it determines the contributions of members, and may decrease or increase them. It is therefore possible for the defendant to fix the amounts to be contributed by members large enough to save it harmless from loss on account of accident and negligence, and to throw on the employees a burden which does not rightfully belong to them. If such a result should be reached, and it appeared affirmatively that the defendant paid nothing under its rules and regulations, the promises of the defendant "to guarantee," etc., would be promises incorporated in the regulations by the defendant, without any



expectation of being called on to perform them, and would not furnish a consideration, and under such circumstances the acceptance of benefits would not affect the right to recover.

[2] (2) If a consideration had been proven, it appears, according to the evidence of the plaintiff, that he was entitled to receive benefits for eight months, and that he was paid for four months. In the consideration of this phase of the case, it must be remembered that it is the "acceptance of benefits," not the acceptance of a promise to pay benefits, that bars a recovery. The transaction partakes of the nature of an accord and satisfaction, which to be effectual, must be performed in its entirety. If performed in part only, the original right of action remains, and the party to be charged is allowed what he has paid in diminution of the amount claimed. Chief Justice Bleckley states the rule, with its qualifications, in *Railway Co. v. Clem*, 80 Ga. 539, 7 S. E. 86. He says: "As long as the accord is executory, although it is partially performed, the original cause of action is not extinguished, and an action may be brought upon it; and the remedy of the defendant is to plead his part performance as a satisfaction pro tanto. He gets credit for all he has paid upon it, but the right of action is not extinguished by an accord merely without complete satisfaction, where the parol contract is that performance, not mere promise, is to constitute the satisfaction, though, if a promise is to constitute it before performance, then the accord is executed by the promise." Blackstone says: "An accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions on this account." 3 Bl. Com. 15. "Accord executory without performance accepted is no bar. Accord with part execution cannot be pleaded in satisfaction. The accord must be completely executed to sustain a plea of accord and satisfaction." Bacon, Abr., tit. Accord & Satisfaction, A. & C. In *Peytoes' Case*, 9 Co. 79, it is said: "And every accord ought to be full, perfect and complete, for, if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed." These and other authorities to the same effect are cited with approval in *Kromer v. Heim*, 75 N. Y. 574, 31 Am. Rep. 491; and in conclusion the court there says: "The doctrine which has sometimes been asserted that mutual promises, which give a right of action, may operate and are good as an accord and satisfaction of a prior obligation, must, in this state, be taken with the qualification that the intent was to accept the new promise as a satisfaction of the prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then,

until performance, there is not complete accord, and the original obligation remains in force." The following authorities announce the same rule: 5 Lawson R. & R. §§ 2567, 2568; 2 Par. Con. (5th Ed.) p. 683; 1 Cyc. p. 815, and cases in note; Clark, Con. 491.

There are three cases bearing directly on the effect of the payment of a part of the benefits due under the provisions of a relief department on the original cause of action for negligence—*Penn. Co. v. Chapman*, 220 Ill. 428, 77 N. E. 248; *Johnson v. Railroad*, 58 S. C. 488, 36 S. E. 851; and *Petty v. Brunswick Railroad*, 109 Ga. 666, 35 S. E. 82. In the Illinois case it is held that part performance does not extinguish the right of action for negligence, and the cases from South Carolina and Georgia hold to the contrary. These last cases from South Carolina and Georgia proceed upon the idea that, by the terms of the relief department then before the court, the employé had stipulated that the acceptance of any benefit released the right of action, as appears from what is said in the *Petty Case*. "*Petty* (the plaintiff) therein expressly stipulated that acceptance by him from the relief and hospital department of any of the benefits provided for by its regulations should operate, without more, to release the defendant company from all claims for damages he might have against it;" and it is upon this ground that the case is distinguished from *Railway Co. v. Clem*, supra. We do not so understand the rules and regulations before us. In an extended note to *Johnston v. Fargo*, 6 Am. & Eng. Ann. Cas. 3, practically all the cases considering the terms of relief departments and their legal effect are collected, and among others the three above referred to. After stating the rule adopted by the Georgia and South Carolina courts, the editors say: "It will be observed that his doctrine is not only opposed to the reasoning in *Penn. Co. v. Chapman*, but is inconsistent with the well-considered cases, cited supra, holding that it is the receipt of benefits under the contract, and not the contract itself, that binds the employé." We conclude, therefore, that the weight of authority and the reason of the thing favor the rule that a payment of a part of the benefits to which the employé is entitled does not prevent the prosecution of an action to recover damages for negligence, in the absence of an express stipulation that the acceptance of a part shall have that effect, and we so hold.

[3] This disposes of the appeal, but the rules and regulations of the relief department are in evidence, and the question has been fully argued as to the effect of an acceptance of all the benefits to which an employé is entitled from a fund to which the defendant has contributed on his right of action for negligence, and, as the question will necessarily arise again, it is our duty to consider it. The question is undecided

by this court. The views expressed in *Barden v. Railroad*, 152 N. C. 318, 87 S. E. 971, relied on by the plaintiff, are entitled to great respect, emanating, as they do, from a member of this court of learning and of much capacity for research, but the point in controversy here was not raised in that case.

In the *Barden* Case no benefits were paid to the employé, and the defendant railroad company did not rely on the provisions of the relief department as a defense. On the contrary, both plaintiff and defendant admitted the validity of the rules and regulations of the department. The case in brief was this: The plaintiff alleged in his complaint: (1) That the defendant was a railroad corporation. (2) That it maintained a relief department. (3) That as a part of its relief department it maintained a hospital. (4) That in this hospital it employed surgeons and physicians. (5) That he was an employé of the defendant and a member of the relief department. (6) That as such he was entitled to be treated in the hospital when sick or disabled. (7) That he was suffering from fistula, and was admitted to the hospital, and there negligently treated by the physicians.

The argument of the plaintiff was that the relief department was an agency of the railroad; that the hospital was a part of the department; that the physicians were employed in the hospital, and the conclusion deduced was that the physicians were agents of the railroad, and therefore it was responsible for their negligence. The defendant demurred to the complaint upon the ground that it did not state a cause of action, in that it was not alleged that the defendant failed to exercise due care in the selection of the physicians. The demurrer was overruled by the judge of the superior court, but on appeal this ruling was reversed, and the complaint held to be insufficient. We therefore regard the question as an open one presented for our decision.

It has been considered by the highest courts of Alabama, Georgia, South Carolina, Maryland, Pennsylvania, New Jersey, New York, Ohio, Indiana, Illinois, Iowa, and Nebraska, and by the Circuit Courts and the Circuit Courts of Appeal of the United States, and, with two exceptions, it has been held that an acceptance of all the benefits under the rules and regulations of a relief department, when it is the voluntary act of the employé, and is free from undue influence or fraud, bars an action for negligence. The exceptions are *Pittsburg R. R. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301, which was overruled in *Pittsburg R. R. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638, and *Miller v. Railroad* (C. C.) 65 Fed. 305, which was disapproved on this point on appeal to the Circuit Court of Appeals, 76 Fed. 439, 22

C. C. A. 264. We do not cite in support of the proposition the English cases of *Clement v. Railroad*, 2 Q. B. Div. 490, *Griffiths v. Dudley*, 9 Q. B. Div. 362, and the *Queen v. Grevier* Can. Sup. C. 30, p. 50, because they hold that a regulation is permissible which gives no option to the employé to accept benefits or sue, and which compels him to accept the benefits, although injured by the negligence of his employer, which we would not follow. In the cases which have come before the courts, it would seem that every attack conceivable has been made on the relief department.

It has been urged that it is against public policy, that there is no privity of contract between the employé and the railroad, and that there is no consideration to support a release of a right of action, and in reply the courts say, as stated in *Eckman v. Railroad*, 169 Ill. 318, 48 N. E. 498, 38 L. R. A. 750: "The various courts which have had this question under consideration appear to agree that the stipulation in question is not opposed to sound public policy, but, on the whole, is conducive to the well-being of those whom it immediately affects, inasmuch as many railroad employé, owing to the dangerous character of their employment, are hurt without any culpable negligence on the part of their employer, and inasmuch as the employé retains, until after he sustains an injury, the right to elect whether he will sue his employer for negligence or accept benefits from the association. It also appears to be agreed that the obligation assumed by the employer to maintain and support such association by contributing the funds necessary for that purpose creates a privity of contract between the employer and all the members of the association, and at the same time furnishes a sufficient consideration to support such contract." Substantially the same language and reasoning have been used in the following cases, all of which sustain the sufficiency of such a defense: *Maine v. Railroad Co.*, 109 Iowa, 260, 70 N. W. 630; *Railroad Co. v. Bell*, 44 Neb. 44 [62 N. W. 314]; *Donald v. Railroad Co.*, 93 Iowa, 284, 61 N. W. 971 [33 L. R. A. 492]; *Railroad Co. v. Wymore*, 40 Neb. 645 [58 N. W. 1120]; *Vickers v. Railroad Co.* [C. C.] 71 Fed. 139; *Lease v. Pennsylvania Co.*, 10 Ind. App. 47 [37 N. E. 423]; *Ringle v. Pennsylvania Co.*, 164 Pa. 529 [30 Atl. 492, 44 Am. St. Rep. 628]; *Shaver v. Pennsylvania Co.* [C. C.] 71 Fed. 931; *Otis v. Pennsylvania Co.* [C. C.] 71 Fed. 136; *Johnson v. Railroad Co.*, 163 Pa. 127 [29 Atl. 854]; *Spitze v. Railroad Co.*, 75 Md. 162 [23 Atl. 307, 32 Am. St. Rep. 378]; *Fuller v. Relief Ass'n*, 87 Md. 433 [10 Atl. 237]; *Graft v. Railroad Co. (Pa.)* 8 Atl. 206; *Martin v. Railroad Co.* [C. C.] 41 Fed. 125; *State v. Railroad Co.* [C. C.] 36 Fed. 655; *Owens v. Railroad Co.* [C. C.] 35 Fed. 715 [1 L. R. A. 75]. \* \* \* In the case at bar the ap-

pellee contributes largely to the fund under its agreement to make up or guarantee deficits, to furnish surgical aid and attendance, to pay all the expenses of administration and management, and to become responsible for the safe-keeping of the funds of the relief department."

It is the fact that the employé is not compelled to accept the benefits, that he has the choice after his injury to accept benefits or to sue to recover damages, which saves the rules and regulations from condemnation as a contract against public policy or against negligence. To deny this right of exercising his choice to the employé would be equivalent to saying that, when injured, he can make no settlement with his employer. "The injured party, therefore, is not stipulating for the future, but settling for the past. He is not agreeing to exempt the company from liability for negligence, but accepting compensation for any injury already caused thereby. He may as well accept it in installments as in a single sum, and from an appointed fund to which the company has contributed as from the company's treasury as a result of litigation. The substantial feature of the contract, which distinguishes it from those held void as against public policy, is that the party retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. Having accepted the former, he cannot justly ask the latter in addition." *Johnson v. Railroad*, 163 Pa. 127, 29 Atl. 854. The same reasoning meets the objection that the rules and regulations are in violation of the statutes existing in many states, invalidating agreements between employer and employé, having for their object the exemption of the employer from liability for negligence. *Hamilton v. Railroad* (C. C.) 118 Fed. 92; *Petty v. Railroad*, 109 Ga. 666, 35 S. E. 82; *Pittsburg R. R. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; *Pittsburg R. R. v. Hosea*, 152 Ind. 412, 53 N. E. 419; *Donald v. Railroad*, 93 Iowa, 284, 61 N. W. 971, 33 L. R. A. 492; *Pittsburg, etc., R. Co. v. Cox*, 55 Ohio St. 497, 45 N. E. 641, 35 L. R. A. 507; *Day v. Railroad*, 179 Fed. 30, 102 C. C. A. 654. The opinion in the last case was written by Connor, J., and concurred in by Judges Goff and Pritchard, in which it is said: "Assuming that the averments of the declaration bring the plaintiff's case within the provisions of the Constitution, and that he was injured by an act or omission of a fellow servant," as defined and limited by the language of the section, does the contract, set forth in the special plea, waive any of the 'benefits' conferred by said section? It is manifest that by becoming a member of the relief department plaintiff did not waive or deprive himself of the right to maintain an action against defendant for an injury sustained by him while in its service as defined by the

Constitution 'by an act or omission of a fellow servant.' There is nothing in the rules and regulations of the relief department which could be averred or pleaded in bar of an action brought by him for such injury; nor did he by becoming a member thereof make any 'contract, express or implied,' by which he waived any of the 'benefits' conferred upon, or secured to, him by the Constitution. Giving the language of the section the most liberal construction possible, nothing more is secured to the employé injured by the negligence of a fellow servant than the right to recover from the common master damages for such injury in the same manner and to the same extent as if the same acts or omissions were those of the master himself in the performance of a nonassignable duty. We are unable to perceive how by any possible interpretation the scheme known as the relief department, or becoming a member thereof, can be said to waive the right of action secured to the employé by the Constitution. As uniformly held by other courts, in which the same contention has been made, the employé does not waive, or agree to waive, any rights to which he is entitled by becoming a member of the relief department. He simply agrees that, after the injury is sustained, and his cause of action accrues, he will elect whether to sue for damages or accept the benefits secured by the relief department—that he will not do both. There is no suggestion that plaintiff made his election under such circumstances or conditions either mental, moral or physical, making it inequitable to enforce it. Similar statutes have been enacted, whereby agreements made in advance of an injury, caused by the negligence of a fellow servant or defective appliances, ways, or means, are declared to be invalid. The courts have held that becoming a member of the relief department was not within the letter or spirit of these statutes."

[4] Again, it is contended that the business is that of insurance, and that it is outside of the powers granted to a corporation to do a railroad business. The authorities hold the contrary view. *Maine v. Railroad*, 109 Iowa, 280, 70 N. W. 630; *State v. Railroad*, 68 Ohio St. 41, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635; *Beck v. Railroad*, 68 N. J. Law, 232, 43 Atl. 908, 76 Am. St. Rep. 211. In the New Jersey case the court says: "We must recognize that it (the railroad) has either express or implied power to engage the services of many men, and contract with them as to the compensation they shall receive for their services. Each of such employés is engaged in an employment which subjects him to the hazard of injury and the danger of death. Each is possessed of the liberty to contract with the employer respecting his compensation. A contract by which an employé permits such an employer to create a fund in part out of his wages, supplemented by a contribution by the employer when necessary, out of which

relief for sick and injured employes is provided, and by which the employer undertakes to manage the fund and furnish the agreed-on relief, is, in my judgment, within the implied powers of the employer, if a corporation. On the part of the employer, such a scheme may be deemed likely to increase the efficiency of the force it employs, and on the part of the employe it may tend to relieve from anxiety as to support if injured by any of the many dangers to which he is daily and hourly exposed. As incidental to the contract of employment and compensation, therefore, it is not *ultra vires*."

The following authorities are also in point: *Sturgiss v. Railroad*, 80 S. C. 167, 60 S. E. 940; *Fuller v. Relief Ass'n*, 67 Md. 436, 10 Atl. 237; *Chicago v. Curtis*, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456; *Chicago v. Bell*, 44 Neb. 44, 62 N. W. 314; *Harrison v. Railroad*, 144 Ala. 252, 40 South. 394; *A. C. L. v. Dunning*, 166 Fed. 850, 94 C. C. A. 128; *Carter v. Railroad*, 115 Ga. 853, 42 S. E. 239; *Owens v. Railroad (C. C.)* 35 Fed. 718, 1 L. R. A. 75; *Spitze v. Railroad*, 75 Md. 168, 23 Atl. 307, 32 Am. St. Rep. 378; *Otis v. Railroad (C. C.)* 71 Fed. 136; *Lease v. Railroad*, 10 Ind. App. 57, 37 N. E. 423; *Ringle v. Railroad*, 164 Pa. 532, 30 Atl. 492, 44 Am. St. Rep. 628; *Railroad v. Elwood* 25 Ind. App. 674, 58 N. E. 866; *Brown v. Railroad*, 6 App. D. C. 244; *Graft v. Railroad (Pa.)* 8 Atl. 207; *Clinton v. Railroad*, 60 Neb. 692, 84 N. W. 90; *Black v. Railroad (C. C.)* 36 Fed. 655; *Martin v. Railroad (C. C.)* 41 Fed. 126; *Colaizzi v. Railroad*, 143 App. Div. 638, 128 N. Y. Supp. 312, March term, 1911; 3 *Elliott on Railroads*, § 1379 et seq. Up to this point we have considered the effect of the voluntary acceptance by the employe of the benefits to which he is entitled, based upon the language of the rules and regulations, and uninfluenced by other matters, and hold that such acceptance operates as a release or an accord and satisfaction of a claim for damages on account of negligence when based on a consideration moving from the defendant. If, however, the release is not voluntary, and if it is procured by undue influence or fraud, or has no consideration to support it, it will not avail as a defense.

[8] The history of the relief department justifies the courts in subjecting settlements made thereunder to close scrutiny. They seem to have kept pace with the employer's liability acts, and as one of these was passed a relief department would be organized. The English act, on which most of the American statutes are based, went into effect on the 1st day of January, 1880, and on the same day the owner of a colliery notified his employes they must look to the department in the event of injury by negligence, and from then until now the effort has continued to avoid the increased liability imposed by the acts. In so far as those efforts are legitimate and fair, they should be upheld, and

no further. By "undue influence" is meant a controlling influence, one which impels a person to do an act he would not otherwise do. *Westbrook v. Wilson*, 135 N. C. 402, 47 S. E. 467; *In re Abee*, 146 N. C. 274, 59 S. E. 700. As is well said by Justice Brown in *Re Will Amella Everett*, 153 N. C. 85, 68 S. E. 924: "Experience has shown that direct proof of undue or fraudulent influence is rarely attainable, but inference from circumstances must determine it. \* \* \* Undue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but, when collectively stated, may satisfy a rational mind of its existence." When it is in issue, the jury have the right to consider the relation of the parties, the circumstances connected with their relationship, the condition and situation of the parties at the time of the transaction, the adequacy of the consideration, and any other relevant facts.

The relation of employer and employe is not one of those regarded as confidential, from which a presumption of fraud or undue influence will arise, but it is recognized by the courts that the employer has great influence in determining the conduct of the employe, and may use it to his injury. It is upon this ground that the statutes regulating the hours of labor are sustained, as stated in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. "The Legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are to a certain extent conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the Legislature may properly interpose its authority." This language was approved by the Supreme Court of the United States in an opinion written by Mr. Justice Hughes in *Railroad v. McGuire*, 219 U. S. 552, 31 Sup. Ct. 259, 55 L. Ed. 328. It is also competent to consider the fact that the option to accept benefits or sue is in the application for membership, and that the defendant has control of the department and prescribes its rules and regulations. It is true that it is the acceptance of benefits that bars the action, when free from fraud or undue influence, but this acceptance receives its vitality from the clause in the application for membership, or, as is said in the *McGuire Case*: "The payment of benefits is the performance of the promise to pay contained in the contract of membership."

The situation of the employe at the time

he accepts the benefits, his condition and surroundings are relevant. Was it soon after his injury and while suffering, or was he surrounded by the employes of the company, with no opportunity to confer with relations or friends? In 2 Pom. Eq. Jur. § 948, it is said: "Whenever a person is in pecuniary necessity and distress, so that he would be likely to make any undue sacrifice, and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration and the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively." Note, however, that it is not pecuniary necessity and distress which are the basis of the equity jurisdiction, but it is taking advantage of this condition. Again, Pomeroy says (Vol. 2, § 851): "Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances undue influence naturally has a field to work upon in the condition or circumstances of the person influenced which render him peculiarly susceptible and yielding, his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessity, his ignorance, lack of advice, and the like. All these circumstances, however, are incidental, not essential."

The consideration paid to the employé is important, and may be controlling, but it is not to be determined alone by the amount of benefits paid to the employé and the proportion this may bear to a fair compensation for his injury. On the part of the employé it must be remembered that he has contributed to the fund out of which he is paid, and that the department has been established primarily for the benefit of the railroad, and not as a charity, and that it has been relieved of liability for negligence in many instances under its rules and regulations; on the part of the railroad, that the party injured is a member of the relief department, and as such is entitled, upon the payment of a small sum, to hospital treatment and benefits when sick or disabled, or when injured by accident, and to larger benefits at death, that to maintain the department it is necessary to keep up its membership, that the railroad has been compelled to expend large sums in operating expenses, and in contributions to the relief fund, if this appears. When due weight is given to these matters, and there is evidence that the consideration is inadequate, it is a circumstance which, in connection with other circumstances, may be submitted to the jury, and, if grossly inadequate, it alone is sufficient to carry the question of

fraud or undue influence to the jury. 2 Pom. Eq. Jur. §§ 926, 927. At the last term, this court said in *Leonard v. Southern Power Co.*, 70 S. E. 1063, on this question: "In *Byers v. Surget*, 19 How. 311 [15 L. Ed. 670], the Supreme Court of the United States says: 'To meet the objection made to the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration singly cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts, namely, unless such inadequacy be so gross as to shock the conscience, for this qualification implies necessarily the affirmation that, if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud.' And, again, in *Hume v. U. S.*, 132 U. S. 411, 10 Sup. Ct. 136, 33 L. Ed. 393: 'It (fraud) may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other.' Our court, speaking through Justice Brown, so declares the law in reference to awards and other transactions, in *Perry v. Insurance Co.*, 137 N. C. 406, 49 S. E. 890. He says: 'Where there is a charge of fraud or partiality made against an award, the fact that it is plainly and palpably wrong would be evidence in support of the charge, entitled to greater or less weight according to the extent or effect of the error and the other circumstances of the case. There might be a case of error in an award so plain and gross that a court or jury could arrive only at the conclusion that it was not the result of an impartial exercise of their judgment by the arbitrators. *Goddard v. King*, 40 Minn. 164, 41 N. W. 659. The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award; but, if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption or partiality and bias.' Where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence upon the issue of fraud, but will not, standing alone, justify setting aside a contract or other paper writing on the ground of fraud." In the enforcement of these principles, relief should be granted with caution. If nothing appears except that the employé has signed the application for membership, the rules and regulations of the department that the employé was not with his friends, and that the consideration is inadequate, but not grossly so, relief should be denied. The employé is required to exercise diligence in protecting his rights, and will not be excused on the ground of want of knowledge when he has the opportunity to learn.

[6] If the issue of fraud or undue in-

fluence is found in favor of the employé, and he has been injured by the negligence of the railroad, he may recover damages, without returning what he has received as benefits, but this will be allowed in reduction of the damages. *Hayes v. Railroad*, 143 N. C. 125, 55 S. E. 437.

There must be a new trial.  
New trial.

CLARK, O. J., concurs in the result upon the ground that the contract of the relief department of the defendant company is invalid because it is in violation of both the federal and state statutes which have been passed for the protection of the employés of railroad companies. It is so held because a violation of the state statute in *Barden v. Railroad*, 152 N. C. 818, 67 S. E. 971, and no reason has been shown in my judgment to overrule the able and well-considered opinion of the court in that case which was written by Mr. Justice Manning. The fellow servant act of North Carolina of 1897, now Rev. 1905, § 2846, giving employés of railroads an action for wrongful death or personal injuries caused by the negligence of the defendant or a fellow servant or from defective machinery, ways, or appliances of a railroad company, provides "any contract or agreement, expressed or implied, made by any employé of such company to waive the benefit of this section shall be null and void." Every employé of the defendant company is required to join this "relief department," and the contract which he signs upon entering its relief department contains this provision: "I also agree that in consideration of the amounts paid by the said company for the maintenance of the said relief department, and the guaranty by the said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company and all other companies associated therewith in the administration of the relief department for damages arising from or growing out of said injury." This contract made prior to the injury is invalid because in violation of the express terms of the statute. It is also without consideration, for the evidence in this case does not show that the defendant in fact contributed any money to the department or for its maintenance. It appears from the rules and regulations that said relief department is a bureau of the defendant, and that its rules and regulations are prescribed by the defendant; also, that under those rules and regulations the defendant has sole control of the department and of its money; that the rules and regulations can be changed by the defendant without the consent of the members of the department, and cannot be changed without the consent of the defendant. It was admitted in the argument here, and is a well-known fact, that no employé of the defendant can remain in its service unless he

is a member of this department. The so-called relief department was not established until after the enactment of the act of 1897, called the fellow servant act.

From the above-condensed statement of the evidence, it is clear that the sole object of the relief department is for the relief of the railroad company by requiring the employés of that company to raise by a forced contribution out of their salaries and wages a fund out of which all damages for personal injuries or wrongful death caused to employés by the negligence of the defendant shall be paid. It is public policy as declared by statute that, in case of injury or death resulting to an employé from the negligence of a railroad company or of a fellow servant, such loss shall fall upon the company whose negligence caused it, and thus the stockholders will see that their officers and agents take proper steps to prevent such negligence, and to safeguard by proper care the lives and limbs of its employés. This safeguard is entirely swept away by this device of a relief department, whereby the employés are compulsorily required to raise out of their own meager wages a fund of \$9 to \$45 per annum from each employé, amounting in the aggregate to many hundreds of thousands of dollars annually, out of which fund the damages for the injuries and deaths which may be inflicted upon them by the negligence of the railroad company shall be paid. The defendant is the only railroad company in this state which has resorted to this device. If, after an injury has been inflicted, there is a fair and free settlement made between the injured party and the company for the damages sustained by the negligence of the corporation, which damages are paid out of the funds of the company, it would be upheld by the courts. But such arrangement needs no previous agreement as is here required to be signed by each employé of the defendant company. Nor should such a settlement be made out of funds raised by involuntary contributions exacted by the company out of the wages of its employés. Nor is it a valid contract to impose upon plaintiff the loss of all he has paid in if he elects to sue, or if he leaves the service. The so-called relief department is also in violation of the federal employer's liability act of April 22, 1908 (35 Stat. 65, c. 149 [U. S. Comp. St. Supp. 1909, p. 1171]). That statute, after giving employés of any railroad company an action for injury caused by the negligence of any railroad company or of fellow servants, or by reason of any defects in appliances, machinery, etc., provides: "Sec. 5. *Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void.*" The debates in both houses of Congress over the enactment of this section, as preserved in the "Congree-

sional Record," show that the object of this section was to prohibit these relief departments which had sprung up in the several states immediately after the passage of state acts to the above effect, and which had been held valid by courts, which, to say the least, were not unfriendly to these great aggregations of capital. The labor associations of the country were powerful enough to have their rights presented in the debates in Congress, and to secure the enactment of the above section for their protection. If the above section does not have that effect, the mind of man cannot conceive a form of words which will have that effect. In a very recent case decided by the United States Supreme Court October 30, 1911 (*Railroad v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. —), it was held that when the defendant railroad company, operating a railroad which was "a part of a through highway over which traffic was continually being moved from one state to another," hauled over a part of its road five cars, the couplers of which were defective, two of the cars being used at the time in moving interstate traffic and the other three in moving intrastate traffic, though the use of the last three was not in connection with any car or cars used in interstate commerce, yet the federal liability statute applied to said three cars, and the defendant was liable to the penalty for not having automatic couplers thereon because the act applies "on any railroad engaged in interstate commerce." If above decision is controlling, certainly the relief department of the defendant is forbidden by the federal statute. While the three cars in the above case were not directly in use in interstate commerce, every employé of the defendant company is more or less connected in some way every day and hour with the transportation of through freight or passengers by the company which is "engaged in interstate commerce."

BROWN, J. (concurring). I concur in the judgment of this court granting a new trial, although I cannot concur in all that is said in the opinion.

1. I think it has been fully demonstrated in the opinion in this case by Mr. Justice ALLEN, as well as in my dissenting opinion on the *Barden Case*, 152 N. C. 318, 67 S. E. 971, that the relief department agreement of the defendant company is valid, not against public policy, not a mere scheme upon the part of the defendant to evade liability for its own negligence, and in proper cases should be enforced as a bar to actions for damages. Similar articles of agreement have been in vogue in other parts of this country between other railway companies and their employés, and have been invariably upheld. If overwhelming authority and unanimous judicial precedent are worth anything, then the legality of these relief associations and their articles of agreement ought no longer to be questioned. This should be especially true

in this state, for the reason that three successive Legislatures have thoroughly investigated this very relief department of the defendant company, have examined scores of its employés of all grades, and have refused to interfere.

That this is a matter addressed entirely to the wisdom and within the jurisdiction of the General Assembly is expressly declared by the Supreme Court of the United States in the *McGuire Case*, 219 U. S. 550, 31 Sup. Ct. 259, 55 L. Ed. 328, where it is held: "Whether the relief scheme of a railroad company involving contracts with its employés and contributions from both employés and the company, such as the one involved in this case, is a wise and proper scheme which should be approved, or an unwise scheme which should be disapproved by the public policy of the state, is under the control of the legislative power of the state." If this relief association agreement had been found by our General Assembly to work an injustice or hardship to the employé, it would have been destroyed long ago.

2. This association does not deprive the employé of any legal right he has under the law, and does not attempt to. On the contrary, it confers upon him many benefits and privileges which the company is under no legal obligation to assist in providing. If the employé is sick or injured from any cause with which the company is wholly disconnected, he may enter its hospitals and without expense be nursed back to health. When he is convalescent, but unfit to return to labor, he can draw a weekly allowance. There is an insurance feature by means of which the employé can provide for his family in case of death at a cost far less than that of ordinary insurance. In fact, the benefits to be derived from this association by its members are very great, and cannot be well measured by a present cash equivalent. That is the reason that scores of the members have appeared before successive legislative committees and protested against its destruction by legislative enactment. My opinion is that when a member is injured in the service of the defendant, and claims that his injury is due to negligence for which the defendant is responsible, he should consider well whether he will take the emoluments and benefits which membership in this association confers and continues through a long course of years, or whether he will give up those, and sue the company for damages, and take the chances of litigation. The courts should be careful to see that, when the employé makes this choice, he is in a mental and physical condition and his surroundings are such that he may make a deliberate and voluntary choice, free from any overruling influence. It should be the voluntary act of the employé and the choice made when he is in fit condition to make a free choice. When he does make such election, then, according to all the authori-

ties, the employé should be compelled to abide by it. I do not think that under such circumstances, if he decides to remain in the association and take what it offers and abide by its regulations, the courts can look any further into the matter to see if the employé has received enough compensation or has made a wise choice. Being a member of the association, the employé is familiar with its advantages, and knows beforehand exactly what it offers him. He also knows the uncertain fruits to be derived from a lawsuit. Therefore I think the court errs in considering the matter as an adjustment or a settlement in any sense. It is simply an election. There are two courses open to the injured employé. He may elect to take either, but he cannot take both. And, when he deliberately decides in the full possession of his faculties, knowing well what he does, and free from undue restraint or influence, that should end the matter so far as the courts are concerned. This is not only the consensus of all the authorities, but it is, to my mind, entirely consistent with the principles of justice and fairness.

3. All the evidence shows that this plaintiff after he was injured in the shops decided to "abide in the ship," and take the benefits offered by the relief department. He filed the application voluntarily, and complied with the regulations, and for some few weeks he received his allowance regularly. I find nothing in the record to indicate any wrong undue influence or oppression practiced on plaintiff to influence his decision. But there is evidence that, before he was recovered, the allowance and benefits were arbitrarily and abruptly terminated and stopped by Dr. Wessell, an assistant surgeon of the relief department of the defendant, and without any notice to plaintiff or opportunity to be heard. I am not aware that there is anything in the articles of agreement which conferred upon Dr. Wessell the right to terminate the plaintiff's benefits in such manner.

In order that this may be considered and inquired into on another trial, I concur in the order of the court granting a new trial.

WALKER, J., concurs in the opinion.

HOKE, J. (concurring). In *Barden v. Railroad*, 152 N. C. 319, 67 S. E. 971, and several other cases, where a similar question was presented, it was contended for the company that a receipt of benefits under the provisions of the relief department by an employé who was a member should operate as an absolute bar to any action by said employé to recover damages for injuries caused by the negligence or other wrong of the company. Being of the opinion that to allow the receipt of benefits the effect contended for would in nearly every instance be in direct violation of our statute law (Revisal, § 2646), I concurred in the decision de-

claring the provision void. The statute in question enacts, in substance, that any employé of any railroad company, operating in this state who shall suffer injury to his person, or the personal representative of any such employé, who has in the course of his employment been killed by the negligence, carelessness, or incompetence of any other employé, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company, and then concludes with the provision "that any contract or agreement, expressed or implied, made by any employer of the company to waive the benefit of this section, shall be null and void." True, there are numerous decisions of the courts elsewhere that the receipt of benefits under the provisions of this charter or scheme known as the relief department shall operate as a bar to the action, basing their ruling chiefly on the position that the acceptance of benefits is in the nature of an adjustment after the injury, but, in my view, the position is untenable here, for the reason that to allow the receipt of benefits the effect of an absolute bar resort must be had to the stipulations of the contract, by which the injured employé became a member and so comes directly within the prohibition of the statute referred to. While not directly presented because the court was upholding the provisions of the federal statute as to companies engaged in interstate commerce avoiding a similar stipulation, this view was suggested in a recent case before the Supreme Court of the United States—*Railroad v. McGuire*, 219 U. S. 568, 31 Sup. Ct. 262, 55 L. Ed. 328—in which Associate Justice Hughes, delivering the opinion, said: "The acceptance of benefits is, of course, an act done after the injury, but the legal consequences sought to be attached to that act are derived from the provision in the contract of membership. The stipulation which the statute nullifies is one made in advance of the injury, that the subsequent acceptance of benefits shall constitute full satisfaction of all claim for damages," etc. From the principle here suggested and on the view of this relief department and the acceptance of benefits under it, which has been always heretofore presented, I am of opinion that the case of *Barden v. Railroad*, supra, was properly decided, and might be allowed to prevail now, as a correct and forcible statement of the law controlling the subject. In the present cause while disapproving *Barden's Case* to the extent that it holds the provision in question absolutely void, the principal opinion by Associate Justice ALLEN now decides that the acceptance of benefits by an injured employé, having a right of action against the railroad company, whether regarded in the nature of a release or an accord and satisfaction, may be successfully assailed in the courts for fraud, undue influence, or oppres-



sion and that on such issue joined the entire facts may be presented, including the circumstances under which the employé became a member, as well as those more directly attendant upon the transaction, and that in some instances this fraud may be inferred when there is such gross disproportion between the amount received and the extent and value of the claim as to make it clear that no fair adjustment has been had, nor one that in equity and good conscience should be allowed to stand. From this opinion and two on the same subject and under differing facts by the same learned judge, at the present term (Nelson v. Railroad, 72 S. E. 998, and Wacksmuth v. Railroad, *infra*), I am convinced that a wise and workable rule has been found and established by which the beneficent features of this department may be preserved, and proper and adequate relief afforded to injured employés having meritorious claims, and therefore concur in the opinion as written.

(157 N. C. 34)

# WACKSMUTH v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Nov. 15, 1911.)

## 1. DAMAGES (§ 166\*)—PERSONAL INJURIES—ASSESSMENT OF DAMAGES—EVIDENCE.

It is competent to ask plaintiff suing for a personal injury as to the extent of his injury.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 166.\*]

## 2. TRIAL (§ 90\*)—NONRESPONSIVE ANSWERS—REMEDY—MOTION TO STRIKE.

A party must promptly move to strike out a nonresponsive answer of a witness to a proper question, or the objection is waived.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 90.\*]

## 3. MASTER AND SERVANT (§ 100\*)—RELIEF FUND AGREEMENTS—VALIDITY—EVIDENCE.

Where a railroad employé suing for personal injuries had accepted benefits from a relief fund maintained by the company, parol evidence that the employé was induced to accept the benefits by the promise of the company to give him employment, and that the company breached its promise, was admissible on the issue whether the employé was relieved thereby from the legal effect of the acceptance, so as to permit him to sue for the injuries received.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 100.\*]

## 4. MASTER AND SERVANT (§ 100\*)—RELIEF FUND AGREEMENTS—ACCEPTANCE OF BENEFITS—EFFECT.

An acceptance of benefits by an injured employé of a railroad company maintaining a relief fund for injured employés induced by a verbal contract to furnish employment to the employé does not bar an action for the injuries, where the company breaches its contract.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 166-170; Dec. Dig. § 100.\*]

## 5. APPEAL AND ERROR (§ 928\*)—QUESTIONS REVIEWABLE—INSTRUCTIONS—PRESUMPTIONS.

Where the instructions are not set out, and there is no exception to them, the court on ap-

peal must assume that the trial court correctly charged on the issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.\*]

## 6. COMPROMISE AND SETTLEMENT (§ 20\*)—CONCLUSIVENESS—PERFORMANCE.

One relying on a contract of compromise and settlement calling for the performance by him of certain acts must show a performance of such acts.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 88-88; Dec. Dig. § 20.\*]

## 7. MASTER AND SERVANT (§ 100\*)—INJURIES TO SERVANTS—ACTIONS—RECOVERY.

Where an employé suing for injuries had accepted benefits from the employer maintaining a relief fund for injured employés, but the acceptance did not preclude a recovery, the employer was entitled to have the amount of the benefits credited on the judgment received, the employé offering to return such amount.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 166-170; Dec. Dig. § 100.\*]

Appeal from Superior Court, Edgecombe County; Whedbee, Judge.

Action by Louis Wacksmuth against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for personal injuries caused as the plaintiff alleges by the negligence of the defendant. The defendant denies negligence, alleges that the plaintiff was guilty of contributory negligence, and specially pleads, as a defense, that the plaintiff was a member of its relief department, and that, after his injury, he accepted benefits from the department. There was evidence that the plaintiff was injured on the 18th day of April, 1904, in a collision, while performing his duty for the defendant as engineer, and without fault on his part. It was admitted that, after his injury, four checks aggregating \$155, were sent to him from the relief department as benefits. The plaintiff did not collect the money on the checks, and on the 29th of August, 1904, wrote a letter to the superintendent of defendant, containing the following proposition: "If you, as the proper representative of the A. C. L., will give me steady work at a salary of \$4.50 per day and I to be employed in the shops at Rocky Mount and to break in new engines and such other similar work that will not require me to make long runs or do service at night, and give me further guarantee that I shall remain in the above employment for a term of not less than fifteen years at a salary of not less than \$4.50 per day, steady time, and with the further privilege of returning to my regular run or daylight run, going out of Rocky Mount, whenever my physical condition will admit of the same, I will release the A. C. L. from any further claims for damages resulting from the above-named ac-

cident. It being agreed that you are to allow me also the amount agreed to in your letter of August 1st, and the amount that I am entitled to from the relief department." The superintendent replied, inviting the plaintiff to Wilmington, and saying: "I think it is better for us to talk over the matter about which you have written." The plaintiff testified that he went to Wilmington and saw the superintendent, and that he agreed to give him employment and to look out and care for him, and that in consequence of these promises he collected the checks. There was evidence to the contrary. The defendant offered evidence tending to show that it had contributed to the relief department, but no issue was submitted or requested on this question. The rules and regulations of the relief department are fully stated in *Barden v. Railroad*, 152 N. C. 318, 67 S. E. 971, and in *King v. Railroad*, 72 S. E. 801, and *Nelson v. Railroad*, 72 S. E. 998, at this term. There was evidence tending to prove negligence.

The jury returned the following verdict:

"(1) Did the plaintiff voluntarily become a member of the relief department of defendant, and execute the agreement introduced in evidence? Answer: Yes.

"(2) Did the plaintiff, after his alleged injury, accept benefits under said contract, and, if so, in what amount? Answer: Yes; \$155.

"(3) Was the plaintiff induced to cash the relief checks and accept benefits under said contract upon the promise and agreement of defendant to furnish him such work or employment as he might thereafter be able to perform, and to take care of him as an old employé? Answer: Yes.

"(4) If so, did the defendant comply with its agreements? Answer: No.

"(5) Was the plaintiff injured by the negligence of the defendant company? Answer: Yes.

"(6) Did the plaintiff, by his negligence, contribute to his own injury? Answer: No.

"(7) What damage is plaintiff entitled to recover of defendant? Answer: \$7,500."

There was a judgment in favor of the plaintiff, and the defendant excepted, assigning the following errors:

First exception: For that the court erred in allowing the plaintiff, in answer to question of plaintiff's counsel, "How much did you suffer?" over the defendant's objection, to answer, "Suffered all kinds of troubles with doctors, thinking they were doing justice by me, kept telling me I would be all right, and I was continually having trouble." This exception is upon the ground that both question and answer are improper and incompetent, and should have been excluded.

Second exception: For that the court erred in allowing the plaintiff, under the defendant's objection, to testify to what passed between him and the superintendent, as fol-

lows: "Q. And you went to see the superintendent about your letter of August 29th, and his reply of September 10th. Tell the jury what passed between you? A. The superintendent said that in regard to entering into a contract they did not do such a thing (this is as I understood him to say), and I told him my reasons for it, that I thought there might be some changes around the railroad, as there had been in the past, and I thought best to have a contract, and he said, 'We are likely to stay as long as you,' and I said that might be true, and he said, 'Haven't we always looked out for old employés?' I said, 'Yes,' and I insisted that in case I could not run on the short cut, as my nerves were not right, and I would want to be on the safe side, that they give me something else to do, and he said to the manager, 'Isn't there going to be a light run put on to Fayetteville, and maybe that will suit Mr. Wacksmuth?' And I said maybe it would, that all I wanted was something in case I couldn't run, so I would have something to do, and he said, 'Go back, and don't work until you feel stronger, and put in your application for this run, and we will look out for you.' And I said, 'I am going to have my relief check signed,' and I think I also signed for my watch, pin, etc. Q. What did he do that first thing? A. He touched me and said, 'Go back,' they would look out for me, and the manager said he knew I was a good workman, that he had passed through the shops and seen me at work, and he knew I was a good workman, and he left me with the impression— Q. He told you that they would care for you, and he said they always took care of old men. The last thing he said to you was that you were to go back and they would take care of you, and you went and cashed those checks? A. Yes; I went from there down to Mr. B's office, an architect in Wilmington, and told him what I had done." This exception is upon the ground that the same is irrelevant and incompetent, for that (1) it does not constitute any promise or agreement which is sufficiently explicit to make the basis of a contract; and (2) it contradicts by parol the express terms and provisions of a written contract, and should have been excluded.

Third exception: For that the court erred in allowing the plaintiff, in answer to his counsel's question, "Why did you cash the relief checks?" to state, under defendant's objection, that it was "with the promise that they would look out for me." This exception is upon the ground that the question and answer are both irrelevant and incompetent, in that they contradict by parol the express terms of the written contract or agreement.

Fourth exception: For that the court erred in refusing to give the special instruction, numbered 1, asked for by the defend-

ant, as follows: "The defendant prays the court to instruct the jury that there is no evidence that plaintiff was induced by the defendant to accept the relief benefits." This exception is upon the ground that there was no such evidence, and the court should have so instructed the jury.

Fifth exception: For that the court erred in refusing to give the special instruction numbered 5, asked for by the defendant, as follows: "Before you can answer the issue, was plaintiff induced to accept the benefits by the defendant? you must find the facts from the evidence that the defendant knowingly, purposely offered and agreed to give plaintiff indefinite employment, and that this was done to induce him to accept the benefits, and release his right of action. There is no evidence of this, and you are instructed to answer the issue, 'No.'" This exception is upon the ground that the instruction asked for was a correct statement of the matter necessary to be found before the issue could be answered in favor of the plaintiff, and that there was no evidence upon which said finding could be based, and the instruction should have been given.

Sixth exception: For that the court erred in using the following language in the general charge to the jury, to wit: "If you find as a matter of fact that the plaintiff went to Wilmington, and the general superintendent promised and agreed and said to him that if he would go back, and not sue the company, that he would see that he was taken care of, and would be given such work as he would be able to do, and that by reason of these representations he did cash his checks, then I charge you that that would be such an inducement, and you ought to answer the third issue, 'Yes'; but if, on the other hand, they did not induce him to, or did not intend to induce him to, cash those checks, but that he did it voluntarily or without promises, then you should answer that issue, 'No.'" Upon This issue the burden is on the plaintiff. What is meant by the burden is that the evidence of one party outweighs the evidence of the other; in other words, if upon this issue the evidence is equally balanced, then the answer would be against the plaintiff, because the plaintiff has the burden of the issues. If the testimony of the plaintiff outweighs or bears down the evidence of the defendant, then he is said to have carried the burden, and it would be your duty to answer this issue 'Yes.'" This exception is upon the ground that there was no evidence offered by the plaintiff from which such a finding of fact as is contemplated in that part of the charge quoted could have been made.

Seventh exception: For that the court erred in refusing to grant the defendant's request for judgment of nonsuit at the close of the plaintiff's evidence, and again at the close of all the evidence.

F. S. Sprull, for appellant. H. A. Gilliam and L. V. Bassett, for appellee.

ALLEN, J. (after stating the facts as above). [1] An examination of the record shows that no exception was taken to the answer of the witness embraced in the first assignment of error. The objection was to the question, and it was clearly competent to ask the plaintiff as to the extent of his injuries, and for him to state how much he suffered, and, if the defendant thought the answer was not responsive, it was its duty to move to strike it out.

[2] This is fair to the judge and the parties, as it gives an opportunity to correct any error that has been committed, and the judge may well conclude when objection is made to a question, which is proper, and none to the answer, that it is not regarded of sufficient importance to note an exception, or that it is unobjectionable. "Defendant's remedy was to promptly move to strike out the objectionable testimony, and by the failure of its counsel to adopt this course any and all right which the defendant may have had to object thereto was waived." 8 Ency. of Pl. & Pr. p. 134.

The remaining assignments, as indicated in the brief of the appellant, are intended to present three questions:

(1) The plaintiff having admitted that he accepted benefits, is it competent to prove by parol that he was induced to do so by the promise of the defendant?

(2) If such evidence is competent, was the evidence introduced by the plaintiff sufficient to sustain a finding that the promise was made?

(3) If the promise was made, would it relieve the plaintiff from the legal effect of the acceptance of the benefit?

The term "benefits," as used in the regulations of the department, has a definite meaning, and does not include hospital treatment and medical attention, and it is the acceptance of benefits, not the agreement to do so, which under certain conditions may bar a recovery. The acceptance of the benefit is an act of the party, which is not evidenced by any writing, and, when its effect is in dispute, it is competent to show the circumstances connected with it. It is in this respect that *Aderholt v. Railroad*, 152 N. C. 411, 67 S. E. 978, and *Railroad v. Vanordstrand*, 67 Kan. 387, 73 Pac. 113, are distinguishable from the case at bar, as in each of those cases there was a written release.

[3] We think the evidence was competent, and that it was sufficient to be submitted to the jury on the third issue.

[4] There was evidence that the plaintiff received the checks for benefits; that he wrote the superintendent of the defendant and submitted a proposition of settlement, which included future employment, and said

he would release the defendant if it would give him this employment; that the superintendent invited him to see him in order that they might talk the matter over; that he went, and that in the conversation the superintendent said that, "in regard to entering into a contract, they did not do such a thing (this is as I understood him to say), and I told him my reason for it, that I thought there might be some changes around the railroad, as there had been in the past, and I thought it best to have a contract, and he said, 'We are likely to stay as long as you,' and I said, 'That might be true,' and he said, 'Haven't we always looked out for old employes?' I said 'Yes,' and I insisted that in case I couldn't run on the short cut, as my nerves were not right, and I would want to be on the safe side, that they give me something else to do, and he said to the manager, 'Well, isn't there going to be a light run put on to Fayetteville, and maybe that will suit Mr. Wacksmuth?' And I said maybe it would, that all I wanted was something in case I couldn't run, so I would have something to do, and he said, 'Go back, and don't go to work until you feel stronger, and put in your application for this run, and we will look out for you.' And he said, 'You go back to Rocky Mount, and we will look out for you.' And I said, 'I am going to have my relief checks signed,' and I think I also signed for my watch, pin, etc. He touched me and said, 'Go back,' that they would look out for me;" and that, relying on what was said to him, he then collected the benefit checks, and this, if believed, justified the jury in answering the third issue, "Yes."

[6] The charge of his honor is not set out, but, as there is no exception to it, we must assume that he fully explained to the jury the significance of the issue and the bearing of the evidence. If the evidence was competent and was sufficient to sustain the verdict, does the acceptance of benefits, induced by the promise of the defendant which it failed to perform, bar a recovery? In the consideration of this question, it must be remembered that the defendant is not relying on the promise. It does not say that the plaintiff has accepted a new promise of future employment in satisfaction of his claim for damages, and therefore he must declare for breach of the promise, but, on the contrary, it says no promise was made. It seems to us that a fair interpretation of the verdict is conclusive against the defendant on the principles declared in *King v. Railroad*, 72 S. E. 801, at this term. The jury has found that there was a contract between the plaintiff and the defendant, and that by its terms the plaintiff agreed to release the defendant from claims for damages on ac-

count of negligence upon payment to him of the benefits and giving him employment, and that the defendant has broken the contract. If so, the acceptance of the benefits did not constitute the settlement, but an act done in furtherance of it. *Dalrymple v. Craig*, 70 Mo. App. 155. The contract must be considered as a whole, and, if treated as an accord and satisfaction or as a contract with dependent stipulations, the defendant must show performance in order to rely on it. Our views, as to the controlling principles when an accord and satisfaction is pleaded, are stated in the *King Case*, and it is unnecessary to repeat them.

[6] It is also well settled that "one relying on a contract of compromise and settlement calling for the performance by him of certain acts must show a performance of the conditions imposed on him by such agreement." 8 Cyc. 534. This is declared to be the law in *Quarles v. Jenkins*, 98 N. C. 261, 3 S. E. 396, where the court says: "The court therefore properly instructed the jury, in effect, that if the settlement alleged was to be final, on conditions to be observed and performed on the part of the defendant, and he failed to observe and perform the same according to the terms as agreed upon between the parties, then there was no such settlement and discharge." The case of *Armistead v. Railroad*, 108 La. Ann. 173, 32 South. 456, is in principle like this. There the plaintiff's boat was injured by the negligence of the defendant, and he brought an action to recover damages. The defendant pleaded a compromise and settlement, and it was held that the plea was not good because it had promised to furnish a steamboat and had failed to do so; the court saying: "The defendant violated the compromise, and then voluntarily canceled it, and is therefore not in a position to plead it in bar of plaintiff's action." We conclude that the plaintiff was entitled to judgment upon the verdict.

[7] On the trial the plaintiff offered to return the amount he received as benefits. This was proper, and the defendant is entitled to have this sum credited on the judgment recovered.

We find no error.

No error.

CLARK, C. J., concurs in the result upon the ground that the contract of the plaintiff with the so-called relief department is denounced as null and void by the provisions of the state statute Rev. 1905, § 2646 (the *Fellow Servant Act*), and also by section 5 of the *Federal Employer's Liability Act* of April 22, 1908, c. 149, 35 Stat. 66 (U. S. Comp. St. Supp. 1909, p. 1173), and refers to his concurring opinion in *King v. Railroad*, 72 S. E. 801, at this term.

(156 N. C. 378)

**RODGERS, McCABE & CO. v. BELL.**

(Supreme Court of North Carolina. Nov. 9, 1911.)

**1. GAMING (§ 12\*)—CONTRACTS FOR FUTURE DELIVERY—VALIDITY.**

A contract to deliver cotton on or before a fixed date is not rendered invalid as a gambling contract by a stipulation therein that the measure of damages for failure to deliver shall be the highest market price between certain dates with interest, etc.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. § 12.\*]

**2. CONTRACTS (§ 15\*)—ESSENTIALS—MEETING OF MINDS.**

To constitute a valid contract, the minds of the parties must meet on the same thing at the same time; but this may be by words written or unwritten, or by conduct, or both.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 61-66; Dec. Dig. § 15.\*]

**3. GAMING (§ 12\*)—CONTRACTS FOR FUTURE DELIVERY—VALIDITY.**

Under Revisal 1905, § 1689, making void contracts to deliver cotton, etc., when actual delivery by the parties is not intended, uncommunicated intent of one of the parties not to deliver does not invalidate the contract.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. § 12.\*]

**4. GAMING (§ 49\*)—GAMBLING CONTRACTS—BURDEN OF PROOF.**

Revisal 1905, § 1689, makes void contracts to deliver cotton, etc., when actual delivery is not intended. The last sentence provides that the section shall not apply to manufacturers or wholesale merchants dealing in commodities required in the ordinary course of their business. Section 3823 unqualifiedly makes such contracts criminal. Section 1691 provides that, on verified answer claiming that a contract sued on is void as being a gambling contract, the burden shall be on plaintiff to show validity of the contract. *Held*, that the last provision of section 1689 should be read as qualifying section 1691, and not as exempting manufacturers, etc., from the prohibition against speculation in futures, and hence, in an action by a wholesale dealer in spot cotton for breach of a contract to deliver, the burden is not on him to prove the validity of the contract, but on defendant to prove its invalidity.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 100-102; Dec. Dig. § 49.\*]

**5. STATUTES (§ 205\*)—CONSTRUCTION.**

A statute should be construed as a whole in arriving at the Legislature's intention.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. § 205.\*]

**6. STATUTES (§ 224\*)—CONSTRUCTION.**

If possible, a statute should be construed in harmony with existing laws, unless the legislative intent is clearly expressed in the contract.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 300, 302; Dec. Dig. § 224.\*]

**7. STATUTES (§ 225½\*)—CONSTRUCTION.**

In construing a codified statute, resort may be had to the original legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 306; Dec. Dig. § 225½.\*]

Walker and Brown, JJ., dissenting in part.

Appeal from Superior Court, Edgecombe County; Ward, Judge.

Action by Rodgers, McCabe & Co. against

J. H. Bell. Judgment for plaintiff, and defendant appeals. Affirmed.

The written contract, on its face, provided for the delivery of 50,000 pounds of cotton at the depot or boat landing in Pollocksville, N. C., on or before January 1, 1910, and contained a stipulation that, in case the party of the second part failed to deliver said cotton or any part thereof, the damages should be admeasured at the highest price in the above-mentioned market on any day between September 10, 1909, and December 1, 1909, with interest, etc. There was testimony on part of plaintiff tending to show a failure to deliver 29,454 pounds of cotton causing damage, etc., and further that actual delivery of the cotton was intended. The defendant filed verified answer, admitting execution of the written contract and containing averment that, although the contract on its face provided for actual delivery, it was not so intended by the parties, but that same was a gambling contract prohibited by the statute, etc., and offered evidence tending to show that the contract was negotiated by plaintiff's agents, and it was understood between them at the time that no actual delivery was intended or should be required, etc.

Issues were submitted and responded to by the jury as follows: "(1) Did the plaintiff and defendants enter into the contract as alleged in the complaint? Answer: Yes. (2) Was the plaintiff at all times able, ready, and willing to accept and receive and pay for said cotton upon its delivery during the time and at the place mentioned therein? Answer: Yes. (3) Was the said contract illegal and void? Answer: No. (4) If not, what damage is plaintiff entitled to recover? Answer: 29,454 pounds at 4½ cents per pound, with interest at 6 per cent. until paid from December 1, 1909." Judgment on the verdict, and defendant excepted and appealed, assigning errors, etc.

T. D. Warren, Aycock & Winston, and P. M. Pearsall, for appellant. F. S. Spruill and H. A. Gilliam, for appellee.

**HOKE, J.** [1] The defendant moved to nonsuit, contending that the contract on its face is a gaming contract avoided by the statute, and this because it contains definite provision for an adjustment of damages on failure to deliver; but the question has been resolved against defendant in *Harvey v. Pettaway*, 72 S. E. 364, at the present term, holding that this and other stipulations of similar import, appearing in the contract, are not conclusive as a matter of law.

[2, 3] It was also insisted that the court below erred in charging the jury as he did on the third issue, as follows: "Upon this issue the jury is instructed that whether or not such contract is illegal and void is to be settled from the evidence in the case by ascertaining the real underlying intention

of both parties to the contract, and the inquiries are to be directed to the question as to whether it was the intention of both parties to the contract that the cotton described therein should not be delivered, and whether it was the purpose and intent of both parties to conceal in the terms of the written contract a gambling deal in which the parties to the contract contemplated no real transaction as to the articles to be delivered." The objection being that, if either party had the intent and purpose not to deliver, though uncommunicated to the other, the contract was prohibited by the statute. Defendant also tendered an issue presenting this view which was rejected. It is true that, in order to constitute a valid agreement, the minds of the parties must have met on the same thing at one and the same time; but this is said in reference to the common intent as contained and expressed in the communications had between them. This may be by words written or unwritten, or by conduct, both or either; but it must be in some way expressed, or it does not bind, and the position may not be allowed that when the parties have made an agreement for valuable consideration, clearly expressing their common intent and purpose in one way, this can be frustrated or altered by the secret and undisclosed intent of one of the parties to the contrary. This is true on general principles. *Williams v. Carr*, 80 N. C. 294; *Anson on Contracts*, pp. 2, 3, 4; *Clark on Contracts*, pp. 2, 3. And on the facts of this case both the statute in question and authoritative interpretation of this and similar enactments here and elsewhere are against defendant's position.

Section 1689, Revisal, being the law by which contracts in futures are declared to be unlawful, provides, in part, "that every contract, whether in writing or otherwise, whereby any person shall agree to sell and deliver cotton, corn, wheat, rye, bacon, salt, etc., at a place and time specified and agreed upon therein," to any other person, etc. When in fact and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered or the value thereof paid, "but it is intended and understood by them that money or other thing of value shall be paid to the one by the other or to a third party dependent on whether the market price or value of the thing shall be greater or less, at the time and place, etc., \* \* \* shall be utterly null and void." It will be noted that the statute avoids the contract when the vitiating purpose is held by the "parties thereto," and, further, "but it is intended and understood by them" that settlement may be had by paying the difference according to the rise or fall of the market or other change in value, and this view has prevailed in the different cases with us construing the law. *Harvey v. Pettaway*, supra; *Edgerton v.*

*Edgerton*, 153 N. C. 167, 69 S. E. 53; *Burns v. Tomlinson*, 147 N. C. 634, 61 S. E. 615; *Id.* 147 N. C. 645, 61 S. E. 614; *Rankin v. Mitchem*, 141 N. C. 277, 53 S. E. 854; *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50; *State v. Clayton*, 138 N. C. 732, 50 S. E. 866. And authoritative decisions elsewhere are to the same effect. *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; *Scanlon v. Warren*, 169 Ill. 142, 48 N. E. 410; *Wail v. Schneider*, 59 Wis. 352, 18 N. W. 443, 48 Am. Rep. 520; *Clark on Contracts*, p. 331. In *State v. Clayton*, supra, it was held: "The test of the validity of a contract for 'futures,' which Laws 1889, c. 221, requires, is the 'intention not to actually deliver' the articles bought or sold for future delivery. No matter how explicit the words in any contract which may require a delivery, if in fact there is no intention to deliver, but the real understanding is that at the stipulated date the losing party shall pay to the other the difference between the market price and the contract price, this is a gambling contract and void at common law and indictable under the statute." In *Rankin's Case*, Associate Justice Brown, for the court, said: "That being so, the matter is to be settled by ascertaining the real underlying intention of the parties to the contract. Was it the intention of both parties to the contract that the cotton should not be delivered? Was it their purpose to conceal in the terms of a fair contract a gambling deal, in which the parties contemplate no real transaction as to the articles to be delivered? This purpose and underlying intent his honor properly left to the jury; the contract not being a gambling one on its face."

Undoubtedly, if it was understood by both that either party to the contract could be relieved by paying the difference, and that no actual compliance was intended at the time, this would avoid the contract; the language of the statute being that the contract is utterly void if there was no intent "that the thing should be actually delivered or the value thereof paid." It is in this sense that the court said in *Burns v. Tomlinson*, 147 N. C. 634, 61 S. E. 615: "That a lawful contract was one where actual delivery was intended by both parties"—a correct statement of the burden placed on plaintiff by section 1691 of the statute, whenever the same applies. But it was never held in this case, or any other with us, that, when an innocent party had made a contract valid in its terms, his rights acquired thereunder should be denied him by reason of an undisclosed purpose or intent of the other. To avoid the contract the vitiating purpose or understanding must be shared in by both.

The cases apparently holding a contrary view, to which we were cited by counsel (*McGrew v. City Produce Ex.*, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771, and *Connor v. Black*, 119 Mo. 126, 24 S. W. 184), were on statutes differing from ours and permitting

or requiring, perhaps, a different interpretation. Thus the Tennessee statute in express terms condemns the contract "if either of the contracting parties, dealing simply for the margin or on the prospective rise and fall of prices, had no intention or purpose of making actual delivery." And the Missouri statute of similar import received like construction and seems to have been enacted just after the decision from that state which we have cited in support of our conclusion.

[4] It was further urged for error that the court, after imposing upon the plaintiff the burden of proving the contract a lawful one as required by chapter 36, § 1691, of the Revisal, in a subsequent part of the charge changed this ruling by placing the burden on defendant showing it to be unlawful. On a perusal of the charge of his honor, we doubt if it is subject to this criticism; but, assuming that defendant's position concerning the charge is correct, we are of opinion that there is no error committed to defendant's prejudice, and this by reason of certain qualifying words appearing elsewhere in the chapter as follows: "This section shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandizing in the purchase or sale of necessary commodities required in the ordinary course of their business." These words now have place at the end of section 1689 of the same chapter, that defining and declaring what contracts of this kind shall be considered unlawful, and the court has already held in *State v. McGinnis* and *State v. Clayton*, *supra*, that, in so far as these qualifying words are considered in reference to that section, they are without significance. In answer to the suggestion made in the *McGinnis* Case that this statute gave manufacturers and wholesale merchants the right to "hedge" by purchasing "future contracts" for raw commodities without intending to demand actual delivery, the Chief Justice said in *McGinnis' Case* that the words referred to had no such meaning, but were inserted "unnecessarily and out of abundance of caution," and further that: "Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business." And in *Clayton's Case* he further said: "It is this class of bona fide contracts, in aid of business and not for gambling purposes, that section 7, c. 538, Laws 1905, was intended to authorize. That section did not authorize, nor can it be construed to intend to authorize, manufacturers and wholesale merchants to gamble

by buying commodities for future delivery when there was no intention to deliver." To allow to this proviso the meaning which the words, used ordinarily, import, and as affecting the body of the section where it now has place, would cause a direct conflict with section 3823 of the Revisal, by which contracts, of the very kind described in section 1689, are made criminal and without qualifying words of any description. Accordingly, in *McGinnis' Case*, it is suggested that the clause in question should probably be annexed to section 1691 of the chapter, that in reference to the burden of proof, and, on full consideration, we hold this to be the proper construction.

[5] It is a well-recognized principle that, in construing a statute, "in order to determine the true intent of the Legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered, in fixing the meaning of any of its parts." *Black on Interpretation of Laws*, § 74, p. 166. A principle especially insistent in case of legislation "in *pari materia*" and directly applied to our Revisal is *State v. Lewis*, 142 N. C. 626, 55 S. E. 600, 7 L. R. A. (N. S.) 669, and other decisions of like import.

[6] Having reference to this general principle, it is also well understood that a statute should be so construed as to make it "harmonize with the existent body of the law, unless the legislative intent is clearly expressed to the contrary, and that each and every clause shall be allowed significance if this can be done by any fair and reasonable interpretation." *Black, Interpretation of Laws*, p. 60, §§ 32, 49; *Lewis' Sutherland, Statutory Construction*, § 516.

[7] It is also held that where laws have been codified, and in case of ambiguity or doubt, permitting construction, it is allowed that the court may examine the original legislation, as an aid to a correct interpretation. *Lewis' Sutherland*, § 450. On examination of the original statutes, it appears that the act, defining and declaring contracts of the kind in question unlawful, was passed in 1889, chapter 221. In 1905, chapter 538, the Legislature enacted a law to suppress what is known, in popular phrase, as "bucket shops," and, having provided for this in sections 1 and 2, the statute contains several additional sections, relating to the statute of 1889, and all of them having reference to the mode or quantum of proof which should be required in enforcement of that act. The law of 1905 then, in its closing section, provided: "That this act shall not be construed so as to apply to any person, firm or corporation," etc. This is the first time the words we are considering appear in our legislation on this subject, and, so far as they had reference to the law of 1889, it is clear that the Legislature, in the original statutes, only intended that they should affect questions

of proof. From these considerations, we are of opinion, as stated, that the proviso at the end of section 1689 of the Revisal, by correct interpretation, should appear, and only affect section 1691, that relating to the burden of proof, and, giving the words this effect and placing, there has been no error committed which gives defendant any just ground of complaint. On the undisputed fact, it appears that plaintiffs are dealers in spot cotton; that they buy from 200,000 to 300,000 bales of cotton each year, supplying in the ordinary course of their business other dealers in Baltimore, New York, Boston, and various cotton mills in different sections of the country. Under and by virtue of the words in question, plaintiff's case is therefore withdrawn from the operation of section 1691, and he is entitled to have his cause tried under the rule which generally prevails "that one who asserts that an ordinary business contract is unlawful is required to prove it to the satisfaction of the jury by the greater weight of evidence." Defendant objected, further, that his honor, on the issue as to damages, allowed the jury to award same on the basis of the highest market price of cotton between September and December 1st, as provided by the contract. It is a general trend of court decisions to hold that, when "a contract is for a matter of certain value or value easily ascertainable" (Clark on Contracts, p. 412), or, as stated by another author, "where damages can be easily and precisely determined by a definite pecuniary standard, as by proof of market values" (Hale on Damages, p. 137), that any sum stipulated for in the contract, in excess of that value, should be considered as a penalty, and especially is this true when the stipulated sum would necessitate an exorbitant recovery or one greatly disproportionate to the loss; but, on perusal of his honor's charge, we do not find that such an exception is open to defendant. The court seems to have submitted the question of damages under the rule which ordinarily obtains; that is, to be admeasured on the difference between the market and contract price at the time and place of delivery. *Hosiery Co. v. Cotton*, 140 N. C. 452, 53 S. E. 140. The damages were no doubt awarded on that basis, and the plaintiff does not appeal. The question therefore is not presented, and on the facts in evidence we make no decision upon it.

There is no reversible error disclosed in the record, and the judgment for plaintiff is affirmed.

No error.

WALKER, J. (concurring in result). In *Sprunt v. May*, 72 S. E. 821, decided at this term, I filed a dissenting opinion, stating my views as to the Acts of 1889, c. 221, and Acts of 1905, c. 538, forbidding dealings in "futures," and the conduct and maintenance of

bucket shops. For the reasons therein given, I dissent from so much of the opinion of the court in this case as is in conflict therewith, and assent to the conclusion that there was no error in the trial below, as the plaintiff is excepted from the operation of Revisal, § 1689.

BROWN, J. (concurring). I concur generally in the opinion of the court, but will state my view as to the effect of the last sentence in section 1689 of the Revisal upon wholesale dealers.

I am of opinion that they are exempted entirely from the effect and operation of the act of the General Assembly embraced in chapter 36, Revisal, sections 1687 to 1691, inclusive. The validity of contracts for future delivery entered into with such dealers are to be determined according to the principles of the common law just as if no such legislation had ever been enacted.

(156 N. C. 401)

RODGERS, McCABE & CO. v. BROCK.

(Supreme Court of North Carolina. Nov. 9, 1911.)

1. SPECIFIC PERFORMANCE (§ 4\*)—RIGHT TO REMEDY—CONTRACTS OF SALE.

Generally, equity will not specifically perform a contract to deliver cotton, since failure to deliver may be compensated in damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 4; Dec. Dig. § 4.\*]

2. GAMING (§ 12\*)—FEATURES.

That the measure of damages provided in a contract of sale of cotton for future delivery, for breach of contract, provides for settlement on an artificial price of cotton, does not conclusively indicate that it is a gambling contract.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. § 12.\*]

Appeal from Superior Court, Edgecombe County; Ward, Judge.

Action by Rodgers, McCabe & Company against Furney Brock. Judgment of nonsuit, and plaintiff appeals. New trial ordered.

The court at the close of the testimony stated it would charge the jury, if they believed all the evidence and should find all the facts to be as testified, there could be no recovery, and they should answer issues in favor of defendant, upon which plaintiff excepted and submitted to nonsuit and appealed.

H. A. Gilliam and F. S. Spruill, for appellant. Aycock & Winston, Thos. D. Warren, and P. M. Pearsall, for appellee.

BROWN, J. The first contention of the defendant is that the contract is a gambling one on its face for these reasons: (1) No cotton is specified so as to enforce delivery. (2) Delivery cannot be compelled, as contract provides for a settlement on an artificial price of cotton. (3) Measure of dam-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



age provided is arbitrary and not such as law provides. The contract calls for delivery of 75,000 pounds lint cotton at Trenton on or before January 1, 1910. This is sufficiently specific.

[1] It is true that specific performance of a contract to deliver cotton will not generally be enforced by a court of equity because the failure to deliver the cotton may be compensated in damages. That does not necessarily stamp a contract as a gambling one.

[2] That the measure of damages provided in the instrument for a breach of the contract differs somewhat from the rule of the law does not of itself conclusively indicate that it is a gambling contract on its face. This is decided at this term in *Harvey v. Pettaway*, 72 S. E. 364.

While there is evidence in this case tending to prove that the contract sued on is a gambling contract, we think there are phases of the evidence to the contrary.

The principles of law governing cases of this character are fully discussed and settled in the opinions of this court at this term by Mr. Justice Hoke in *Rodgers, McCabe & Co. v. Bell*, 72 S. E. 817, and *Sprunt v. May*, *infra*.

The case should be submitted to the jury upon the issues raised by the pleadings under appropriate instructions.

New trial.

(156 N. C. 388)

#### ALEX. SPRUNT & SONS v. MAY.

(Supreme Court of North Carolina. Nov. 9, 1911.)

#### 1. GAMING (§ 49\*)—FUTURES—BURDEN OF PROOF—STATUTES.

Where plaintiffs, in the cotton business, exported cotton in large quantities, they are within Revisal 1905, § 1689, relating to gaming contracts and providing that the section shall not apply to persons in the wholesale business, so that section 1691, placing the burden of proof on plaintiff in a suit for breach of contract to deliver cotton, etc., to show that the contract was not gambling in futures, does not apply.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 100-102; Dec. Dig. § 49.\*]

#### 2. PRINCIPAL AND AGENT (§ 171\*)—ACTS OF AGENT—EFFECT ON PRINCIPAL—GAMBLING CONTRACTS.

A bona fide wholesale dealer in cotton for actual delivery cannot recover for breach of defendant's contract for future delivery, if it was understood between the dealer's agent and defendant that actual delivery should not be made, and that the transaction should be a speculation in futures, though the agent was only authorized to make a contract for actual delivery, since the dealer adopts the contract by suing on it.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 644-655; Dec. Dig. § 171.\*]

#### 3. GAMING (§ 49\*)—FUTURES—EVIDENCE—SUFFICIENCY.

Evidence held to warrant a finding of an understanding that actual delivery under a contract to sell cotton was not intended, vitiating the agreement under Revisal 1905, § 1689.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 100-102; Dec. Dig. § 49.\*]

Walker, J., dissenting.

Appeal from Superior Court, New Hanover County; Peebles, Judge.

Action by Alex. Sprunt & Sons against C. C. May. Judgment for plaintiff, and defendant appeals. New trial ordered.

Civil action to recover damages for an alleged breach of a written contract for delivery of cotton. The evidence, on part of plaintiffs, tended to show: That on September 9, 1909, defendant entered into a written contract with plaintiffs, agreeing to deliver 100 bales of cotton at Trenton, N. C., between September 15, 1909, and November, at the price of 12 cents per pound, and plaintiffs agreed to accept same and pay the stipulated price. That defendant had failed to deliver said cotton or any part thereof, to plaintiffs' damage, \$1,000. That the contract was negotiated, on part of plaintiffs, by one F. Brock, their agent, and signed by plaintiffs "per F. Brock, Agent," and by defendant. That plaintiffs were large dealers and exporters of cotton, supplying other dealers and mills in Europe, etc., and, through their agents, bought spot cotton, required for their business, in different sections of the country to the average amount of 400,000 bales annually. That plaintiffs intended in good faith to carry out the terms of the contract, and that no agent had authority from them to make purchases and contracts therefor with any other understanding. Defendant, having filed a verified answer, alleging that the contract in question was a gaming contract, prohibited by the statute, offered evidence tending to show that it was the understanding between defendant and plaintiffs' agent, when contract was entered into, that actual delivery of the cotton was not intended, and that, on failure to comply, the demand could be satisfied by paying the differences, etc. The court charged the jury. There was verdict in plaintiffs' favor for \$1,000 damages. Judgment on the verdict, and defendant excepted and appealed.

G. D. Warren, J. K. Warren, Aycock & Winston, and P. M. Pearsall, for appellant. Rountree & Carr, for appellee.

HOKE, J. (after stating the facts as above). [1] We have held, in *Rodgers, McCabe & Co. v. Bell*, 72 S. E. 817, at the present term, in reference to our statute as to gaming contracts (Revisal 1905, c. 36), that the words now appearing at the end of section 1689, to wit, "this section shall not be

construed so as to apply to any person, firm, corporation or his or their agent, engaged in the business of manufacturing or wholesale merchandizing, in the purchase or sale of the necessary commodities required in the ordinary course of their business," by correct construction, should appear and only affect section 1691 of said chapter, the section relating to the burden of proof, and that, by reason of this clause, so placed, a bona fide wholesale dealer in spot cotton, who purchased the same, in the ordinary course of his business, is not affected by said section, but is entitled to have his cause tried and determined under the rule, which generally obtains, that one who asserts that an "ordinary business contract, valid on its face, is unlawful, is required to prove it by the greater weight of the evidence." On the facts in evidence it appears that plaintiffs and their predecessors, under the style of "Alex. Sprunt & Sons," from 1866 have been engaged in the cotton business, and since 1880 they have exported cotton in large quantities, supplying mills and dealers abroad, and, in the ordinary course of their business, they buy annually on an average 400,000 bales of cotton. They are, therefore, if this evidence is accepted by the jury, well within the clause withdrawing their case from the provision of section 1691, and on another trial the same will be submitted under the ordinary rules of evidence obtaining in such cases.

[2] Objections were chiefly made to the validity of the trial for alleged error in a portion of his honor's charge, as follows: "So, therefore, if you find as a fact that Alexander Sprunt & Sons were engaged in the wholesale cotton business here, buying cotton and shipping it to Europe, and that they had not been engaged and were not engaged in gambling contracts or futures with the expectation of taking margins or the difference between the contract price and the price at the time of the delivery, and that they did not authorize Brock to make any such contracts, but simply authorized him to make a contract for the actual delivery of the cotton, then you will find the first issue, 'Yes.' As we understand it, the charge could only mean, and was intended by his honor to mean, that if plaintiffs were bona fide wholesale dealers in cotton and only authorized Brock to make a contract for actual delivery, plaintiffs could recover for breach of a contract, made by Brock, although in the negotiations and making of the contract there was an understanding between Brock and the other party that actual delivery was not intended and would not be required," a position that cannot be sustained. If plaintiffs were seeking to avoid this contract and its effect, they might, under certain conditions and circumstances, be heard to repudiate the representations and conduct of their agent, Brock, who acted for

them, in this matter. But the plaintiff, here, adopts the contract and is seeking recovery on it, and, where this is true, he must be held bound by the acts and statements of his agent, in negotiating and closing the trade. The position indicated has been often upheld in decisions of our court and elsewhere. *Beeson v. Smith*, 149 N. C. 145, 62 S. E. 888; *Corbett v. Clute*, 137 N. C. 551, 50 S. E. 216; *Black v. Bayless*, 86 N. C. 527; *Harris v. Delamar*, 88 N. C. 219; *McIntire v. Pryor*, 173 U. S. 38, 19 Sup. Ct. 352, 43 L. Ed. 606; *Manufacturing Co. v. Cotton & Long*, 126 Ky. 750, 104 S. W. 12 L. R. A. (N. S.) 427; *Huguenin v. Baseley*, 14 Ves. 273. In *Corbett v. Clute*, plaintiff sued to foreclose a mortgage. There was allegation, with evidence, on part of defendant, tending to show that the agent of plaintiff had wrongfully procured the note and mortgage by falsely representing that the son of the mortgagor, an old, feeble, inexperienced woman, had been guilty of a criminal offense, and that unless mortgage was executed her son would be prosecuted and sent to the penitentiary. It was claimed by plaintiffs—and this was very well established—that they had not authorized the conduct of their agent; but the position was not allowed to affect the question, the court saying: "It will not be contended that the plaintiff is not bound by the statements of his agent. He is here now, asserting his claims under the note and mortgage, obtained for him by this transaction, and, if he claims the benefits, he must accept the responsibility"—citing *Black v. Bayless* and *Harris v. Delamar*, supra. In *Manufacturing Co. v. Cotton & Long*, supra, it was held: "That when a principal accepts an order for goods, obtained by agent, he is bound by the agent's acts in obtaining it, although he violated the principal's instructions." The principle is very generally recognized, and further citation of authority is not required.

[3] Nor can it be contended, for a moment, that there was no testimony tending to show an understanding and agreement between defendant and plaintiff's agent, Brock, forbidden by the statute. Revisal, § 1689. Speaking to this question, the defendant testified as follows: "Mr. Brock asked me if I wanted to sell some cotton for 12 cents, and I told him there was already more cotton sold around there than could be delivered, even if cotton went down below the contract price. He says: 'We are already in the hole. We have already sold some for 10 and 11.' Q. Who had? A. He and I, too, and several others. He says, 'If you can sell this for 12 cents, you can take this and pay the difference in that 10-cent cotton.' Q. What was the agreement between you and him in reference to the actual delivery of the cotton? A. He told me it would not be expected, and we could settle on the difference. Q. Did you intend to deliver any cot-

ton under that contract? A. No, sir. Q. Did you have any cotton to deliver? A. No, sir. Q. Did you own any cotton? A. No, sir. Q. Did Mr. Brock know that you were not farming? A. Yes, sir." And the agent Brock testified: "Q. You say you told Mr. May that the cotton was not expected to be delivered? A. Yes, sir; I told him I didn't think they would require the delivery of the cotton. I asked Mr. May did he want to sell some cotton for 12 cents. He said he had already sold some cotton, and as far as everything said in the conversation, I don't know about that; I can't remember that. We were talking over what they were intending to do about it, that they could take the difference in one and pay the difference in the other, and that was the way the contract was made. Q. What was it Mr. May said to you before you signed the contract in reference to having sold some contract cotton? A. He said he had already sold some contract cotton, and in the general discussion of the contract cotton, and if he would sell more, he would take the difference in one way and pay the difference in the other. That's exactly what was said about it. Q. What did you say to him at the time of the execution of this contract in reference to the delivery of the actual cotton? A. I told him I didn't think the actual delivery of the cotton was expected at all. If I was wrong in it, that was what I told him." Applying the principle as stated, if, when this contract was negotiated and made, there was an understanding between defendant and plaintiff's agent that actual delivery of the cotton should not be required, but that the difference between the contract and market price could be paid in money, such a contract is condemned by the statute, and no recovery can be had thereon.

For the error in the charge the defendant is entitled to a new trial, and it is so ordered.

New trial.

WALKER, J. (dissenting). I regret always to differ from my Brethren; but when an important and valuable right of the citizen, which, in my opinion, is recognized by the law, is abridged or impaired by a decision of this court, it is my clear duty to enter my dissent, and, when required, as is the case here, to give my reasons therefor. I cannot agree to the proposition, which seems to form the basis of the court's opinion, that the exception in the statute (Revisal, §§ 1689, 1690) as to purchases or sales by manufacturers and wholesale merchants of the necessary commodities used in their business is restricted to the burden of proof or to the clause of the statute raising a prima facie case of illegality in the transaction upon the proof of certain facts, nor do I think that it was so decided in *State v. McGinnis*, 138 N. C. 724, 51 S. E. 50, or

*State v. Clayton*, 138 N. C. 732, 50 S. E. 866. An extract from the opinion of the Chief Justice in the former case will show the contrary: "That no other businesses or persons are mentioned as authorized to deal bona fide for the purchase of commodities on 'margin' is not an implied restriction upon others to do an act not forbidden by any statute. Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business." It is true that the court, in that case, when considering the burden of proof, did say: "There may be good reasons why the purchase of 'necessary commodities required in the ordinary course of their business' for future delivery 'on a margin,' by manufacturers and wholesale merchants, shall not raise a presumption that such dealings are 'wagering' contracts, while purchases by them, not of such commodities, or when not 'required in the ordinary course of their business,' or the purchase by others of any commodities, when made on the deposit of a 'margin' and for 'future' delivery, shall raise the presumption of a 'wagering' contract. Whether the reason is good and sound for making the purchase of commodities upon 'margin' prima facie evidence of a 'wagering' contract, under a certain state of facts, and providing that upon a different state of facts such purchase upon 'margin' does not constitute prima facie evidence of a 'wagering' contract, is a matter for the Legislature."

But this but emphasizes the correctness of my position that no such decision was made in that case, when we connect the two quotations and consider them together. It was evidently in the minds of the Chief Justice and the other members of the court, at the time, that such manufacturers and dealers could buy cotton and other commodities "on margin," if done *bona fide*, and not for the mere purpose of speculation, but for the legitimate purpose of preventing losses in their business by sudden and violent fluctuations of prices in the market. It is said in the *McGinnis* Case, as we have seen, that they may purchase commodities used and required in the ordinary course of their business, "for future delivery on a margin." It is thus conceded that the mere fact that such a dealer buys "on a margin" does not make the transaction unlawful under the statute, but is clearly authorized. The statute covers the whole subject and provides a general scheme of legislation to prevent the vicious practice of dealing, for the purpose

of speculation, in "futures," which have a well-known and definite meaning, being regarded by the law as a cover for gambling, and therefore denounced by it as illegal. Such purchases and sales by manufacturers and wholesale dealers or merchants being lawful, the Legislature, by section 1689, which declared "future contracts" unlawful, excepted such manufacturers and dealers, as we have described, from the operation of that section, which means, of course, that as to them the purchase of commodities used in their business "on margins" should be lawful, or, expressing it negatively, should not be unlawful. That exception is in section 1689, and not in the two sections 1690 and 1691, which relate to the *prima facie* case and the burden of proof. I understood, at the time they were decided, that McGinnis' Case and Clayton's Case were in accord with this view, and I believe that they were intended to be; but, if they are not or were not so intended to be, I cannot longer give my assent to them. The defendants in those two cases were indicted for conducting and maintaining bucket shops, which was plainly unlawful. They were not manufacturers or merchants, in the sense of those terms as used in the statute, and the question now presented was not necessarily involved in those decisions, although the court, I think, recognized the law to be as I now contend it is. Alex. Sprunt & Sons are engaged in a perfectly legitimate business, that of buying spot cotton for export, and are not dealing in what are known as "futures" for the purpose of speculation. They are wholesale dealers in the cotton itself, and buy it for resale or to fill orders, and, in no view, are they gambling in the article. When they buy "on a margin," it is merely for the purpose of protecting themselves against losses which may arise from the rise or fall in prices in the cotton market, and only to that extent, and this is precisely what they are authorized to do by the last provision in Revisal, § 1689.

But it is said that the exception to be found at the end of that section (1689) should be bodily taken therefrom and transferred to sections 1690 and 1691, which relate to the burden of proof, and the *prima facie* case made against the plaintiff by the plea of the defendant that the contract sued on is illegal, it being a gambling contract, for the purchase or sale of cotton "on margins," to be settled merely by paying the difference in the price of the commodity at a given time, which is determined by the rise or fall of the price in the market, and therefore purely speculative. We are permitted to construe statutes in *pari materia* together and to transfer terms, if necessary, to ascertain the legislative intention; but we are not authorized to take an important exception from one section of the Revisal, withdrawing thereby its qualification of the

broad and general provisions of the enactment, and transfer it to another section relating to a different branch of the law. It will be seen at once that this is not ascertaining, but changing, the legislative meaning; besides, the Acts of 1905, c. 538, § 1, not only refers to transactions therein forbidden, such as bucket shops, but is expressly made applicable to the Acts of 1889, c. 221, and to *every* section thereof, and by section 7 of the act of 1905 it is explicitly provided that it shall not apply to commodities bought and sold by wholesale dealers in their business. It was unnecessary to enact such a provision unless reference was had to purchases and sales "on margins," for those otherwise made, or in a legitimate manner, were clearly not within the prohibitory terms of the statute. The codifiers inserted the exception at the proper place, not only because the act of 1905 made it applicable to that section by plain and direct words, but also because, if a purchase or sale on margins by such a dealer was not unlawful under that section, the sections as to the burden of proof and the *prima facie* case could have no bearing upon the transaction; it being a lawful one. They relate only to gambling contracts. But there is another fact to be taken into account. The Legislature, when it enacted the Revisal of 1905, placed the exception at the end of section 1689 at the very session of that body when the proviso or exception was first adopted, and the Revisal was passed in this form, with a provision repealing all public and general statutes not contained in the Revisal, with certain limitations not pertinent to this question. The Revisal took effect August 1, 1905, and became the law of the state from that date, in form and substance as adopted. Revisal, §§ 5453, 5463. The last-cited section is in these words: "All the provisions, chapters, subchapters and sections contained in this Revisal shall be in force from and after August 1, 1905."

It is suggested that, as section 1689 of the Revisal does not apply to the plaintiff, who is a wholesale dealer in cotton, by reason of the exception at the end of that section, the common law is in force as to him, and the burden, instead of being upon the plaintiff to show, apart from the writing, that the contract is a lawful one, where illegality of the contract is pleaded as a defense, is upon the defendant to show, as he was required to do at common law, that it was illegal. But the glaring fallacy of this position is seen in the well-recognized and established rule, by which we construe all statutes. It is conceded by all writers upon the subject, and by all the judges who have considered it, to be a rule of universal application, and it is thus stated by them: "(1) The common law, of course, gives way to the statute, which is inconsistent with it. (2) When a statute is designed to be a revision, consolidation, or

codification of the whole body of the law, applicable to a given subject, it supersedes and supplants the common law, so far as it applies to the subject, and leaves no part of it in force." Black's Inter. of Law, p. 236; Hannon v. Madden, 10 Bush (Ky.) 664; Kramer v. Rebman, 9 Iowa, 114; Com. v. Cooley, 10 Pick. (Mass.) 37; State v. Wilson, 43 N. H. 415, 82 Am. Dec. 163. The courts, whose reports I have cited, are of very high repute, and could not well go astray upon such a simple proposition. The theory and practical operation of this rule are so well explained and clearly illustrated by the Supreme Court of Alabama, in the case of Barker v. Bell, 46 Ala. 216, that no room is left for doubt that our statute (Revisal, § 1689) takes the place of the common law and is the one and only rule upon the subject with which it deals. That court, which is held in high esteem by all courts for its juridical learning and ability, said in the case just cited: The Revisal "is intended to contain all the statute laws of the state of a public nature, designed to operate upon all the people of the state, up to the date of its adoption, unless otherwise directed in the Code. This law is not merely cumulative of the common law, and made to perfect the deficiencies of that system, but it is designed to create a new and independent system, applicable to our own institutions and government. In such case, where a statute disposes of the whole subject of legislation, it is the only law. Otherwise, we shall have two systems, where one only was intended to operate, and the statute becomes the law only so far as a party may choose to follow it. Besides, the mere fact that a statute is made shows that, so far as it goes, the Legislature intended to displace the old rule by a new one. On some questions, the common law conflicts more or less with our constitutional law, and is necessarily displaced and repealed by it; and in others it has, by the lapse of ages, and by mistakes inevitably attendant on all human affairs, become uncertain and difficult to reconcile with the principles of justice. Hence the Legislature intervenes to remove such difficulties, uncertainties, and mistakes, by a new law. This new law, to the extent that it goes, necessarily takes the place of all others. It would be illogical to contend that the old rule must stand, as well as the new one, because this would not remedy the evil sought to be removed and avoided." Even if the statute introduces a new rule, it repeals immemorial custom and the common law, provided the enactment introduces a new principle or rule sufficient in itself. Black, p. 236; Delaplane v. Crenshaw, 15 Grat. (Va.) 457. So we see it is not necessary that a

statute should be in direct conflict with the common law, in order to repeal it; but it is quite sufficient if the statute introduces into the law a new principle and a new rule sufficient of itself to create or answer for a full provision upon the subject. Revisal, § 1689, is of this character, and it takes the place of the common law as much so as if there had been an express clause of repeal of that law in it. The exception, therefore, applies to the law as declared in that section, and there is no common law upon the subject left to operate, it having been repealed, and the statute furnishes the only rule.

After careful deliberation, my conclusion is that the charge of the court was correct, regardless of what occurred between the defendant, C. C. May, and the plaintiff's agent, F. Brock. His honor appears to have entertained the same views as those herein expressed, and for that reason instructed the jury as he did.

I concur with the majority of the court in the construction placed upon section 1689 of the Revisal, so far as it relates to the real agreement of the parties. If it is agreed or understood by both parties that there need not be an actual delivery of the cotton, but that the contract may be settled by either one of them, by paying the difference in the price, and the transaction is not within the exception, it is void by the terms of the statute; but the undisclosed or unexpressed intention of one of the parties is not sufficient to invalidate it, as a contract is the agreement of both parties, and not merely the intention of one. "A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree." Prince v. McRae, 84 N. C. 675. See, also, Brunhild v. Freeman, 77 N. C. 128; Pendleton v. Jones, 82 N. C. 249; Bailey v. Rutjes, 86 N. C. 517. Besides, Revisal, § 1689, declares that the contract shall be void, notwithstanding the terms stated therein, if it was not intended, *by the parties thereto*, that the articles or thing so in form agreed to be sold and delivered should be actually delivered or the value thereof paid, but that it should be settled by paying the differences in the market price, according as the same may be greater or less at the time and place fixed for the performance of the contract. It will be seen that it is the unlawful intention in the understanding of *both* parties, and not merely the secret purpose of one of them, that renders the contract invalid.

(187 N. C. 23)

**STANDARD MIRROR CO. v. PHILADELPHIA CASUALTY CO.**

(Supreme Court of North Carolina. Nov. 1, 1911.)

**1. APPEAL AND ERROR (§ 797\*)—DISMISSAL OF APPEAL—FAILURE TO DOCKET—TIME OF MOTION.**

Supreme Court rule 17 (140 N. C. 659, 66 S. E. vii) provides that if appellant fails to file his transcript seven days before the court begins the call of causes from the district from which it comes, at the term of the Supreme Court at which the transcript is required to be filed, appellee may file the certificate of the clerk of the trial court, showing the time the judgment and appeal were taken, etc., with his motion to docket and dismiss at appellant's cost, which motion shall be allowed at the first session of the court thereafter, with leave to appellant during the term to apply for redocketing. *Held*, that a motion to dismiss an appeal in a case tried at the February, 1911, term of the Guilford superior court, for failure to docket at the August term, as it was required to do, was made in apt time, when made at the August term to which the appeal was returnable; the change in the time prescribed by the court rules for docketing transcripts not changing the requirements of rule 17.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 797.\*]

**2. APPEAL AND ERROR (§ 807\*)—DISMISSAL—MOTION FOR REDOCKETING.**

Appellant is required by the rule to move for the reinstatement of his appeal at the term of the Supreme Court to which his appeal is returnable.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 807.\*]

**3. APPEAL AND ERROR (§ 797\*)—DISMISSAL—FAILURE TO DOCKET APPEAL.**

Appellee's right to move, under rule 17 (140 N. C. 659, 66 S. E. vii), to dismiss the appeal for failure to docket in time will be defeated by appellant docketing the appeal before the motion is made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3153; Dec. Dig. § 797.\*]

**4. APPEAL AND ERROR (§ 627\*)—DISMISSAL—FAILURE TO DOCKET.**

An appeal, docketed after the end of the return term of the Supreme Court, will be dismissed on motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2746; Dec. Dig. § 627.\*]

**5. APPEAL AND ERROR (§ 564\*)—RECORD—FILING—STIPULATIONS—WRITING—NECESSITY.**

Under Supreme Court rule 39 (66 S. E. x), providing that that court will not recognize any agreement by counsel, unless the same appear in the record or a writing filed in the cause of the Supreme Court, an oral agreement of counsel for the extension of time for preparing and serving the case on appeal will not be considered by the court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 564.\*]

**6. APPEAL AND ERROR (§ 632\*)—RECORD—CASE—RETURN.**

The officers of the court should make true returns as to the time and manner of service of the case on appeal, etc., and the reason for misdating a return, or of any apparent inaccuracy, should be fully stated in the return, so that, although the return of service of a case

on appeal, as served April 4th, the actual service being on September 14th, was signed by the officer in presence of the counsel for both parties and with their assent, the return should have shown the actual facts.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 632.\*]

Appeal from Superior Court, Guilford County; Daniels, Judge.

Action by the Standard Mirror Company against the Philadelphia Casualty Company. From a judgment for plaintiff, both parties appeal, and each moves to dismiss the other's appeal. Defendant's motion denied, and its own appeal dismissed.

Stern & Stern and Walser & Walser, for appellant. Wescott Roberson and King & Kimball, for appellee.

**Plaintiff's Appeal.**

**WALKER, J.** The above-entitled action was tried at February Term, 1911, of Guilford superior court, and both parties appealed from the judgment therein. The plaintiff failed to docket its appeal at this term of court, as it was required to do, and the defendant moved to dismiss the appeal, under rule 17. The motion of the defendant would be granted, but for the fact that plaintiff had abandoned the appeal below.

[1, 2] Rule 17 (140 N. C. 659, 66 S. E. vii) provides that such a motion shall be made during the term of this court to which the appeal is returnable, and not after said term, so that the defendant moved in apt time. Even the appellant is required by the rule to move for a reinstatement of his appeal at that term. Not only is that the requirement of the rule, but it has been so construed to be its meaning in several of our decisions. *Benedict v. Jones*, 131 N. C. 473, 42 S. E. 909; *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150. The practice in such cases as arise under this rule of the court is fully stated by the present Chief Justice, in *Porter v. Railroad*, 106 N. C. 478, 11 S. E. 515, which was followed by *Hinton v. Pritchard*, 108 N. C. 412, 12 S. E. 338, *Paine v. Cureton*, 114 N. C. 606, 19 S. E. 631, *Causey v. Snow*, 116 N. C. 498, 21 S. E. 179, and numerous other cases cited in the note to *Porter v. Railroad*, at margin page 480 of the annotated edition of 106 N. C. The change in the time prescribed by the rules for docketing transcripts in this court has not had the effect of altering the requirement in regard to motions of appellees to dismiss under rule 17, as was decided in *Benedict v. Jones*, supra.

[3] If the appellant should docket the case before a motion is made by the appellee to dismiss, it will defeat such a motion; but the latter may move in the matter, during the return term of the appeal, at any time after the case should be docketed here.

[4] If the appellant should docket his ap-

peal at any time after the end of said term of this court, it will also be dismissed on motion. *Benedict v. Jones*, supra; *Causey v. Snow*, supra; *Burrell v. Hughes*, 120 N. C. 277, 26 S. E. 782; *State v. James*, 108 N. C. 792, 18 S. E. 112. It follows that, while the appellee in the plaintiff's appeal has come into this court in time to avail itself of the right given by rule 17 to dismiss, the motion is nevertheless denied; the plaintiff having abandoned its appeal, as appears from the papers on file here, and no motion to dismiss being really necessary. Motion denied.

#### Defendant's Appeal.

[5] This is a motion to dismiss the appeal or to affirm the judgment below in favor of the plaintiff, because the defendant did not prepare and serve its case on appeal in time. It appears that, by consent of the appellee, the plaintiff, it was allowed 30 days after the adjournment of the court, on February 28, 1911, to serve the case on appeal, but it was not served within the extended period. An unfortunate dispute between counsel, as to an alleged further extension of time, by agreement between defendant's and one of appellee's (plaintiff's) counsel, has brought into this court a disagreeable controversy, which we have said more than once before we would not undertake to decide. It would impose upon us an exceedingly unpleasant and delicate duty to perform, if we should consent to hear and pass upon such disputes; and therefore this court not only decided that it would not consider such controverted questions between counsel, but we have actually adopted rule 39 (66 S. E. x), which is as follows: "The court will not recognize any agreement of counsel in any case, unless the same shall appear in the record, or a writing filed in the cause in this court." This should have sufficiently warned members of the bar that if they consent to waive the directions of the statute, or of the rules regarding the service of cases or the extension of time, the agreement must be evidenced by a writing; otherwise, if disputed, the party seeking to take benefit under it will not be heard by us. It is always better to reduce such agreements to writing, in order to prevent these unpleasant controversies, and this case but strikingly illustrates the wisdom and practical utility of the rule. The subject is fully reviewed by the present Chief Justice in *Graham v. Edwards*, 114 N. C. 229, 19 S. E. 150, and we reproduce here what was so aptly said by him in that case:

"The alleged agreement [for an extension of time to docket case in this court] was not in writing, and is denied by appellee's counsel. It cannot, therefore, be considered. Rule 39 of this court, and numerous cases cited in *Clark's Code* (2d Ed.) 704. This court is for the correction of errors of law

committed in the trial of causes below. We cannot be called upon to settle disputed matters of fact arising upon oral agreements of counsel. *Hemphill v. Morrison*, 112 N. C. 756 [17 S. E. 535]. The duty of passing upon the correctness of memory of counsel as to such agreements when there is a difference is a delicate one. It is not contemplated by the statute that we should be called upon to discharge such function, and we have no right or disposition to assume it. We again repeat, as was lately said in *Sondley v. Asheville*, 112 N. C. 694 [17 S. E. 535]: 'It is to be hoped that hereafter counsel will in every instance put their agreements in writing, or have them entered of record, when for any reason they may think best to depart from the plain provisions of the statute. If they do not care to do this, the courts will not pass upon the controversies, as to the terms or existence of such agreements.' Our brethren of the bar owe it to themselves and to the court to avoid bringing such controversies hereafter before the courts. Their experience as lawyers must impress upon them the treachery of memory among the very best of men. If not disposed to guard against differences of recollection by the easy mode of reducing agreements to writing, or having them entered on the minutes, the courts have no process to gauge the accuracy of their respective recollections."

In this case, there is not the least ground for the disparagement of counsel, as nothing has been done which is not entirely consistent with the strictest integrity and a proper professional courtesy. Counsel simply have disagreed in their understanding of the facts, and that is all, and to avoid such unpleasant occurrences the rule was adopted, and must be observed, as stated by the Chief Justice in the case just cited. We are unable to say that either of the counsel is infallible; and therefore that the statement of the one should give way to that of the other. They are equally honorable and truthful, and there is nothing to show that the memory of either one of them is more retentive than that of the other. We are all liable to err, and should deal with each other charitably on that account, as it is a frailty of human nature, and forgetfulness, therefore, is consistent with perfect honesty. The plaintiff's counsel was under the express and positive instructions of his client not to make any agreement for an extension of time in serving the case on appeal, at least after the allotted time had expired, and therefore did not have the authority to do so. It appears to us that he was very careful not to waive any of his client's rights, or to disobey his instructions in what he did. We fully and readily acquit him of even the slightest wrongdoing, and find as a fact, and hold as matter of law, that he was at all times in

the clear exercise of his legal rights as an attorney, and strictly observed the directions of his client, under which he was acting. He was without doubt misunderstood by the defendant's counsel, and in his eagerness to be liberal and not disregard his client's instructions he may have conceded too much when the sheriff signed the return of service; but he did not surrender any of his client's rights, and could not do so under the circumstances. This is an honest difference of recollection between counsel, but we cannot settle it otherwise than by enforcing the rule of this court.

[8] It appears by the return of the officer that the defendant's case on appeal was served April 4, 1911, but he testifies by affidavit that this return is not true in fact, and that the case was actually served September 14, 1911, long after the lapse of the extended time. In his justification, it may be said that he merely signed the return in the presence of the counsel of plaintiff and defendant, at their request, or with their assent; the plaintiff's counsel expressly reserving all of his client's rights, and especially the right to object to the service, as being too late. But officers should make true returns as to time and manner of service, and if they do not the reason for misdating a return, or for any other inaccuracy, should be explained in the return; that is, the real facts should be fully stated. In this case, no copy of the case on appeal was served upon the plaintiff's counsel, as admitted by the officer. He should have stated this fact in the return, and also the other undisclosed matters which are inconsistent with the return. But, after all that can be said, the fact remains that there was no service of a case on the plaintiff within the time prescribed by law, or within the extended time, and the motion of the plaintiff is granted.

The appeal of defendant is dismissed, and judgment will be entered in the court below for the plaintiff, if it has not already been done.

Appeal dismissed.

(157 N. C. 88)

**PRITCHETT v. SOUTHERN RY. CO.**  
(Supreme Court of North Carolina. Nov. 15, 1911.)

**1. MASTER AND SERVANT (§ 269\*)—ISSUES AND PROOF—CAUSE OF INJURY.**

Where defendant, in an action by its employé for the loss of an eye, alleged in its answer that the chip of brass which entered the plaintiff's eye came from the hammer he was using, and not from a boring machine as plaintiff charged, evidence that, on account of the condition of the hammer, plaintiff was not striking with it at the time he was injured, is within the issues.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 269.\*]

**2. MASTER AND SERVANT (§ 274\*)—ADMISSIBILITY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.**

In an action against an employer for personal injuries, where there was evidence that a nearby boring mill was in operation and throwing off chips when plaintiff began to work, and that a chip of brass from the mill entered his eye almost instantly, evidence that the plaintiff could have completed the job upon which he was at work within 1½ minutes was relevant as bearing on the plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.\*]

**3. MASTER AND SERVANT (§ 270\*)—ADMISSIBILITY OF EVIDENCE—MASTER'S NEGLIGENCE—SIMILAR FACTS AND TRANSACTIONS.**

The statement of defendant's foreman, as he directed him to do certain work, that they were behind in the driving-box job, and that he wanted him to assist in it in place of the regular man, who was sick, and evidence that the boring mill which threw the brass chip that entered plaintiff's eye had thrown chips in the driving-box space before the time of plaintiff's injury, were admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-932; Dec. Dig. § 270.\*]

**4. MASTER AND SERVANT (§ 265\*)—ACTION FOR INJURIES—BURDEN OF PROOF—UNSAFE PLACE TO WORK.**

In an action for personal injuries, alleged to have resulted from an unsafe place to work, plaintiff has the burden of proving that the place where he was at work was unsafe, and that the defendant knew it to be so, or he could have discovered it by the exercise of ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 265.\*]

**5. MASTER AND SERVANT (§ 270\*)—ACTION FOR INJURIES—ADMISSIBILITY OF EVIDENCE—KNOWLEDGE BY MASTER OF DANGER.**

In a servant's action for personal injuries alleged to have been caused by an unsafe place to work, evidence that such condition has existed for a long time is admissible as bearing on the master's knowledge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-932; Dec. Dig. § 270.\*]

**6. TRIAL (§ 260\*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.**

Requested instructions, covered by those already given, are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 631-659; Dec. Dig. § 260.\*]

**7. TRIAL (§ 257\*)—REQUESTS—TIME FOR REQUESTS.**

Under Revisal 1905, § 538, which requires requests for instruction to be in writing and to be signed, requests for special instructions, not signed and handed up until after the argument, the court's general charge, and while the court was reading requests of the other party, are not presented in time and will be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 642-645; Dec. Dig. § 257.\*]

**8. MASTER AND SERVANT (§ 265\*)—ACTION FOR INJURIES—BURDEN OF PROOF—CAUSE OF INJURIES.**

In an action against an employer for personal injuries, plaintiff has the burden of proving



ing, not only defendant's negligence, but that such negligence was the cause of his injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908; Dec. Dig. § 285.\*]

**9. MASTER AND SERVANT (§§ 101, 102\*)—MACHINERY, APPLIANCES, AND PLACES FOR WORK—DUTY OF MASTER.**

An employer of labor in the operation of railways, mills, and other plants where the machinery is complicated, and especially where mechanical power is used, must provide the employes a reasonably safe place and machinery and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of the same kind.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185, 171-184, 192; Dec. Dig. §§ 101, 102.\*]

**10. MASTER AND SERVANT (§ 103\*)—FELLOW SERVANTS—DUTY OF MASTER—SAFE PLACE.**

The duty of providing a reasonably safe place in which to work is one of the primary or absolute duties of the master, and cannot be delegated so as to discharge him from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.\*]

**11. NEGLIGENCE (§ 1\*)—NATURE AND ELEMENTS OF "NEGLECT"—DEGREE OF CARE.**

"Negligence" is the failure to perform a duty imposed by law, or to exercise that care which a man of ordinary prudence would have exercised under existing circumstances, and, where conditions change, the degree of care required changes with them.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

**12. MASTER AND SERVANT (§ 286\*)—ACTION FOR INJURIES—QUESTION FOR JURY.**

In an action by an employe for personal injuries, evidence of negligence by defendant directly causing plaintiff's injuries held sufficient to go to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001-1050; Dec. Dig. § 286.\*]

**13. APPEAL AND ERROR (§ 927\*)—MOTION FOR NONSUIT—TRUTH OF FACTS WHICH EVIDENCE TENDS TO PROVE.**

On review of a motion to nonsuit, an appellate court must accept as true those facts which the evidence for plaintiff tends to prove.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3748; Dec. Dig. § 927.\*]

**14. MASTER AND SERVANT (§ 289\*)—ACTION FOR INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.**

In an action by an employe for personal injuries, held, that the question of contributory negligence was for the jury, on the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

**15. MASTER AND SERVANT (§ 226\*)—ASSUMPTION OF RISK—NATURE AND EXTENT.**

The risks assumed by an employe are only the ordinary risks of the employment, and not the risk of the employer's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.\*]

**16. MASTER AND SERVANT (§ 274\*)—ACTION FOR INJURIES—ADMISSIBILITY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.**

In an employe's action for personal injuries, his knowledge and his familiarity with conditions may be considered as bearing upon his own contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.\*]

Appeal from Superior Court, Rowan County; Lyon, Judge.

Action by J. E. Pritchett against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. No error.

This action is to recover damages for the loss of an eye and other injuries caused, as the plaintiff alleges, by the negligence of the defendant in failing to furnish him a safe place to work, and in not providing a shield to protect him from brass chips falling from a boring mill. The defendant denies negligence and alleges that the injury to the plaintiff was an accident, or that it was caused by his contributory negligence, or was the result of one of those risks assumed as a part of his employment. All of the evidence is not set out, but enough to consider the motion of the defendant for judgment of nonsuit.

J. E. Pritchett, the plaintiff, testified: "I am the plaintiff. I am 31 years old. Am a machinist." Here the defendant admitted that the plaintiff was in its employment as a machinist in its machine shops at Spencer, N. C., at the time he was injured. "I have served my apprenticeship and have been working at my trade as machinist for 15 or 16 years. I was employed by the Southern Railway Company in its machine shop at Spencer, beginning work on the 20th day of June, 1910. I reported for work, and my first work was on the rod job on the eastern side of the shops. After I had been at work on the rod job three-fourths of an hour that afternoon, Mr. Daniels, defendant's shop foreman, came and told me that they were behind on the driving-box job, and that he wanted me to assist in the driving-box job in the place of the regular man, who was sick. Shop Foreman Daniels took me over there to the driving-box space, and introduced me to Foreman Hege, who was in charge of the driving-box shop that afternoon. Foreman Hege then laid off some oil grooves with chalk on some driving boxes in this driving-box space, for me to chip. I then went to work on those oil grooves, when I was instantly struck blind by something striking me in the eye. I had no warning of where it came from. Mr. Carver then took me in his arms. I could not see him, but I recognized him by his voice. Quite a number of men gathered round me, as I could tell by their voices. I do not know who pulled the brass out of my eye, but I am told that Foreman Daniels did it. This driving-box job space is 10x15

feet, and is located northwest of the rod-job space where I had been working. That driving box they put me to work on weighed from 500 to 700 pounds. Those driving boxes had been placed in that driving-box space before I got to that space. I did not help place them. I had chipped grooves on two or three of those driving boxes before I was hurt. The driving box on which I was ordered to work was about 10 or 12 feet from a boring mill. At the time of my injury I was about 10 or 12 feet in a northerly direction from that boring mill. I was facing towards the boring mill, with my right eye exposed to said boring mill. I had never worked in this driving-box space before. The boring mill was not in operation, but was idle, when I was carried there. The last time I noticed that boring mill was possibly a minute or a couple of minutes before I was hurt, and it was then idle. It was not running. When struck I was in a stooping position; the driving box in front of me. I had my air hammer in my right hand and my left hand over the barrel of it. At the moment I was struck, as well as my recollection serves me, I was trying to get control of this air throttle on the hammer. It was very stiff and would not work. When I first took hold of this hammer, I called Mr. Hege's attention to it, stating to him about the spring being very stiff. He said, 'That spring is too rigid and stiff, and the way we control it is we have to put our finger on it and push it and work with the right hand.' My best recollection is that at the time I was struck I had cramped my finger trying to get control of the hammer." The defendant objected to the witness testifying as to the defective condition of the air hammer, on the ground that there was no allegation in the complaint of any defect in the air hammer. The objection was overruled, and the defendant excepted. "When I was first struck by the chip, it was like a man being shot. It dazed me; but I threw my hands up immediately to my eye to hold it apart, as it burned like fire. The brass chip went in the center of my eye, or very close to the center of it. I was facing the direction of the boring mill with my right eye exposed. It became necessary for a man to be standing like I was. Certainly a man could twist, wrestle, and pull one of those driving boxes around, and his back would be towards the boring mill, if he desired to do so. I could not have got help to move that driving box, as help was scarce."

C. S. Carver testified as follows: "I am a machinist. Have been a machinist 12 years. I was working for defendant at Spencer the day Pritchett was hurt. I had been keying up some brass. I was 35 or 40 feet from Pritchett. This boring mill was on a line with him and me, and I could see both Pritchett and the boring mill at the

same time. I was watching Pritchett at the time he was hurt and was the first man to get to him. I was watching him at the moment he was hurt. At that moment he was sitting down looking at his hammer. There was no chisel in it. I looked at him to see what he was doing. He was looking at his hammer. He had his throttle in his right hand and end of barrel in his left hand. No chisel was in his hammer at the time he threw his hand to right eye. Pritchett was facing the boring mill in a northeast direction with his right eye more exposed to the boring mill. Up to one minute before he was injured, the boring mill was not in operation. I saw defendant's apprentice boy, Kizziah, walk up to the boring mill and start it. I do not think the boring mill made more than two or three revolutions before Pritchett was hurt. That boring mill makes about 50 or 60 revolutions per minute. Pritchett was injured possibly 30 seconds after Kizziah started the boring mill. A piece of brass entered his eye near the center, and was taken out by Daniels about two minutes thereafter. I got to him in several seconds after he was hurt, as soon as I could run to him. He was holding his right eye open with his hands, and said he was blind. The boring mill was still in operation when I got to where Pritchett was hurt and the cuttings still flying. They will fly 120 degrees in a circular bed. Most of them go to the northwest. At the time I went to catch Pritchett those cuttings were flying so that they could hit me. There was no shield between this driving-box space and that boring mill. Pritchett was facing towards the boring mill when hurt. When the brass cutting hit him, he dropped his hammer and staggered back. When I got to Pritchett, the boy had not shut off the boring mill, and the cuttings were still flying to him. That shield protects the driving-box space to some extent, but not enough to where he was standing. It does not protect where he was standing, but the other side. I worked in the machine shops at Rocky Mount, N. C., Waycross, Ga., two machine shops on the C. and O., Richmond, Va., and Huntington, W. Va., and American Locomotive Works, where boring mills are used like defendant's at Spencer. And I have been through and observed 10 or 15 more shops where boring mills are used. Some shops have sheet-iron shields, some have bags; but in those shops canvas shields are mostly in general use as a precaution to protect the employees from brass cuttings that fly from such boring mills. It was the custom for those shields to be placed between the operator, wherever the operator might be at work, and the boring mill. Some have two shields; some are V-shape to come around the mill. Those safety shields that were in general use around machine shops of such kind were six or eight feet square, on racks, with canvas

backs tacked around them. Such a shield costs \$2. If one of these shields had been placed between that boring mill and the driving-box space, it would have provided protection and safety to employes working within the zone of the cuttings that flew from that boring mill. Such a shield would not have interfered with the efficiency of any of defendant's machinery or hindered any of its employes. Defendant worked men in that driving-box space every day, and kept a man operating the boring mill pretty much all the time. Plaintiff's eye just after it was struck looked like it had been burned. That cutting was hot when it went in and his eye turned white. The kind of cuttings from the boring mill depend upon how the tools are ground, how much feed you have, how much cutting you have, and upon how deep the cuttings are you are taking. Cuttings from boring mills are hot. Cuttings from air hammers are cold on account of lack of friction. There was no shield between the driving-box space and that boring mill when Pritchett was hurt. In these machine shops it is customary to shield these boring mills with canvas shields. That is the proper kind of shield and answers the purpose. Yes, if defendant had had that kind of shield there the day Pritchett was hurt, and had had it large enough to come around the boring mill, it would have been the proper kind. Apparently plaintiff was looking down at the moment he was hurt. I could not see his eyeball."

J. B. Donovan testified as follows: "Am a machinist at Spencer. I was working for Southern Railway Company in June, 1910, about 25 or 30 feet from where plaintiff was when he was injured. I did not see him at the time he was injured. Have operated this boring mill something like 3½ years. Cannot tell whether the boring mill is in the same condition now as it was then. I saw that boring mill during June, 1910. There has been no change in that mill that I know of since I worked it. It is the same mill. When I worked it, it would throw brass, I would say, a little over a quarter of a circle of the machine. That is, you would get 10 feet from the machine and they would go 10 feet. At the time I operated it, it would throw shavings in the same portion of the driving-box space where plaintiff was working. It is the general custom for the men to move round the boring mill in chipping it."

W. P. Nelster testified as follows: "I have been working as a machinist for defendant at Spencer 9 or 10 years. To my personal knowledge, that boring mill is located now where it has been for 8 or 4 years; so has also the driving-box space been located in the same place for the past 4 years. I do not remember any alterations prior to time Pritchett was hurt. I worked 30 or 40 feet from that boring mill. I have observed it.

Every few minutes I was looking in that direction and often passed there. It was the same boring mill 8 or 4 years ago, as far as I know, without any change. During that time I have seen it throwing off brass cuttings, before Pritchett was hurt. It would throw the biggest majority of the brass shavings in a northwesterly direction, but they did not all go in that direction. The rest would go north and possibly to the northeast, slightly. I did not see the driving box Pritchett was working on when hurt, to recognize it. But I have been pointed out the place, and I know where the driving box was when he was hurt, and I have heard witnesses to-day describe where he was. And, from where the witnesses say Pritchett was at the time he was injured, he was in the zone of those flying shavings at the time he was hurt, according to my knowledge and honest belief. There was no shield between this driving-box space and the boring mill the day Pritchett was hurt. It was customary for defendant to work employes throughout the day in this driving-box job space. I operated the boring mill in March or April, 1910. At that time, using the same right-hand head, it scattered cuttings quite a good bit in the space where Pritchett occupied, in the lower end of the driving-box space."

I. N. Ayers testified as follows: "I have been a machinist for 13 years. Was working for defendant in June, 1910, when plaintiff was hurt. I was 25 or 30 feet from where plaintiff was working. I have seen that boring mill throw brass before Pritchett was hurt. I had been working there 12 months before Pritchett was hurt. The boring mill would throw brass about a quarter circle of the boring mill. I think the boring mill would throw brass clippings where Pritchett was. During those 12 months Foreman Daniels would pass that driving-box space about 50 times a day while that boring mill was in operation."

J. F. Perkinson testified as follows: "I am working for defendant, and I was working for it as a machinist at Spencer in June, 1910, and about 30 feet from where plaintiff was hurt. Did not see plaintiff when he was hurt. I had been working in those shops about 10 months prior to the time plaintiff was hurt. During that time I had seen that boring mill in operation every day. The tool has something to do with where the cuttings are thrown from that boring mill. You can place a tool so that it will throw them in almost any direction. If you are using the head spoken of this morning, the biggest portion of the cuttings would go in a northwesterly direction. This boring mill would usually throw part of its brass cuttings to where Pritchett was when he was hurt. I do not know that there was a screen out there. I did not see one that day. A screen in the northwest direction

would catch part of those shavings, but not all. They will fly in every direction. The biggest portion of them will go in a north-west direction; but you cannot tell where the other shavings are going to fly. They scatter in every direction."

C. S. Flood testified as follows: "I am a machinist. I was working for defendant at Spencer last June, about 30 feet from where plaintiff was when he was hurt. Before Pritchett was hurt I worked in the driving-box space where plaintiff was hurt. When I worked in that driving-box space a couple of days before Pritchett was injured, they had a tool on the boring mill exactly like the one and shaped like the one they were using when Pritchett was hurt; and it then threw cuttings to the place where Pritchett was hurt. I have had experience in five or six machine shops of this kind where boring mills are generally used: American Locomotive Works, Pennsylvania Railway at Baltimore, S. A. L. at Waycross, Ga., A. C. L. at Rocky Mount, N. C., at Pittsburg, etc. And have had observations in others. The general custom of all machine shops is to have this canvas screen to protect the boring mills to keep the cuttings off of the men. I did not see such screen there the day Pritchett was hurt. The cuttings from the boring mill were hot because of the friction. The hammer would throw cold cuttings. Pritchett's eye was all inflamed and looked like a white blister hanging on his eye."

The defendant offered evidence tending to establish the following facts: (1) That the danger from chips was northwest from the boring mill and that it had a shield there. (2) That a shield was unnecessary between the boring mill and the driving-box space. (3) That the plaintiff could perform the work assigned to him with his back to the boring mill, and that he unnecessarily exposed himself to danger. (4) That, in the position of the plaintiff's head at the time he was stricken, a chip from the boring mill could not enter his eye, without striking some object, and rebounding, and therefore that plaintiff was accidentally injured. (5) That the chip which entered the plaintiff's eye came from the hammer he was using, and not from the boring mill.

The evidence as to damages is not stated, as there is no exception in regard thereto.

The defendant excepted to rulings of his honor on the evidence. (1) For that the court permitted the plaintiff to testify about the defective condition of the air hammer. (2) For that the court permitted the plaintiff to testify that he would have completed his job upon which he was at work within 1½ minutes. (3) For that the court permitted the plaintiff to testify that the Shop Foreman Daniels told him a man was disabled or sick or out, and they were behind on the job and that they were in a hurry. (4) For that the court permitted the witness

J. P. Donovan to testify that, when he operated the boring mill 3¼ years prior to the accident, at that time it threw chippings in that driving-box space. (5) For that the court permitted the witness J. P. Donovan to testify that, when he worked in the driving-box space 4 or 5 feet east of the steel column, the boring mill threw cuttings on witness' hands and in his face. (6) For that the court permitted I. N. Ayers, plaintiff's witness, to testify that he was standing 25 or 30 feet beyond where plaintiff was working, and that the boring mill threw brass cuttings where he was standing. (7) For that the court permitted C. S. Flood to testify that, a couple of days prior to the injury of the plaintiff, he was working in the driving-box space northeast, more north than east, from the boring mill, and that it threw brass cuttings where he was.

There was a motion to nonsuit, which was overruled, and defendant excepted.

The jury returned the following verdict:

(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

(2) Was the plaintiff's injury caused by his own contributory negligence, as alleged in the answer? Answer: No.

(3) What damages, if any, is the plaintiff entitled to recover? Answer: \$5,500.

Judgment was rendered thereon, and defendant excepted and appealed.

Linn & Linn, for appellant. Edwin C. Gregory, for appellee.

ALLEN, J. (after stating the facts as above). There is no error in the rulings on the evidence.

[1] The defendant alleges in its answer that the chip which entered the eye of the plaintiff came from the hammer he was using, and it was competent, for the purpose of meeting this contention, to show that, on account of the condition of the hammer, the plaintiff was not striking with it at the time he was injured.

[2] The evidence that the plaintiff would have completed his job upon which he was at work within 1½ minutes is of little importance, but is relevant to the inquiry. The plaintiff testified that the boring mill was not in operation when he began to work, and that the chip entered his eye almost instantly, and it was proper for the jury to have before them the length of time he would be engaged at work, in determining whether his conduct was negligent.

If the boring mill was not in operation, and he could complete his job in two minutes, the jury might say it was not imprudent to work with his face to the mill, and that he ought to have taken greater precautions for his safety if required to remain longer.

[3] What the foreman said as he directed him to do the work, and evidence that the

boring mill had thrown chips in the driving-box space before the day of the injury to the plaintiff, were properly admitted.

[4, 5] The burden was on the plaintiff to prove that the place where he was at work was unsafe, and that the defendant knew it to be so, or that it could have discovered it by the exercise of ordinary care (*Hudson v. Railroad*, 104 N. C. 491, 10 S. E. 669; *Neison v. Tob. Co.*, 144 N. C. 420, 57 S. E. 127; *Blevens v. Cotton Mills*, 150 N. C. 499, 64 S. E. 428), and evidence that a condition has existed for a long time is evidence of knowledge (*Cotton v. Manf. Co.*, 142 N. C. 531, 55 S. E. 358; *Cotton v. Railroad*, 149 N. C. 227, 62 S. E. 1093).

[6] There are several assignments of error to the refusal to give certain special instructions, all of which, we think, were covered by the charge; but, if not, they could not be ground for a new trial on this record.

At the close of the evidence, at 5 o'clock p. m., the judge adjourned court until 9 o'clock next morning. Upon the opening of court next morning, plaintiff tendered in writing his prayers for instructions, duly signed by his counsel. Counsel for defendant tendered in writing prayers for instructions, but which were not signed.

[7] After the court had given to the jury the general charge, and while the court was reading to the jury the plaintiff's prayers for instruction, defendant's counsel signed the prayers which it had tendered unsigned as aforesaid, and handed them to the court. The court then read defendant's said prayers numbered 1, 2, 7, 9, and 11. The court did not give defendant's other prayers except as contained in the court's general charge to the jury.

The statute (Rev. § 538) is imperative that counsel must sign prayers for special instructions, and that, upon failure to do so, the judge may disregard them, and the judge need not put his refusal of the instructions on the ground that they were asked too late. As was said by the present Chief Justice in *Posey v. Patton*, 109 N. C. 457, 14 S. E. 64: "The law does that."

That the instructions were not presented in apt time when signed and finally handed up, after the argument closed and the charge concluded, is well settled.

In *Craddock v. Barnes*, 142 N. C. 93, 54 S. E. 1004, it was held that prayers for instructions in due form ought to be considered, if requested before the argument begins, and Justice Walker there says: "The time within which instructions should be requested must be left to the sound discretion of the court, as in the case of many other matters of mere practice or procedure, and we will be slow to review or interfere with the exercise of that discretion; but the presiding judge should, and we are sure he always will, so order his discretion as to afford counsel a reasonable time to pre-

pare and present their prayers. Counsel should perform this duty to their clients seasonably and with a proper regard for the right of the trial judge to require that he should have reasonably sufficient time to write his charge and to consider the prayers for special instructions; and what time is required by each must be determined by the nature and exigencies of each case."

In *Biggs v. Gurganus*, 152 N. C. 176, 67 S. E. 501, the question is again considered, and Justice Brown cites with approval *Craddock v. Barnes*, supra, and says: "It is well settled that special instructions must be in writing and handed up before argument commences."

The question remaining is the refusal of the motion to nonsuit, and this involves the consideration of the duty which the defendant owed to the plaintiff, and whether the evidence, viewed in the light most favorable to the plaintiff, shows a breach of that duty, causing his injury.

[8] In all courts where the common law is administered, it is held that one cannot recover damages upon proof of negligence alone, and that he must proceed further and show that the negligence of which he complains was the real proximate cause of his injury. He cannot recover because a place where employes work is dangerous, unless he was injured by the unsafe place. He cannot say, "There was an unsafe place in the shop where I was working, and, while it is true I was not working at that place, I fell in another part of the shop and broke my leg," and therefore ask for damages.

The counsel in this case do not contend otherwise; but the difficulty arises in the application of the rule.

[9, 10] "We have repeatedly decided that an employer of labor is required to provide for his employes a reasonably safe place to work." *House v. Railroad*, 152 N. C. 398, 67 S. E. 981. And "it is accepted law in North Carolina that an employer of labor to assist in the operation of railways, mills, and other plants where the machinery is more or less complicated, and more especially when driven by mechanical power, is required to provide for his employes, in the exercise of proper care, a reasonably safe place, and to supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like kind." *Hicks v. Mfg. Co.*, 138 N. C. 325, 50 S. E. 705. And "the duty of providing a reasonably safe place in which to work is one of the primary or absolute duties of the master; and, when the master delegates the discharge of such duty to a servant, he represents the master, and the latter will be held responsible for the manner in which the duty is discharged." *Shives v. Cotton Mills*, 151 N. C. 293, 66 S. E. 143.

The relative duties of the employer and employé, and the doctrine of contributory negligence and assumption of risk, as applied to the conduct of the employé, are well stated by Justice Hoke in *Pressly v. Yarn Mills*, 138 N. C. 416, 51 S. E. 72, in which he says: "It is suggested that, if a negligent failure to furnish a shifter is declared to be the proximate cause of the injury on the part of the employer, by that same token the employé, working on when aware of the defect, is also negligent, and such negligence should be held to be concurrent, and to hold otherwise would require the master to take more care of the servant than the servant takes care of himself. This position finds support in some of the decided cases; but the court does not think it is in accord with the better considered adjudications on the subject. The position had its origin in some of the older decisions rendered when the employment of labor was much more restricted and the implements and appliances were comparatively simple and attended with little danger. At that time it was considered of little consequence what the employé assumed, and as matter of fact he assumed the risk of almost everything that happened to him. As business enterprises, however, were enlarged, and extended, and machinery became more complicated, and larger numbers of men were being employed in its operation, it was found that the position here contended for was not a proper one by which to determine the relative rights and duties of employer and employé in regard to defective machinery and appliances. It was based upon an entirely erroneous conception, that there was a perfect equality of position between the two in respect to such defective appliances; but nothing is further from the fact, and for the reason, chiefly, that the employer controls the conditions in which the employés do their work. His duty to furnish machinery and appliances reasonably safe and suitable, such as are approved and in general use, in the exercise of a reasonable care, is absolute. As a rule, he buys the machinery from the manufacturer or dealers, who are experts, and can change when he desires; he selects and employs a superintendent and skilled labor, and has the time and opportunity to inform himself as to the character of the machinery he buys and the hazards incident to its use; and, accordingly, the principle which holds the employé to an equality of obligation and responsibility in the respect suggested is unsound and unjust and has been rejected in the more recent and better considered cases."

[11] Negligence is the failure to perform a duty imposed by law. It is the failure to exercise that care which a man of ordinary prudence would have exercised under existing circumstances, and, where conditions change, the degree of care required changes with them.

In former days, tools were simple, and the mechanic and his tools were inseparable. He used them daily, and by use became familiar with their qualities, and the dangers incident to his employment, and there was less reason for holding the employer to a high degree of care than now, when complicated machinery, selected by the employer, is used, and when the employé is practically separated from his tools.

There are also in large shops, where many machines are in operation, as in the one where the plaintiff was working, dangers that are not traceable to any particular machine, but are incident to the business. These cannot generally be made the basis of a cause of action; but the knowledge that they exist imposes upon the employer the duty of exercising greater care.

[12] Applying these principles, there was no error in denying the motion to nonsuit.

There was evidence that the plaintiff was employed on the day of his injury; that he had not, before this, seen the place where he was required to work; that, when he began to work, the boring mill was not in operation; that there was much noise in the shop from machines; that it was necessary for him to face the boring mill in the performance of his duty; that, as he began to work, the boring mill, which was boring brass, started, and a brass chip struck him in the eye; that he was not using the hammer at that time; that chips from the boring mill are hot, and those from the hammer cold; that his eye was blistered; that the chip taken from the eye was from the boring mill; that the boring mill was throwing chips in the space where he was working; that the boring mill had thrown chips into this place where employés were required to work several years; that shields around boring mills were in general use; that they were movable and should be placed between the mill and the employé; that there was no shield between the mill and the plaintiff; and that if one had been there he would not have been injured.

[13] There was much evidence to the contrary; but, on a motion to nonsuit, the law requires us to accept as true those facts which the evidence tends to prove, and we therefore hold that there was evidence of negligence on the part of the defendant, which was the direct cause of the plaintiff's injuries.

[14] There was a conflict of evidence as to contributory negligence, and it was submitted to the jury, under proper instructions.

In our opinion, there was no aspect of the case in which the issue of assumption of risk arose. The doctrine is very generally applied that the duty to provide a safe place to work is an absolute duty, which cannot be delegated, and that the breach of this duty is negligence.

[15] It also accepted law that the risks as-

sumed by the employé are the ordinary risks of the employment, and that he does not assume the risk of the employer's negligence.

It would seem to follow that when the jury answers the first issue, "Yes," and thereby establishes the negligence of the employer, and that this negligence was the real proximate cause of the injury, there can be no assumption of risk which will prevent a recovery.

[16] It is, however, permissible to consider the knowledge of the employé, his familiarity with conditions, and other circumstances, on the issue of contributory negligence.

Upon an examination of the whole record, we find no error.

No error.

(157 N. C. 74)

YOUNG et al. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 15, 1911.)

**1. APPEAL AND ERROR (§§ 1050, 1058\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

Any error in admitting or excluding evidence was not prejudicial to defendant, where the same witness had, before exception thereto, testified to the same effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4166, 4195-4206; Dec. Dig. §§ 1050, 1058.\*]

**2. CARRIERS (§ 133\*)—FREIGHT—ACTION FOR INJURY—ADMISSION OF EVIDENCE.**

In an action for damages for injury to fruit trees en route, plaintiff testified that the orders for both shipments were obtained by salaried traveling men, and that one shipment was sold for a certain price and was not delivered, and that plaintiff told defendant's agent, on November 2d or 3d, that if he did not receive the shipment promptly and in good condition he would refuse it, and also testified that plaintiff's customers were to receive the shipments at destination on November 2d. *Held*, that the evidence was admissible on defendant's claim that plaintiff was negligent in not being ready to receive the trees at destination, especially in view of defendant having introduced an order for trees from one of plaintiff's customers requiring them to be delivered at such destination in October, November, or December with notice by mail of the date of delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 583, 587, 606; Dec. Dig. § 133.\*]

**3. CARRIERS (§ 137\*)—FREIGHT—ACTIONS FOR INJURIES—INSTRUCTIONS.**

In an action against a railroad company for injury to trees en route, the court instructed that, if plaintiff called for the trees at destination within a reasonable time and made a reasonable effort to receive them if they reached there within a reasonable time, he was not required to stay until they arrived, unless he had notice as to when they would arrive; but if he made reasonable effort to get them, and if they did not arrive within a reasonable time and were damaged for that reason, he would be entitled to recover damages, "but otherwise he would not be." *Held*, that by the quoted phrase the court gave the converse of the affirmative part of the instruction, and sufficiently charged as to plaintiff's duty to use reasonable

efforts to receive the goods even if they did not arrive within a reasonable time.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 137.\*]

**4. TRIAL (§ 233\*)—INSTRUCTIONS—SPECIAL ISSUES—RELATION.**

In an action for damages for injury to fruit trees en route, caused by delay in delivery, etc., the court instructed that, if the jury answered the special issue as to whether defendant failed to transport the property within a reasonable time in the affirmative, they should then proceed to the next special issue, "Was the property \* \* \* injured by reason of the failure of the defendant to transport within a reasonable time," and, if they answered that, "Yes," they should ascertain what damage, if any, plaintiff had sustained; but, if they answered the first issue, "No," they should return a verdict for defendant, and the same rule applies as to the other issues. *Held*, that the instruction was not objectionable, being merely an explanation of the relation of the special issues to each other.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 233.\*]

**5. APPEAL AND ERROR (§ 1067\*)—HARMLESS ERROR—FAILURE TO INSTRUCT—MEASURE OF DAMAGES.**

In an action against a railroad company for injury to trees by delay in delivery, defendant's counsel objected, in the jury's presence, to evidence offered by plaintiff as to the damages, and stated that the rule as to damages was the difference between the market value of the goods when delivered to the company and their actual value as damaged by its negligence, and the court stated that it so understood the rule as to damages, when plaintiff's counsel stated that he would agree that that was the rule, and the court said that it should be so understood and the argument proceeded. *Held* that, since the parties agreed as to the measure of damages in the jury's presence, the court's failure to charge on the measure of damages was not reversible error, as the jury could not have been misled thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

Appeal from Superior Court, Guilford County; Allen, Judge.

Action by John A. Young and another against the Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action to recover damages for loss and injury to certain fruit trees and nursery stock, shipped over the line of the defendant and of connecting carriers. There were two shipments, one to Williamsburg, Va., and the other to Tappahannock, Va. On the 23d of October, 1907, the plaintiffs delivered to the defendant three boxes of trees and other nursery stock, consigned to Jno. A. Young's agent, to be shipped by freight to Williamsburg, Va., a station on the Chesapeake & Ohio Railroad about 50 miles east of Richmond. The plaintiff did not pay the freight charges for transportation, but guaranteed it. The trees arrived at Williamsburg on the 6th of November, 14 days after the date of the bill of lading. The plaintiff's agent, having called for the trees at the station of the Chesapeake & Ohio

Railroad in Williamsburg on the 1st, 2d, 3d, 4th and 5th of November, refused the shipment on the ground that they had been too long en route and were damaged. Freight delivered at Greensboro to the Southern Railway Company for shipment to Williamsburg, Va., goes via Danville and Richmond over the Southern Railway Company. At Richmond it is transferred to the Chesapeake & Ohio Railroad and goes over that road to Williamsburg. There is a car of freight from Greensboro to Richmond each day; but, if freight is delivered at the station at Greensboro too late to take that train, it remains until the next day before it is forwarded. Danville is an intermediate point between Greensboro and Richmond, and freight for Williamsburg would have to be transferred at Danville. It would also have to be transferred at Richmond from the Southern Railway Company to the Chesapeake & Ohio. The plaintiff had sold these trees for \$908.08 and sued for that amount.

On the 25th of October, plaintiffs delivered to the defendant certain fruit trees and nursery stock consigned to Jno. A. Young's agent for shipment by freight over its own and connecting lines to Tappahannock, Va., a town on the Rappahannock river, not on a railroad line. The trees arrived at Tappahannock on the 12th day of November, 18 days after the date of the bill of lading. The plaintiff's agent called for them and accepted them, but found they were damaged so that about one-fourth were unfit for delivery. Plaintiff had sold the whole shipment for \$287.17 and sued for \$108.15 as the amount of his loss on account of the damaged trees. Freight from Greensboro for Tappahannock goes over the Southern Railway via Danville to Richmond. There it is transferred to the Richmond, Fredericksburg & Potomac Railroad and is carried over that road to Fredericksburg, from there to Tappahannock. The freight is carried by boat, which runs twice a week.

In making each of said shipments, the plaintiffs, in order to secure prompt service and delivery of the said freight so delivered to the defendant for shipment, paid to the defendant a higher rate of freight than it was necessary to pay if the plaintiffs had been willing to contract for the delivery of the freight to the defendant railway company marked, "Released." By reason of the delay on the part of the defendants in the Tappahannock shipment, plaintiffs were put to an additional expense in delivering the goods of \$108.52. The shipment to Williamsburg was never delivered to the plaintiff, although the agents waited for it at Williamsburg until the 5th of November, at which time the defendant's agents would not advise them when the trees would arrive, and they had no reason to expect that they would arrive on any certain subsequent date. The plaintiff, having other engagements to meet other shipments in that territory, left Williams-

burg on the 5th of November. When the trees did arrive, they were of no value whatsoever to the plaintiff, who was forced to fill his orders at Williamsburg by an extra order sent by express. Freight shipped from Greensboro to Williamsburg was routed to Richmond, Va., 180 or 190 miles from Greensboro. A through car of freight from Greensboro to Richmond is made up each day, and freight loaded one day in Greensboro ought to reach Richmond the evening of the next day. The railroad company required the plaintiff to guarantee the payment of the freight on each of these shipments.

The following verdict was returned by the jury:

(1) Did the defendant fail to transport the property of the plaintiff from Greensboro to Williamsburg, Va., within a reasonable time? Answer: Yes.

(2) Was the property of the plaintiff injured by reason of said failure of the defendant to transport within a reasonable time? Answer: Yes.

(3) What damage, if any, has plaintiff sustained? Answer: \$908.08 without interest.

(4) Did the defendant fail to transport the property of the plaintiff from Greensboro to Tappahannock, Va., within a reasonable time? Answer: Yes.

(5) Was the property of the plaintiff injured by reason of the failure of the defendant to transport said property within a reasonable time? Answer: Yes.

(6) What damages, if any, has plaintiff sustained? Answer: \$108.02 without interest.

Willson & Ferguson, for appellant. Justice & Broadhurst, for appellees.

ALLEN, J. [1] There are 14 assignments of error, 6 of which relate to the rulings on the evidence, and of these, with possibly one exception, the same witness had, before the exception was taken, testified to the fact admitted or excluded, and therefore, if error was committed, which we do not find to be so, the defendant was not prejudiced thereby.

[2] The assignment of error which may be an exception is to a part of the evidence of one of the plaintiffs, John A. Young. He testified, among other things, in reference to the Williamsburg shipment: That he had orders from customers for both shipments; that the orders were obtained by traveling men on salary with their expenses paid; that W. J. Thompson had interest in the money collected in both cases; that the goods shipped to Williamsburg had been sold for \$908.08; that the interest would run from November 2, 1907; that none of the Williamsburg shipment was delivered; that he had a conversation with Mr. Devlin, the agent of the defendant, about the shipment to Williamsburg, and told him that it had not arrived and asked him to look it up, and that if he did not get it promptly in good



condition that he would refuse the shipment, and he replied that he would have it looked up at once; that that was on the 2d or 3d day of November, 1907, and was then asked the following question: "Q. What date were your customers to be there to receive these goods? A. At Williamsburg on November 2d." We think this evidence was competent to meet one of the contentions of the defendant, that the plaintiffs were negligent in not being ready to receive the trees at Williamsburg, and particularly so as it introduced one of the orders for trees of a customer of the plaintiffs requiring the trees to be delivered at Williamsburg in October, November, or December, 1907, and notice to be given by mail of date of delivery.

[3, 4] The defendant also excepted to the following portions of the charge:

"(1) If the plaintiff called for them, called for them within a reasonable time, and made a reasonable effort to receive them if they reached there within a reasonable time, then he was not required to stay there until they did come, unless he had some notice as to when they would arrive; but if he made a reasonable effort to get them, and they did not arrive within a reasonable time, and they were lost to him on that account, then he would be entitled to recover damages, but otherwise he would not be.

"(2) So if you answer the first issue and the fourth issue, that is, the issue as to the reasonable time, if you answer that, 'Yes,' you will go to the next issue, 'Was the property of the plaintiff injured by reason of said failure of the defendant to transport within a reasonable time?' And if you answer that, 'Yes,' you will go to the last issue and answer, 'What damages, if any, has the plaintiff sustained?' If you answer the first issue, 'No,' you need not go any further, but return your verdict, and the same rule applies to the fourth, fifth, and sixth issues, that is, as to the Tappahannock shipment."

The criticism of the first part of the charge set out, as shown in the brief of the appellant, is: "That his honor should have charged the jury that, even if the goods did not arrive within a reasonable time, it was the duty of the plaintiff to remain at Williamsburg a reasonable length of time, or to have made arrangements with some other person to receive and examine the goods when they did arrive, in order to mitigate, if possible, the damages. He should have further given to the jury the converse of the proposition, and stated that if the plaintiff did not call for the goods within a reasonable time, and did not make a reasonable effort to receive them if they had reached there within a reasonable time, he would not be entitled to recover damages."

We think the converse of the affirmative charge was given in the language, "but oth-

erwise he would not be," which can only mean that, if the plaintiff did not call for the trees within a reasonable time and did not make a reasonable effort to receive them, the defendant would not be liable, and the charge also presents the view of the defendant that it was the duty of the plaintiff to use reasonable effort to receive the trees.

We can see no possible objection to the other portion of the charge. It is no more than an explanation to the jury of the relation of the issues to each other.

[5] The remaining assignments are to the failure to state to the jury any rule as to the measure of damages, and this would be fatal and would entitle the defendant to a new trial, if it did not appear from the record that there was no controversy between the parties as to the true rule, and that they agreed in the presence of the jury, and with the sanction of the court, as to what it was.

The record states that during the trial, in the presence of the jury, when the plaintiff was offering evidence as to damages, the counsel for the defendant objected to the evidence and stated the rule as to damages to be the difference in value between the price at which the goods were sold, or rather the market price of the goods when delivered to defendant, and the actual value at the time they were alleged by plaintiff to have been damaged by the negligence of the defendant. The court stated that it so understood the rule as to damages, and thereupon the counsel for the plaintiff said he would agree that that was the rule, and the court said, "Let that be understood," and the argument was conducted accordingly.

The jury could not have been misled when the agreement was made before them, and the court said, "Let that be understood as the rule of damages."

Upon an examination of the record, we find no error.

No error.

(157 N. C. 137.)

# RED SPRINGS HOTEL CO. v. TOWN OF RED SPRINGS et al.

(Supreme Court of North Carolina. Nov. 22, 1911.)

## 1. MUNICIPAL CORPORATIONS (§ 918\*)—BONDS—STATUTES—REFERENDUM.

Under Priv. Acts 1911, c. 170, authorizing a city to issue bonds for waterworks and sewerage system, and declaring in its preamble that such improvements were a necessary public expense, which had also been declared by the municipal authorities, bonds issued for that purpose were not invalid, because not authorized by a referendum vote.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

## 2. MUNICIPAL CORPORATIONS (§ 907\*)—BONDS—STATUTES—INTEREST.

Priv. Acts 1911, c. 170, providing for the issuance of waterworks and sewerage bonds by

a city to bear interest at a rate "not more than six per cent.," and giving the board of public works and board of commissioners power to fix the rate when the bonds are sold, not exceeding 6 per cent., was not objectionable for failure to definitely fix such rate.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1895; Dec. Dig. § 907.\*]

**3. MUNICIPAL CORPORATIONS (§ 931\*)—BONDS—INSUFFICIENCY OF TAX LEVY TO PAY.**

That the special tax rate prescribed by Priv. Acts 1911, c. 170, for the payment of municipal bonds authorized thereby, would be insufficient to pay the annual interest on the bonds, and to provide a sinking fund therefor, did not invalidate the issue.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1944-1947; Dec. Dig. § 931.\*]

**4. MUNICIPAL CORPORATIONS (§ 931\*)—BONDS—STATUTES.**

That Priv. Acts 1911, c. 170, authorizing a city to issue bonds for sewerage and waterworks, left the division of the proceeds of the sale of the bonds between the two works to the discretion of the municipal authorities was not a valid objection to the validity of the bonds.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1944-1947; Dec. Dig. § 931.\*]

**5. MUNICIPAL CORPORATIONS (§ 907\*)—BONDS—STATUTES—REPEAL.**

Priv. Acts 1911, c. 170, authorizing a specified city to issue bonds to pay for sewerage and waterworks, was not affected by a subsequent general act (Pub. Laws 1911, c. 86), intended to give all cities and towns without further legislation power to issue bonds for purposes therein named, when approved by a majority of the qualified voters; the Legislature being authorized to require the referendum vote, or to dispense with it, in so far as the issuing bonds for necessary expenses is concerned, in its discretion.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1895; Dec. Dig. § 907.\*]

Appeal from Superior Court, Robeson County; Carter, Judge.

Action by the Red Springs Hotel Company against the Town of Red Springs and others, to enjoin a bond issue. Judgment for defendants, and plaintiff appeals. Affirmed.

This is a controversy, without action, submitted to the court under the provisions of section 803 of the Revisal of 1905.

The board of commissioners of the town of Red Springs having declared by resolution that a system of waterworks and sewerage was an absolute and imperative public necessity for the town, an act was duly introduced in the Legislature of North Carolina, session of 1911, authorizing said town to issue bonds to the amount of \$35,000, bearing interest at a rate not exceeding 6 per cent., and maturing not later than 30 years from date of issue, and authorizing the levy of a special tax of 35 cents on the \$100 valuation of property, and \$1.05 on each taxable poll, to pay interest and provide a sinking fund for the retirement of said bonds at maturity.

This act was passed by the General Assembly of North Carolina, and appears as chapter 170, Private Acts of North Carolina, session of 1911. A board of public works for the town of Red Springs was created by said act to handle the funds and to perform certain other duties therein specified.

The board of public works of said town first advertised the issue at 5½ per cent. interest, and bonds bearing interest at this rate were advertised and sold. The purchaser failed to comply with his bid, and thereupon bonds bearing interest at 6 per cent. have been advertised and contracted to be sold. It is admitted that, unless the defendants are restrained, they will proceed to sell the bonds and levy the special tax, as provided by said act of 1911.

The plaintiff is a corporation owning property in the town, and brought this action to restrain the issue of the bonds and the collection of the tax.

The cause was heard before his honor, Judge Frank Carter, at November term, 1911, of the superior court of Robeson county, and from a judgment in favor of the defendants the plaintiff excepted and appealed to this court.

McIntyre, Lawrence & Proctor, for appellant. McLean, Varner & McLean, for appellees.

BROWN, J. The plaintiff bases its claim for injunctive relief upon five propositions:

(1) That chapter 170 of the Private Acts of North Carolina, session of 1911, was not enacted by the General Assembly in accordance with the provisions of the Constitution of North Carolina; and hence the town of Red Springs has no legal authority to issue said bonds, or to collect any tax whatever on account thereof. This contention cannot be sustained. A transcript of the entries upon the journals of both houses of the General Assembly are set out in the record, and show that the ayes and noes were duly called and entered, and the bill enacted into law in strict accordance with the Constitution.

[1] (2) That the town of Red Springs has no power to issue said bonds or to collect any tax whatever on account thereof, for that said bonds were not authorized by a vote of the qualified voters. The purpose of the bonds is to secure for the municipality a system of waterworks and sewerage. This is declared by the Legislature in the preamble to the act to be a necessary expense, as well as by the municipal authorities. The question has also been repeatedly decided by this court adversely to plaintiff's contention. *Fawcett v. Mt. Airy*, 134 N. C. 125, 45 S. E. 1029, 68 L. R. A. 870, 101 Am. St. Rep. 825; *Davis v. Fremont*, 135 N. C. 538, 47 S. E. 671; *Hightower v. Raleigh*, 150 N. C. 569, 65 S. E. 279; *Water Co. v. Trustees*, 151 N. C. 175, 65 S. E. 927; *Bradshaw v. High*

Point, 151 N. C. 517, 66 S. E. 601; Underwood v. Asheboro, 152 N. C. 641, 68 S. E. 147.

[2] (3) That chapter 170 of the Private Acts of North Carolina, session 1911, does not definitely fix the rate of interest to be borne by said bonds, but leaves the rate of interest to the discretion of the board of commissioners and board of public works of said town; and hence said act is null and void, and no authority is conferred upon the town of Red Springs to issue said bonds, or to levy any tax on account thereof. This contention cannot be sustained. The purpose of the Legislature in providing that the bonds should bear interest at a rate of "not more than six per cent. (6%)" was to give the town authorities discretion to sell the bonds to bear a rate of interest most advantageous to the town, not exceeding, in any event, 6 per cent. By section 5 of the act above referred to, discretion is given to the board of public works and board of commissioners of the town to fix the rate when the bonds are sold, not exceeding 6 per cent. The point is expressly decided in *Lumberton v. Nuveen*, 144 N. C. 303, 56 S. E. 940.

[3] (4) That the rate of tax to be levied to pay principal and interest on said bonds upon the valuation of property in the town of Red Springs as now constituted is not a sufficient special tax to provide for the payment of principal and interest at maturity, and for that the defendants have no power to levy any larger tax than 35 cents on the \$100 valuation of property and \$1.05 on each taxable poll; this being the rate of special tax provided in the act authorizing the issue of said bonds. The same point was presented and decided by this court in *Lumberton v. Nuveen*, 144 N. C. 303, 56 S. E. 940, wherein it is said: "It is contended that the rate of taxation levied by the plaintiff's commissioners in their orders will be insufficient to pay the annual interest and to provide a sinking fund. This cannot invalidate the legality of the bond issue." *Underwood v. Asheboro*, supra; *Jones v. New Bern*, 152 N. C. 64, 67 S. E. 173. In the latter case this court said: "The alleged failure to provide a sinking fund for payment of principal or special tax for payment of interest does not affect the legality of the bonds, but only the means and methods of payment." The Legislature can and doubtless will, if necessary, authorize an increase in the tax rate; or that may be unnecessary, owing to the growth of the town and increase in taxable property. It is well known that Red Springs is a growing town, and inhabited by a remarkably thrifty, industrious, and high-class citizenship. Doubtless in a short time a fair valuation of the property at the rate authorized by the Legislature will yield ample income to meet the provision for both interest and sinking fund.

[4, 5] (5) That bonds for the creation of

a system of waterworks and bonds for the creation of a system of sewerage are to be issued for two distinct and separate objects; and for that bonds to provide funds for both purposes cannot be issued in one series, and part of the proceeds used for waterworks and another part for sewerage; and for that two purposes are joined in one issue of bonds, and that this cannot be done, especially in view of the fact that there is no method or proportion to be followed in the division of the funds between the two objects. Of necessity, the division of the proceeds of the sale of the bonds between sewerage and waterworks must be left to the discretion of the municipal authorities, as the one may cost more than the other, and the exact cost of each could not well be determined by the Legislature. The point is decided in the *Nuveen Case*, supra. Our judgment is that the bonds are a valid obligation of the defendant town.

Our attention has been called to act of the General Assembly of 1911 (Public Laws; c. 86). That act is a public law, intended to give all cities and towns, without further legislation, power to issue bonds for the purposes therein named, when approved by a majority of the qualified voters. It was ratified March 4, 1911, and the act amending the Red Springs charter was ratified February 27, 1911. The latter is a private act and well within the power of the General Assembly to enact. We have held that in respect to issuing bonds for *necessary expenses* the General Assembly may require the approval of a majority of the qualified voters, and also it may, by special acts, as in this case, not require it.

We are of opinion that the act of assembly (chapter 86, Public Laws 1911) does not affect the powers conferred by the amendment to the charter of Red Springs (Private Acts 1911, c. 170).

The judgment of the superior court is affirmed.

(157 N. C. 126)

HOPPER v. S. S. ORDWAY & SONS et al.  
(Supreme Court of North Carolina. Nov. 22, 1911.)

1. MASTER AND SERVANT (§ 316\*)—INDEPENDENT CONTRACTOR—CONSTRUCTION CONTRACT—CONTROL OR INTERFERENCE OF EMPLOYER.

A contractor for the construction of a mill according to plans and specifications prepared by the employer, who furnishes labor and materials and exercises control as to the method of the work, but who is to increase his force to complete the work within a certain time if required by the engineer of the employer on penalty of forfeiture of his contract, whose compensation is determined by estimates made by the engineer, and who is required to do the work in full accordance with the directions and instructions of the engineer on penalty of a forfeiture of his contract, is an independent contractor, for whose negligence, resulting in

the death of an employé, the principal employer is not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.\*]

**2. MASTER AND SERVANT (§ 318\*)—INDEPENDENT CONTRACTOR—CONTROL OR INTERFERENCE OF EMPLOYER.**

Neither a reservation by an owner of the right to supervise work done under a contract, for the purpose merely of determining whether it conforms to the contract, where it involves merely his approval or disapproval of the results of the work, and not directions as to the mode of attaining such results, nor a provision in the contract that the work shall be done under the direction and to the satisfaction of a representative of the owner, nor that the contract provides that the owner shall, during the progress of the work, define and direct its scope, will make the contractor a servant of the owner, so as to render the owner liable for the contractor's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257-1258; Dec. Dig. § 318.\*]

Appeal from Superior Court, Rockingham County; W. J. Adams, Judge.

Action by W. A. Hopper, personal representative of a decedent, against S. S. Ordway & Sons and the Avalon Mills. Verdict for plaintiff only against Ordway & Sons, discharged bankrupts, but without judgment, and plaintiff appeals. No error.

This is an action to recover damages for the death of the plaintiff's intestate, caused, as the plaintiff alleges, by the negligence of the defendants. The plaintiff was aiding in building the foundation of the mill of the defendant, Avalon Mills, at the time of his injury, and there is ample evidence of negligence. The defendant Avalon Mills denies negligence, and alleges that the work was being done by the defendants Ordway & Sons, as independent contractors, and the defendant's counsel say that the only question presented by the 11 assignments of error is whether or no S. S. Ordway & Sons are independent contractors.

There are three paper writings, which constitute the contract between the defendants. The first is entitled, "Specifications for Constructing the Masonry Abutment and Head Gates for the Avalon Mills at Mayodan, N. C.," and all specifications relate wholly to the material to be used, except the fourth, seventh, eighth, and ninth, which are as follows:

"(4) Mortar shall be composed of two parts clean sharp sand and one part of Rosendale cement of such brand as the engineer may approve, and mixed and used in such manner as he may direct."

"(7) Coping and arch masonry, should any be required, is not to be included in this work, but may be furnished by the company and set in place by the contractor at a fair price to be determined by the engineer."

"(8) The work shall be begun within ten

(10) days from the time of award of the contract, and be finished and completed within four (4) months thereafter. Should the contractor not prosecute the work with such vigor as to indicate the completion of the work within the time specified, he must increase the force and equipment to such extent as the engineer may deem necessary to complete the work within the prescribed time, or suffer the penalty of a forfeiture of his contract and all the moneys that may be due him upon the work at such time as the right may be exercised by the company, party of the second part, viz., the Avalon Mills.

"(9) At the end of each thirty (30) days after the work is begun, the engineer shall measure up all the finished work, and make due and proper safe allowance for unfinished work, and render an estimate of the amount due the contractor for such work, which amounts shall be paid to him, less ten (10) per cent., which shall be held until the final completion of the work by the contractors."

The second is entitled, "Specifications for Constructing the Head Race or Canal for the Avalon Mills Company, at Mayodan, N. C.," and contains detailed statements as to how the work shall be done, and, among others, the following provisions: "Should the contractor not prosecute the work with such vigor as to indicate the completion of the work within the time specified, he must increase the force and equipment to such an extent as the engineer may deem necessary to complete the work within the prescribed time, or suffer the penalty of a forfeiture of his contract and all his money that may be due him upon the work at such time as this right may be exercised by the company, party of the second part, viz., the Avalon Mills. \* \* \* The entire work shall be done in full accordance with the directions and instructions of the engineer or his assistant, and a failure on the part of the contractor to observe and well and truly carry out the work in accordance with the instructions of the engineer or his assistant, shall be deemed sufficient cause for the exercise of his forfeiture clause set forth in section eight (8) by the said Avalon Mills."

The third is entitled, "Specifications to Accompany Plans of Dam, Bulkhead Gates and Spillway for the Avalon Mills, all made for same by C. R. Makepeace & Co., Mill Engineer, Providence, R. I., Aug. 5, 1899," and, after specifying how the work shall be done, says: "In the foregoing specifications it is intended to enumerate all of the leading particulars in the erection and finishing of all this work, and it is understood by the contractor that the same is to be finished complete to the intent and meaning of these specifications and the plans and details, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

all materials and workmanship connected with this work must be entirely satisfactory to C. R. Makepeace & Co., or the engineer or superintendent in charge of the work. It is understood by the contractor that should any difference of opinion arise, respecting said workmanship, work or materials, or any other matter whatsoever relative to the erection and finishing of this work, between the contractor and owners, such difference shall be submitted to C. R. Makepeace, and his decision thereon shall be final and conclusive between both parties, and it is so understood and agreed by said parties."

It was in evidence that one of the workmen went to Avalon, where the work was being done, upon a telegram sent by the superintendent of the defendant mills; but the superintendent testified that he sent the telegram at the request of Ordway & Sons, who needed a mason, and because they were not acquainted at the place where the mason lived.

The plaintiff contended that, upon the face of the papers, Ordway & Sons were not independent contractors, and requested the judge to so charge the jury, and, upon his refusal to do so, excepted.

There was a verdict against Ordway & Sons, but no judgment upon the verdict because of their discharge in bankruptcy.

There is no claim that Ordway & Sons were not responsible parties at the time the contracts were made.

The plaintiff excepted and appealed.

C. O. McMichael and H. R. Scott, for appellant. Johnston, Ivie & Dalton and Manly, Hendren & Womble, for appellee S. S. Ordway & Sons.

ALLEN, J. (after stating the facts as above). [1] The case of Denny v. Burlington, 155 N. C. 33, 70 S. E. 1085, is decisive of this controversy, and upon that authority, in the absence of other evidence, his honor might have held as matter of law, upon the papers in evidence, that the relation of independent contractor was established.

In the Denny Case, the city of Burlington entered into a contract for the construction of a system for water and sewerage, in which the details as to material, the work to be performed, and the time of performance were set out with particularity, and it was also provided that the materials furnished and the labor done should be done "in accordance with the specifications and plans, and the instructions to bidders and the proposal and such detailed directions, drawings, etc., that may be given by the engineer from time to time during the construction, and in full compliance with this agreement," and that, "to prevent all dispute and litigation, it is agreed by and between the parties to this contract that the engineer shall in all cases determine the quality and quantity of the several kinds of work which are to be paid

for under this contract, and his decisions shall be final and conclusive, and he shall determine all questions in relation to lines, levels and dimensions of the work and as to the interpretations of the plans and specifications. The committee, through the engineer, shall have the right to make any alterations in the plans or quantity of the work herein contemplated, and it is expressly agreed and understood that such alterations, additions, modifications or omissions shall not in any way violate this contract, and the contractor hereby agrees not to claim or bring suit for any damages, whether loss of profit or otherwise. \* \* \* Whenever the contractor is not on any part of the work where it is desired by the engineer to give instructions, the superintendent or foreman, who may be in charge of that particular part of the work, shall receive and obey said instructions from the engineer. \* \* \* But no work other than that included in the contract, shall be done by the contractor without a written order from the engineer. \* \* \* The contractor further agrees that if the work to be done under this contract shall be abandoned, or if the contract shall be assigned by said contractor, otherwise than herein provided, or if at any time the engineer shall be of the opinion, and shall so certify in writing to said committee, that the said work is unnecessarily or unreasonably delayed, or that the said contractor is willfully violating any of the terms or conditions of this contract, or is not executing this contract in good faith, or is not making such progress in the executing of said work as to indicate its completion within the time specified, said committee shall have the right to notify said contractor to discontinue all work or any part thereof under this contract, and upon such notification said contractor shall discontinue said work, or such parts thereof as said committee may designate; and said committee shall thereupon have the power to employ by contract, or otherwise, and in such manner and at such prices as it may determine, any persons, etc., which it may deem necessary to work at and be used to complete the work herein described, or such part of it as said committee may have designated." The engineer was appointed by the defendant, and it was held that the person with whom the contract was made was an independent contractor.

It will be observed that not only were the materials to be furnished and the labor to be done, subject to the supervision of the engineer of the defendant, but in accordance with his instructions, and that the defendant reserved the right of inspection and the right to terminate the contract. There are also other provisions extending the authority of the defendant beyond the powers conferred on the Avalon Mills in this case.

The citation from A. & E. Enc. vol. 16, p. 190, that "the fact that the employer may at any time terminate the employment,

though strong evidence that the employé is a mere servant, is not conclusive in that regard," is not, in our opinion, applicable to the contract under consideration, because under that contract there is no absolute right to terminate the contract at any time, but to put an end to it, if the contractor is not performing it according to the stipulations, which is reasonable and necessary.

[2] The same author, on pages 188 and 189, states with accuracy the prevailing rule as to the right to exercise supervision. He says: "A reservation of the employer of the right by himself or his agent to supervise the work, for the purpose merely of determining whether it is being done in conformity to the contract, does not affect the independence of the relation. The fact that the work is to be supervised by an architect representing the owner is also immaterial if this involves merely his approval or disapproval of the results of the work, and not directions as to the mode of arriving at such results. And it has been held that a provision that the work shall be done under the direction and to the satisfaction of a representative of the employer does not make the employé a mere servant, but that such a provision is merely to secure a satisfactory performance of the work in compliance with the contract. Nor is it material that the contract provides that the employer shall, during the progress of the work, define and direct the scope thereof."

His honor, instead of deciding the question as matter of law, submitted it to the jury in a charge, which is full, clear, and accurate, and which might be copied as a correct summary of the law, in determining when one is an independent contractor, and, the jury having decided against the plaintiff, there is nothing, upon the appeal, of which he can complain. It is to be regretted that he has a barren recovery for a death caused by negligence; but this consideration will not justify fixing responsibility on a party who is not liable.

We find no error.

No error.

(157 N. C. 156)

**VAUGHAN & BARNES et al. v. DAVENPORT.**

(Supreme Court of North Carolina. Nov. 22, 1911.)

**PARTIES (§ 6\*)—CONTRACTS—ACTIONS FOR BREACH—REAL PARTY IN INTEREST.**

Under Revisal 1905, § 400, requiring the prosecution of every action in the name of the real party in interest, a buyer and his assignee of the contract to purchase may not sue for the seller's breach, where the right to demand the goods or damages for nondelivery had passed to a third person by an assignment, prior to the date when the goods were deliverable under the contract.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 6-8; Dec. Dig. § 6.\*]

Appeal from Superior Court, Pitt County; Ferguson, Judge.

Action by Vaughan & Barnes and Moseley Bros. against J. R. Davenport. From a judgment for plaintiffs, defendant appeals. Action dismissed.

Aycock & Winston and F. G. James & Son, for appellant. Jacob Battle and Moore & Long, for appellees.

CLARK, C. J. In 1909, the defendant entered into a contract with Moseley Bros. to deliver to them 100 bales of merchantable cotton at the warehouse in Pactolus, under the terms of the contract which is set out in the record. Thereafter Moseley Bros. transferred and assigned the contract to Vaughan & Barnes. This action is brought by them jointly, to recover damages by reason of the failure of the defendant to comply with this contract.

The plaintiffs put in evidence a letter from Vaughan & Barnes, dated November 22, 1909, in which they notified the defendant that they had sold said cotton to Messrs. Hogan & Co., cotton buyers and exporters, and added, "We want to know by return mail what you propose to do in order that we may be able to tell the buyer here when he may expect delivery of this 100 bales of cotton in question." There was no evidence offered to show that the cotton had been resold to the plaintiffs.

The motion of the defendant for nonsuit should have been granted, on the ground that "the evidence disclosed that the plaintiffs were not the owners of the claim sued on." Chapman v. McLawhorn, 150 N. C. 163, 63 S. E. 721, and numerous cases there cited. Rev. 400 is explicit: "Every action must be prosecuted in the name of the real party in interest." The plaintiff's evidence showed that the right to demand this cotton, or damages for its nondelivery, had passed to Hogan & Co. by their assignment, prior to the date when it was deliverable. The plaintiffs are neither legal nor equitable owners of the contract; nor are they trustees of an express trust. They have "sawed the limb off between themselves and the tree."

Action dismissed.

(156 N. C. 422)

**MOORE v. WESTBROOK.**

(Supreme Court of North Carolina. Nov. 9, 1911.)

**1. PARTNERSHIP (§ 75\*)—MUTUAL RIGHTS—INTEREST ON PROFITS AND ADVANCEMENTS.**

Where one member of a firm had possession of all its moneys, but did not agree to pay interest thereon, another member whose land was used by it was not, until dissolution, entitled to interest either upon the amount due him for rent or the undivided profits; the rule being particularly applicable in the case of

profits which cannot be ascertained until after dissolution.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 120-123; Dec. Dig. § 75.\*]

**2. LIMITATION OF ACTIONS (§§ 29, 53\*)—PERSONAL ACTIONS—PARTNERSHIP—ADVANCEMENTS.**

Where a partnership was dissolved in 1899, and no debts remained to be collected or paid, the claim of one partner against his copartner for advancements to the firm will be barred in 1911 by the statute of limitations which began to run immediately upon dissolution.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. §§ 29, 53.\*]

**3. LIMITATION OF ACTIONS (§ 195\*)—PLEADING—BURDEN OF PROOF.**

A plea of the statute of limitations casts the burden upon the plaintiff to prove that his cause is not barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711-716; Dec. Dig. § 195.\*]

**4. APPEAL AND ERROR (§ 719\*)—ASSIGNMENTS OF ERROR—REFERENCE—FINDINGS—EXCEPTIONS.**

An exception to the refusal of the court to overrule a finding of fact made by the referee, and excepted to on the ground that there was no competent evidence on which to base it, will not be considered on appeal in the absence of an assignment of error that incompetent evidence was admitted, for, if the appellant wished to prove this exception, he should have excepted to the admission of the evidence before the referee and to the finding of fact, and, having had these exceptions passed on by the trial judge, embraced them in his assignments of error on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 719.\*]

**5. APPEAL AND ERROR (§ 1022\*)—REVIEW—FINDINGS—REFERENCE.**

Where there is any evidence to justify a finding by the referee, the action of the trial court in refusing to overrule the finding will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.\*]

**6. REFERENCE (§ 105\*)—COMPULSORY ORDER—SUBMISSION OF ISSUES TO JURY.**

Where plaintiff excepted to a compulsory order of reference, reserving his right to jury trial, defendant cannot object that the judge upon the demand of plaintiff submitted the issues to a jury.

[Ed. Note.—For other cases, see Reference, Dec. Dig. § 105.\*]

**7. REFERENCE (§ 105\*)—REPORT—DETERMINATION BY JURY.**

Upon the coming in of a report under a compulsory reference, the issues should be determined by the jury on the evidence before the referee, but, if an amendment of the pleadings is allowed after the report, the parties should be allowed to offer evidence upon the matters embraced in the amendment.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 205; Dec. Dig. § 105.\*]

**8. APPEAL AND ERROR (§ 1056\*)—REVIEW—HARMLESS ERROR—EVIDENCE.**

In an action between two members of a dissolved partnership, where plaintiff, after the coming in of a report upon a compulsory reference, was allowed to amend his complaint so as to embrace new charges, the exclusion of defendant's evidence upon these charges was

not prejudicial, where they were held by the court to be barred by the statute of limitations.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.\*]

Appeal from Superior Court, Pender County; Peebles, Judge.

Action by J. B. Moore against J. A. Westbrook. There was a judgment for plaintiff to which each party excepted, and from which they prosecuted separate appeals. Affirmed on both appeals.

The summons in this action was issued on the 23d day of August, 1907.

The plaintiff filed his complaint on the 18th day of December, 1907, in which he alleged:

(1) That he and the defendant and one S. W. Troublefield on or about the ——— day of ———, A. D. 1892, formed a copartnership for the purpose of growing truck and other produce for market, the agreement being that the said J. B. Moore was to furnish the land for said copartnership at and for the price of \$7 per acre per year, and to pay one-third of the expenses and to receive one-third of the profits, and the said J. A. Westbrook was to pay one-third of the expenses and receive one-third of the profits, and the said S. W. Troublefield was to be paid the sum of \$16.50 as a salary for his time not taken by the firm of J. A. Westbrook & Co., one-third of said salary to go as his part of the expenses of said firm, and to receive one-third of the profits, said firm to operate under the firm name of Westbrook, Moore & Co., which said firm continued in active business up to and including the year 1899, when it ceased active business.

(2) That during all the years the said firm was actively engaged in said business the defendant kept the books of account of the said firm, and received all the moneys coming to said firm, and now has them in his possession.

(3) That from the time of the organization of said firm, and for each year it did business, the said firm was prosperous and made a considerable profit from said business, having used 17½ acres of land furnished by the plaintiff at the rate of \$7 per acre, and said firm has never paid the plaintiff the rent due for the said land.

(4) That during all the years the said firm did business, and up to the present the defendant has had the use of the money belonging to the said firm, and has used the same for his profit and gain, and, though the said firm ceased active business in the year 1899, the affairs of the said firm have not been settled up between the partners, though all the debts have long since been paid, except the rent money due this plaintiff, and this plaintiff has demanded of the defendant a settlement of the said firm's affairs and a payment to him of his share of the profits

of the said business, but the defendant has failed and refused to settle with the plaintiff, though he has repeatedly promised to do so.

(5). That the plaintiff verily believes that his share of the profits of the said business for the said years amounts to the sum of \$2,700, if not more, the exact amount thereof this plaintiff cannot say, for the reason that the books of account of said business and the money is now and always has been in the hands of the defendant, and this plaintiff has not had access to the same.

The defendant answered, admitting the partnership on the terms alleged, and its dissolution in 1899, and denying any liability for rents, or that there were any profits made by the partnership. At January special term, 1910, an order of reference was made, the defendant not excepting thereto, and to which the plaintiff excepted, reserving the right to have the issues of fact tried by a jury.

The referee filed his report on the 23d day of September, 1910, as follows:

"(1) That the plaintiff, J. B. Moore, the defendant, J. A. Westbrook, and one S. W. Troublefield did, in the early part of the year 1892, form and enter into a copartnership for the purpose of growing truck and other produce for market on the terms and conditions set out in the first paragraph of the complaint and admitted in the answer.

"(2) That, pursuant to said copartnership agreement, work was begun about February, 1892, the several parties complying with their respective parts of the partnership contract set up in the first paragraph of the complaint and admitted in the answer.

"(3) That the copartnership began to ship strawberries in the spring of 1893, and continued in business without interruption until the close of the strawberry season in 1899, to wit, on or about the 1st of June, 1899.

"(4) That beginning with the year 1893 the partners met from time to time after the close of the shipping seasons, and went over the business for the past year.

"(5) That at these several meetings all the parties were present with their books, papers, and records, at which times they ascertained the net results of the respective years in dollars and cents, showing profits or loss, as the case might be, and how much.

"(6) That, according to the terms of the agreement between the copartners, Mr. J. A. Westbrook, the defendant, was to receive the moneys derived from the sale of produce, and did receive them, and Mr. Troublefield and Moore to keep the expense account.

"(7) That at these annual meetings every item of expense connected with the conduct of the business was considered and added together, and the sum total was deducted from the total receipts, showing the net profit or loss, as the case happened to be.

"(8) That after deducting the total ex-

penses incurred in the conduct of the business, the copartners, operating under the firm name of Westbrook, Moore & Co., made the following profits for the respective years:

1893 .....	\$426 00
1894 .....	546 00
1895 .....	486 00
1896 .....	552 87
1899 .....	195 87

Making a total of.....\$2,206 74

"But that no money was paid to plaintiff on account of said profits except \$14.70.

"(9) That after considering all expenses and receipts for the years 1897 and 1898 combined, the copartnership lost during these two years about \$657.81.

"(10) That the plaintiff, J. B. Moore, was entitled to one-third of the profits, and was chargeable with one-third of the loss of said copartnership.

"(11) That no final settlement or accounting has been had among said copartners."

#### Conclusions of Law.

Upon the foregoing "findings of fact." the referee draws the following conclusions of law:

"(1) That the contract made and entered into by the plaintiff, J. B. Moore, the defendant, J. A. Westbrook, and one S. W. Troublefield, as set forth in the first allegation of the complaint, was a copartnership contract.

"(2) That such a contract is lawful, and contains nothing illegal, immoral, oppressive or contrary to public policy, and that said contract was binding upon all parties thereto.

"(3) That the defendant, J. A. Westbrook, stood in a fiduciary capacity with respect to his copartners, plaintiff, J. B. Moore, and S. W. Troublefield, which relationship imposed upon him the burden of a strict accounting to his copartners, plaintiff, J. B. Moore, and S. W. Troublefield, for all funds coming into his hands in such capacity.

"(4) So that the referee recommends that the plaintiff recover judgment against the defendant for \$735.58, being one-third of the total amount of profits made by the copartnership during its existence, less \$219.27, being the plaintiff's share of the loss for the years 1897 and 1898, and \$9.80, being two-thirds of the check for \$14.70 not heretofore accounted for. That is to say, that plaintiff is entitled to recover judgment against the defendant for the net sum of \$506.51, together with the costs of this action.

"(5) Considering this case in the light of all circumstances, the referee recommends that the plaintiff should not recover any interest on the amount due, except from the date of summons, August 23, 1907.

"Respectfully submitted, this the 23d day of September, A. D. 1910.

"R. W. Herring, Referee."

Both parties filed exceptions to the report, and the plaintiff demanded a jury trial.



The exceptions of the defendant were as follows:

As to findings of fact:

"(1) To finding of fact No. 6, for that it appears from the plaintiff's own evidence that plaintiff, Moore, and one S. W. Troublefield, received some of the moneys derived from the sale of produce by said firm.

"(2) To finding of fact No. 8, for that there is no competent evidence upon which to base said finding.

"(3) To finding of fact No. 11, for that the testimony of the plaintiff and the witness Troublefield shows a settlement to have been made with the defendant.

"(4) To the above referred to finding of fact No. 8, for that the same is so vague and indefinite as to amount to no finding in law, in so far as it is attempted to find that any profits were made by the said firm."

As to conclusions of law:

"(1) To conclusion of law No. 4, if the same shall be considered by the court to be a conclusion of law, for that the same is based upon findings of fact without competent evidence to support such findings, and which finding is so vague and indefinite as to amount to no finding.

"(2) To conclusion of law No. 5, in so far as the same may be considered as a conclusion of law by the court, and in so far as it may involve any conclusion that there is any amount due from the defendant to the plaintiff."

At March term, 1911, an amendment to the complaint was allowed, alleging, in addition to the matters set out in the original complaint, that he had made advances to the partnership amounting to about \$1,500, and that the defendant was liable for one-third thereof and interest.

The defendant answered the amendment, denying that the advancements were made, and pleading the three-year statute of limitations thereto. He also asked to be allowed to plead the statute of limitations as to the claim for rents, but his honor would not permit him to do so, because the claim for rents was in the original complaint, and the defendant excepted. Evidence as to the advancements made by the plaintiff was offered by both parties before the referee, and he made his finding thereon. The case was tried before the jury upon the evidence taken before the referee. The defendant offered additional evidence, not introduced before the referee, on the claim for advancements, and, upon the refusal of his honor to allow it, excepted.

The jury returned the following verdict:

"Second. Should the said J. A. Westbrook have turned over to the plaintiff his one-third part of said profits on the 1st day of June of the year they were made, and as they were earned, and did he fail to do so, and used the plaintiff's one-third of said profits as his own? Answer: Yes.

"Third. Has the defendant paid to the

plaintiff any part of said net profit, and, if so, when, and in what amount? Answer: No.

"Fourth. Did the plaintiff advance to the said firm the items as set out and claimed by him to have been advanced in plaintiff's fourth exception, during the years mentioned in said exception, aggregating the sum of \$1,559.04, or any part thereof, and, if so, which items, if he did not advance them all? Answer: Yes.

"Fifth. Did the defendant, Westbrook, pay to the plaintiff any other sums of money on account of the said copartnership other than the credit mentioned in the fourth exception, amounting to the sum of \$916.32, and, if so, what sums were so paid, and the dates of payment? Answer: No.

"Sixth. Did the defendant keep the money of the said firm with his own, and use it as his own, except that part paid out by him for said firm? Answer: Yes.

"Seventh. Did the defendant Westbrook ever pay to the plaintiff any money on account of his share in the profit of said firm; if so, when, and what amount? Answer: No.

"Eighth. Should the plaintiff recover interest on the amounts advanced by him to the firm, and not repaid to him, from the 1st day of June of each year that they were advanced, until repaid, and, if not, then from what date should the plaintiff recover interest? Answer: No; from the time the firm ceased to do business.

"Ninth. Should the plaintiff recover interest on his share of the profits of said firm from the 1st day of June of each year when they were earned, until paid, and, if not, then from what date should the plaintiff recover interest? Answer: No; from time firm ceased to do business.

"Tenth. What amount of yearly rent is the plaintiff entitled to recover of the defendant, if any, for the years 1892, 1893, 1894, 1895, 1896, 1897, 1898, and 1899? Answer: \$40.83½.

"Eleventh. Is the plaintiff entitled to interest on the rent money due him from the 1st day of June of each year that the rents became due, and, if not, from what date should the plaintiff recover interest on the rents? Answer: No; from time firm ceased to do business.

"Twelfth. Were the copartners to meet on or about the 1st day of January each year after the shipping season, and have a settlement with each other, and divide the profits, as claimed by the plaintiff in his fifth exception? Answer: Yes."

It was agreed that the judge might pass upon the issues of fact raised by the plea of the statute of limitations to the amendment of complaint. The court then found as a fact from the said evidence and the pleadings that the plaintiff's claim for his advances was barred by the statute of limitations, to which finding of the court the plaintiff excepted. There was no evidence

that the partnership owed any debts at the time of the dissolution in 1899, except the debts between the partners, or that there was anything to be done, except to settle. The plaintiff demanded settlement of the defendant from time to time, and the defendant denied any liability. His honor rendered judgment in favor of the plaintiff for his part of the profits and rents, with interest thereon from January 1, 1900, and denied his motion for judgment for advances made, holding that this claim was barred by the statute of limitations.

The plaintiff excepted: (1) Because his honor held that the claim for advances was barred by the statute of limitations. (2) Because the court erred in refusing to give judgment for the plaintiff for interest on his rents and profits from the year they became due or were earned.

The defendant excepted: (1) For error in refusal of the court to overrule finding of fact No. 8, as found by the referee, and conclusions of law Nos. 4 and 5, as found by the referee, first exception, for that no competent evidence was introduced upon which to base the said finding of fact and said conclusions of law. (2) That the court committed error in submitting to the jury each and all of the issues which appear in the record. (3) That the court erred in submitting to the jury the evidence taken before the referee, and in submitting the cause to the jury upon such evidence. (4) That the court erred in refusing to permit the defendant to plead the statute of limitations as to the amounts alleged to be due as rents. (5) That the court erred in refusing to allow the defendant's motion to set aside the verdict. (7) That the court erred in refusing to grant the defendant a new trial. (8) That the court erred in signing the judgment which appears of record.

E. K. Bryan, J. T. Bland, E. L. Larkins, and John D. Kerr, for plaintiff. Robert Ruark, for defendant.

#### Plaintiff's Appeal.

ALLEN, J. (after stating the facts as above). The exceptions of the plaintiff cannot be allowed.

[1] As to the claim for interest, it is alleged in the complaint that the partnership "continued in active business up to and including the year 1899, when it ceased active business," and the judgment appealed from, based on the findings of the jury, allows interest from the 1st day of January, 1900, which according to the complaint was the time of the dissolution. There is no claim that the defendant agreed to pay interest. "A partner is not entitled to interest on capital which he contributes to the firm, although his contribution is greatly in excess of that of his copartners, unless they have agreed he may have interest." 30 Cyc. p. 698. The cases cited in the note fully sus-

tain the text. *Sheppard v. Smith*, 20 Ala. 750; *Carpenter v. Hathaway*, 87 Cal. 439, 25 Pac. 549; *Tutt v. Land*, 50 Ga. 350; *Thompson v. Noble*, 108 Mich. 25, 65 N. W. 563; *Lamb v. Rowan*, 83 Miss. 53, 35 South. 427, 690; *Smith v. Smith*, 18 R. I. 722, 29 Atl. 584, 30 Atl. 602; *Hart v. Hart*, 117 Wis. 663, 84 N. W. 890; *Rodgers v. Clement*, 162 N. Y. 422, 56 N. E. 901, 76 Am. St. Rep. 342. In the last case the court says: "If the moneys advanced by the plaintiff to the firm were contributions of capital or additions to plaintiff's capital, then he was not entitled to interest on the same, since he must rely upon the profits of the business to compensate him for the investment, unless there was a special agreement between the partners that interest should be allowed." The reason applies with greater force to the claim for interest on profits, which cannot be ascertained until after the dissolution.

The question was considered by Chief Justice Ruffin in *Holden v. Peace*, 39 N. C. 228, 45 Am. Dec. 514. He says: "The general rule for interest on accounts in ordinary dealings is that it is chargeable only after an account has been rendered, so that the parties can see which is the debtor and what he has to pay, unless it be agreed otherwise, or the course of business shows it to have been otherwise understood. This applies still more forcibly, as between partners, because their accounts cannot be fully made up between them without, in truth, taking all the accounts of the firm—in other words, without a dissolution—and it is impossible to tell before what either would be bound to pay or entitled to receive. Therefore, if the parties mean that interest should be charged on the accounts of the partners for dealings in the shop and money withdrawn for personal expenses or other things from year to year, the course is to come to an agreement to that effect, and then for balances appearing upon the individual accounts annually or oftener, according to the agreement to that effect, charges of interest are made from time to time, or, if omitted, will be allowed in making the final settlement. If there be no agreement upon the subject, it must be understood that the parties, especially when they have no separate property, were aware that each must draw from the firm the means of supporting himself and his family, and that an exact equality could not be expected in those matters, and, therefore, that it was not intended that interest should be charged during the partnership."

[2] The exception to the ruling that the claim for amounts advanced by the plaintiff is barred by the statute of limitations is equally untenable. It does not appear that there were any debts to be paid or collected at the time of the dissolution of the partnership, and nothing remained to be done except to settle. The relationship between the parties then became adverse, and the right of action accrued to the plaintiff. The case

of *Murray v. Penny*, 106 N. C. 324, 12 S. E. 957, seems to be directly in point. In that case the partnership between the plaintiff and defendant was formed in 1884, and dissolved in 1885. The action was commenced in 1890 to recover \$400, which the plaintiff alleged to be due him on a fair accounting, and the defendant relied on the limitation of three years as a defense. It was held that the plaintiff's cause of action was barred, and the court said: "Unless there is some agreement, express or implied, fixing a period for accounting beyond the time of dissolution, or circumstances that render an accounting impossible, the statute begins to run from the time the partnership is in fact dissolved. *Wood on Lim.* § 210. During the existence of the partnership, the partners mutually sustain the relation of trustee and cestui que trust. Where there are debts still due the firm, and after dissolution one of the partners is to collect them, or other circumstances showing that a settlement is impossible, the relation of trust between the partners may continue till some act puts them in adversary position to each other. Nothing of that kind is in evidence. There is nothing to show that any debts were outstanding and uncollected, or that any trust remained to be executed. On the contrary, it appears that an immediate settlement was possible, and that both partners agreed that it should be made at once."

[3] We have passed on the exception of the plaintiff as to the statute of limitations, but it is doubtful if he can raise the question on this record, as the plea of the statute by the defendant casts the burden on the plaintiff to prove that his cause of action is not barred (*Hussey v. Kirkman*, 95 N. C. 64), and, a jury trial being waived on this issue, the judge, without any exception to evidence, has found the fact against the plaintiff.

We find no error.

No error.

#### Defendant's Appeal.

[4] The first exception of the defendant is to the refusal of the court to overrule a finding of fact made by the referee. The exception is not based upon the ground that there was no evidence to support the finding, but that there was no competent evidence, and a proper consideration of it would require us to go through the entire record, and pass on the admissibility of evidence, when there is no assignment of error that incompetent evidence had been admitted. This we are not required to do. If the appellant desired to preserve the exception, it was his duty to enter his exception to the evidence before the referee, and to except also to the finding of fact, and to have both exceptions reviewed by the judge, and then, on appeal, to embrace in his assignments of error the exceptions to the evidence.

[5] We find, however, on an examination of the evidence of the plaintiff that he testified to facts justifying the finding, and the rule is well settled that we cannot review the action of the judge when there is any evidence.

[6] It was the duty of the judge to submit the issues to the jury upon demand of the plaintiff, as he had not waived his right to a jury trial, and the exception of the defendant to such action cannot be sustained. The fourth, fifth, sixth, and seventh assignments of error are to rulings within the discretion of the judge, and the eighth assignment is formal for the purpose of preserving the other exceptions.

[7, 8] The third assignment would not be free from difficulty if it had not been held that the claim of the plaintiff for advances made to the firm was barred by the statute of limitations, but, with this decision in favor of the defendant, he cannot complain that he was not allowed to offer evidence in addition to that introduced before the referee on the claim. The general rule is undoubtedly, as his honor held, that upon the coming in of a report under a compulsory reference the issues are to be determined by the jury on the evidence before the referee, but if an amendment is allowed, after the report is filed, containing an additional charge, the parties ought to be allowed to offer evidence as to such charge because it was not embraced in the reference. The defendant has not, however, suffered any injury by the refusal to allow him to introduce the evidence, as there is no recovery against him on the additional matter contained in the amendment.

We find no error of which the defendant can complain.

No error.

(157 N. C. 106)

#### JOHNSON v. MUTUAL BENEFIT LIFE INS. CO. et al.

'Appeal of Fagg.

(Supreme Court of North Carolina. Nov. 15, 1911.)

#### INSURANCE (§ 122\*)—INSURABLE INTEREST—ASSIGNMENT OF POLICY INTEREST.

An assignment of a policy of life insurance, payable to insured, on which premiums have been paid, made to secure a loan in good faith, and not as a cover for a wagering transaction, or a mere speculation, to a person who has no insurable interest in the life of the insured, is valid.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 166, 167; Dec. Dig. § 122.\*]

Appeal from Superior Court, Stokes County; Adams, Judge.

Action by John W. Johnson against the Mutual Benefit Life Insurance Company, in which A. J. Fagg, administrator of Virgil L. Eaton, deceased, was made a party defendant on the company's payment of the

fund in controversy into court. Judgment for plaintiff, and defendant Fagg appeals. No error.

J. W. Hall and Watson, Buxton & Watson, for appellant. J. D. Humphreys and Manly, Hendren & Womble, for appellee.

**WALKER, J.** This is an action by the plaintiff to recover from the defendant insurance company the amount of a certain insurance policy, issued to Virgil L. Eaton on his life, and assigned by Eaton to the plaintiff.

The defendant company at no time contested its liability on this policy, and has at all times expressed its willingness and desire to pay the amount due thereon to the person entitled to receive it, and in its answer it expressed its willingness to pay, and recognized that the amount of the policy was due to some one, but relied upon the fact that the administrator of Virgil L. Eaton was contesting the right of the plaintiff to receive the proceeds of the policy, under the assignment, and was claiming that it should be paid to him, and asked that it be allowed to pay into court the amount due on said policy, and that the court should order the said sum to be paid to the party entitled thereto. In consequence of this answer, and in accordance with its prayer, the administrator was made a party defendant, and the insurance company paid the sum due under the policy into the office of the clerk of the superior court of Stokes county, to abide the judgment of the court. The administrator of Eaton, the original beneficiary, filed an answer, in which he set up two defenses: First, that his intestate had borrowed of the plaintiff the sum of \$100, and as security for said loan had transferred and assigned the said policy to the plaintiff as collateral security; second, that the assignment of the policy by Eaton to the plaintiff was void as a wagering transaction, for that the plaintiff had no insurable interest in the life of Eaton. The contest is therefore between the plaintiff, who is the assignee of the policy, and the administrator of Eaton.

The jury, in response to the issues submitted to them, found that the plaintiff had nothing to do with the taking out of the policy by Eaton, and that the assignment of the policy was made in good faith, and not as a cloak or cover for a wagering transaction or speculation on the life of Eaton. The evidence was to the effect that the plaintiff knew nothing about Eaton taking out the policy until after it was issued, and the first premium paid, and that Eaton became dissatisfied, and endeavored to dispose of the policy to other persons, before coming to the plaintiff, but finally sold and assigned the policy to the plaintiff, in accordance with the assignment as set out in the record. In fact, there was no dispute or evidence to the contrary, and as a result thereof the court

charged the jury, if they believed the evidence, to answer the first issue, "No." The second issue, as to the good faith of the assignment, was answered by the jury, under the charge of the court, in favor of the plaintiff. There was no evidence offered to support the contention of the administrator that the policy had been assigned as security for a debt.

The exceptions of the administrator are to the charge of the judge, and, as we understand, they raise this single question: Can a person take out a policy of insurance on his own life, making the policy payable to himself, and pay the first or subsequent premiums, and then in good faith, and not as a cloak or cover for a wagering transaction, or as a mere speculation, and for a valuable consideration, assign the policy to a person having no insurable interest in the life of the person insured; and can such person recover upon the policy under such an assignment, or does the simple fact that the assignee had no insurable interest in the life of the assignor invalidate the assignment and prevent a recovery by the assignee?

The defendant, administrator of Virgil L. Eaton, appealed from the judgment upon the verdict.

It is impossible to distinguish this case from *Hardy v. Insurance Co.*, 152 N. C. 286, 67 S. E. 767, and again reported in 154 N. C. 430, 70 S. E. 828, and our decision, therefore, must be against the plaintiff and in affirmance of the judgment below, unless we overrule those cases, as requested to do by the plaintiff's counsel in their brief. They are recognized by them to be decisively against the contention of the defendant that plaintiff, as assignee, cannot recover on the policy.

In *Hardy v. Insurance Co.*, 152 N. C. 286, 67 S. E. 767, Justice Hoke, who wrote the opinion for the court, says, after a most learned and exhaustive discussion of the question, that the great weight of authority sustains the legality of such an assignment, when it is found, as a fact, that the policy was valid at its inception; and, further, that the assignment was made in good faith, and not as a mere cloak or cover for a wagering transaction. He quotes with approval what is stated upon the subject in that reliable treatise and standard authority, *Vance on Insurance* (page 14 et seq.), as follows: "On principle and according to the clear weight of authority, an assignment of a life policy to one having no insurable interest therein is perfectly valid, if made in good faith, and not as a cover for fraudulent speculation in life." And referring to the opinions in *Warnock v. Davis*, 104 U. S. 775 [26 L. Ed. 924], and *Cammack v. Lewis*, 82 U. S. [115 Wall.] 643 [21 L. Ed. 244], and to the subject generally, the author says: "These confusing influences have further been aided and abetted by a catch phrase, which, how-

ever, does not state the issue fairly, to the effect that the law will not allow a person to procure by assignment insurance that he could not procure directly. A fair statement of the issue is found in the postulate that the law will allow the insured to designate a beneficiary under the policy as well by assignment as by original nomination. The true principle governing the question may be derived from the statement of some generally accepted rules of law: (1) A person insuring his own life may designate any person whatever as beneficiary, irrespective of insurable interest in that beneficiary. (2) The law requires an insurable interest only at the inception of the policy, as evidence of good faith. The presence of such interest at any subsequent period is wholly immaterial. (3) Life insurance, though based on the theory of indemnity, at its inception, is not a contract of indemnity, but chiefly of investment. As a chose in action, it has, at any time after its issue, a recognized value, termed the reserved value. Hence we conclude that a policy of life insurance, validly issued to one having an insurable interest, becomes in his hands a valuable chose in action, which should be assignable as any other property right, unless such assignment be opposed to some clear rule of public policy. This, we think, correctly states the true doctrine."

That decision was approved, when the same case afterwards came to this court by appeal, in a lucid opinion by Justice Allen (154 N. C. 430, 70 S. E. 828), so that the law, as applicable to the facts found by the jury, must now be considered as thoroughly settled in this state, whatever may be the views of other courts.

There was no error in the ruling of Judge W. J. Adams, and it will be so certified, that the judgment in favor of the plaintiff may be enforced.

No error.

(157 N. C. 262)

#### OSBORNE v. DURHAM et al.

(Supreme Court of North Carolina. Nov. 22, 1911.)

#### 1. PRINCIPAL AND AGENT (§ 79\*)—ACTION FOR WRONGFUL ACTS OF AGENT—EVIDENCE—CONVERSION OR EMBEZZLEMENT.

Evidence, in an action by a principal against his agents to recover an amount realized on a sale of stock for plaintiff, which they had converted and embezzled, *held* insufficient to establish any fraudulent conduct of the agents in their dealings with the stock.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 79.\*]

#### 2. PRINCIPAL AND AGENT (§ 171\*)—RATIFICATION—IMPLIED RATIFICATION.

Agents to sell stock received notes and orders in payment therefor instead of cash, without express authority from their principal, and after the nonpayment of a draft on the corporation, which they had instructed their principal

to draw, one of them gave his individual note for the amount, which was accepted, and proved the principal's claim under the draft against the insolvent estate of the corporation, with the knowledge and expressed satisfaction of the principal, who also requested the maker of the note for advances to be credited thereon. *Held*, that there was a complete ratification of the sale.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.\*]

#### 3. PRINCIPAL AND AGENT (§ 163\*)—RATIFICATION—CONSIDERATION.

A principal's ratification of the act of his agent requires no new consideration.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 618-621; Dec. Dig. § 163.\*]

#### 4. PRINCIPAL AND AGENT (§ 169\*)—RATIFICATION—WHAT CONSTITUTES.

An act of an agent may be ratified by the words or conduct of his principal indicating an intention on the part of the principal to adopt the act as his own.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 636, 637; Dec. Dig. § 169.\*]

#### 5. PRINCIPAL AND AGENT (§ 175\*)—UNAUTHORIZED ACTS OF AGENT—EFFECT OF RATIFICATION.

Where a ratification of the acts of an agent is made with knowledge of the facts, it invests principal and agent with the same rights and duties as if the transaction had been previously authorized, and the agent is thereby absolved from all responsibility on account of the unauthorized act or conduct, whether he exceeded or departed from his instructions, or was a mere volunteer.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 662-668; Dec. Dig. § 175.\*]

Appeal from Superior Court, Stanly County; Lyon, Judge.

Action by R. W. Osborne against S. J. Durham and another. Judgment for plaintiff against defendant Durham, and plaintiff appeals. No error.

R. L. Smith and J. R. Price, for appellant. F. I. Osborne, for appellees.

WALKER, J. Action to recover the sum of \$1,200, alleged to be due by the defendants, as agents of the plaintiff, on account of a certain stock transaction.

In the year 1905, the plaintiff subscribed for 60 shares of the capital stock of the Vermont Mills, each share being of the par value of \$100, on which he paid \$1,200 in cash and consequently owed \$4,800. The plaintiff was an officer in the Vermont Mills, but desired to remove from Bessemer City, where the mills were located. He wished to sell out his interest in the stock, and requested S. J. Durham, one of the defendants in this case, who was treasurer of the mills, to make the sale for him, and Durham agreed to do so. S. J. Wilkins, the other defendant, had charge of the certificates of stock belonging to the plaintiff. The plaintiff authorized S. J. Wilkins to sell the stock for him, and S. J. Wilkins did sell it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

to one Coble. Wilkins, in payment for the stock, did not receive any money from Coble, but two notes, one for \$500 and one for \$400, on the Odell Mills. He further received an order for \$300 on the Vermont, Southern & Whetstone Mills, and another order for \$300 to pay up the assessment due on the stock. After receiving these orders, he canceled the notes due by the plaintiff, and took the \$500 and the \$400 notes with the orders and presented them to S. J. Durham, who was the treasurer of the Vermont Mills. Durham asked for indulgence from Wilkins as to the payment, and Wilkins wrote to the plaintiff on October 18, 1906, asking the plaintiff to make a draft of \$1,200 on the Vermont Mills through the First National Bank at Gastonia at 10 days sight, and stating that Durham had promised to pay the same. The plaintiff drew the draft, which was not paid at the end of 10 days, because of the insolvent condition of the Vermont Mills, and Durham sent his individual note for \$1,200, payable in 60 days, which the plaintiff accepted.

All three of the mills, together with the Odell Mills, failed shortly after the sending of the note, and their affairs were placed in the hands of a receiver. Durham failed, too, about the same time, inasmuch as he was interested in all of them. The plaintiff claims the right to recover \$1,200 for the following reasons: (1) That defendants disobeyed his instructions, express or implied, and sold the stock on credit; whereas, they should have sold it for cash, and by reason of their conduct in the transaction they are liable to him for its value. (2) That they made false and fraudulent representations to him as to the manner in which they had disposed of the stock, and he was led to believe by them that they had received cash for the same. (3) That they fraudulently converted the stock or the proceeds of it, and are thereby liable to him for the value thereof. Defendants denied their liability upon any of the said grounds, and averred that, on the contrary, they had acted, not only prudently, but wisely, as it turned out, and that plaintiff had been greatly benefited by what they had done in his behalf. The court, at the close of the testimony, overruled defendants' motion for a nonsuit, and instructed the jury to answer the first two issues, "Yes," and the fourth issue, "No," according to the agreement of the parties, and upon the evidence to answer the third and fifth issues, "No," and the sixth issue, "Yes, S. J. Durham, in the sum of \$1,200, with interest from November 17, 1906." The jury thereupon returned the following verdict: (1) Did the defendants, or either of them, agree with the plaintiff to sell for him his 12 shares of stock in the Vermont Mills, Incorporated, at the price of \$1,200, and remit the same to him? Answer: Yes. (2) Did defendants, or either of them, under said agreement, sell plaintiff's 12 shares

of stock in the Vermont Mills, Incorporated, at the price of \$1,200? Answer: Yes. (3) Have the defendants, or either of them, received \$1,200 on account of said 12 shares of stock? Answer: No. (4) Have the defendants, or either of them, remitted or paid to the plaintiff the sum of \$1,200 on account of said 12 shares of stock? Answer: No. (5) Have the defendants, or either of them, and, if so, which one, embezzled, converted, or fraudulently applied or misapplied the proceeds from the sale of the plaintiff's stock? Answer: No. (6) In what amount, if any, are the defendants, or either of them, indebted to the plaintiff? Answer: Yes, S. J. Durham, in the sum of \$1,200 and interest from November 17, 1906. Judgment was entered upon the verdict in favor of the defendants, and plaintiff appealed.

The material issues seem to be the third and fifth. As to the third issue, all the evidence goes to show that Coble did not pay any money at all for this stock—that is, that the defendants did not receive any money from him—so there could be but one answer to this question. Coble was a witness for the plaintiff and testified that he had paid for the stock as stated above.

As to the fifth issue, it is specifically charged, in the eleventh paragraph of the complaint, that these defendants received \$1,200 as the proceeds of the sale of the stock, and this fifth issue is directed to that paragraph in the complaint and the answer to it, denying the same. The proceeds were alleged to have been received in cash, and, inasmuch as no money was received, it could not have been fraudulently appropriated or embezzled; but giving to the fifth issue its broadest meaning, so that it will embody the question as to whether or not the defendants converted or fraudulently applied or misapplied any proceeds, whether money or not, realized from the sale of the plaintiff's stock, the defendants then contend that there was no evidence of such fraudulent conversion. The proceeds were two notes due by the Odell Mills and the orders set forth in the above statement of facts. These notes were carried to Durham, who was the treasurer of the mills, by Wilkins, and so were the orders, and Durham did not pay them, because the Vermont Mills did not have the money at that time with which to make the payment.

It is true that the sale, as contemplated by Osborne, the plaintiff, evidently was to be a cash transaction, and he undoubtedly thought so at the time; but Wilkins could not obtain the cash, and, as appears from the evidence, sold the stock in the manner which seemed to him best. There is no charge in the complaint, nor is there any issue with reference to such a charge, that Wilkins fraudulently disposed of the stock for his own benefit. The charge is that he, with the other defendant, converted, embezzled, or fraudulently applied the proceeds

from the sale of the stock. There does not seem to be the slightest evidence that they made any such conversion or were guilty of any kind of fraudulent conduct.

The plaintiff, however, insists that he is entitled to a judgment against Wilkins, as well as Durham, for the \$1,200. He did recover a judgment against Durham for \$1,200 on the note which Durham gave him for his stock. The defendant Wilkins sent the paper to the plaintiff for \$1,200, but did not receive any \$1,200, and he had due authority to sell for the plaintiff, and received what, at the time, he thought was worth \$1,200, and presented the claims to the proper party in order to collect them. They turned out to be of no value. If the plaintiff should be entitled to recover anything from Wilkins, it would be, at most, the value of his stock, that Wilkins disposed of for him; and, from all the evidence, that turned out to be thoroughly worthless, as the Vermont Mills was at that time an insolvent institution. Neither one of these defendants realized a dollar in the transaction, and, as will appear by the entire evidence, were acting in the matter solely for the accommodation of the plaintiff.

The plaintiff was the gainer in the end, for he was indebted to the Vermont Mills in the sum of \$4,800, for his unpaid subscription to the stock, and, had it not been surrendered and canceled, the receiver could and would have obtained judgment against him to the full amount of the notes, for the benefit of the creditors of the Vermont Mills. By the transaction, these notes were canceled, and the plaintiff ceased to be the debtor of the Vermont Mills, and Coble took his place and became responsible for the debt which plaintiff had owed for the stock.

[1] Considering the whole case, we can find no evidence of any fraudulent conduct of the defendants in their dealings with the plaintiff's stock. The undisputed facts show that the defendants were not acting for themselves, with the view of benefiting by the transaction; but finding that they could not sell the stock for cash, and perhaps suspecting what subsequent events proved to be true, that the Vermont Mills were on the verge of insolvency, they did the best they could do to save the plaintiff, their principal, from the wreck, so that he would not suffer any pecuniary loss by the failure of the mills, and disposed of the stock to Coble. It was not very long before the wisdom of their course was justified by the real facts in the case. Durham came to the plaintiff's rescue, as far as he could do so, and gave his own note for the \$1,200, which the plaintiff accepted. Misfortune overtook the defendant Durham, when the mills failed, as he was largely interested in them and lost heavily, and he was unable to pay the note. Plaintiff has a judgment against him for the debt, and that is all to which he is en-

titled, notwithstanding the allegations of fraud, which have not been established.

[2] There is another reason why the plaintiff is not entitled to recover anything more than the judgment of the court allows him. In the first place, the fact that Durham and Wilkins, his agents, had notified the plaintiff to draw on the Vermont Mills for the \$1,200, which he did, the nonpayment of the draft, and the taking of Durham's note, were all circumstances reasonably calculated to put a prudent man upon notice that the sale had not been made for cash, and to stimulate inquiry. It is a fact established in the case that Durham and Wilkins did not sell for cash, and Durham virtually so stated in his letter to plaintiff of November 17, 1906. But, after the latter had become fully acquainted with the fact that the Vermont Mills was his debtor, he agreed to accept Durham's note and to prove his claim against the insolvent mills, and thus to get payment for his stock. This is shown by his letters of February 11, 12, and 16, 1907, to Durham. These letters, which speak for themselves, are as follows:

Letter of February 11th, Osborne to Durham: "I was under the impression that I held no claims against the Vermont Mills, but as you say in your letter, dated 4th inst., that I have a claim, since I hold a note against you, I have no objection to you taking said claim in your hands and collecting what you can and crediting same on your note. If you wish me to file a claim against the mills, please notify me, and I will do so at once, and collect what I can and credit same on your note."

Letter of February 12th, Durham to Osborne: "Your letter received. On receipt of your special delivery letter, I certified and filed your claim as your attorney. I so understood your request. If the mill does not pay you in full, my note stands for balance, as you state in your letter. Please let me know if I did as you wish in filing your claim."

Letter of February 16th, Osborne to Durham: "Replying to your letter of recent date, will say that it is satisfactory to me your putting in the claim as you have. I hope things will come out O. K. in our favor."

In the letter of February 16th, he requests Durham to advance him \$75 or \$100, which he will credit on his note.

[3] This part of the correspondence, with other facts and circumstances, show a complete ratification which, under the law, requires no new consideration.

[4] An act may be ratified by any words or conduct, indicating an intention on the part of the person in question to adopt the act as his own.

[5] If ratification is made with knowledge of the facts, it invests principal and agent, as a rule, with the same rights and duties as

if the transaction had been previously authorized, and, when it takes place, the agent is absolved from all responsibility on account of the unauthorized act or conduct, whether he exceeded or departed from his instructions, or was a mere volunteer. *Tiffany on Agency*, pp. 60, 86, 87.

We will not again consider the fact that the stock was really valueless at the time it was sold to Coble. It was not only worthless, but its continued ownership would have subjected the plaintiff to a heavy loss, and, even if the defendants violated instructions, he has lost nothing by their delinquency.

Our conclusion is that, in any view of the facts, the plaintiff was not entitled to recover any more than he did, and a substantial instruction of the court to this effect was correct.

No error.

(157 N. C. 150)

# PHIFER v. COMMISSIONERS OF CABARRUS COUNTY.

(Supreme Court of North Carolina. Nov. 22, 1911.)

## 1. HIGHWAYS (§ 116\*)—ESTABLISHMENT—DAMAGES AND BENEFITS—SPECIAL BENEFIT.

Where a highway was cut through plaintiff's land at a point three-fourths of a mile from a town, the fact that it enabled plaintiff to plat his property into lots, and sell the same as town property, was a special, and not a speculative, benefit to the particular land, which was properly considered in assessing damages and benefits.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 871; Dec. Dig. § 116;\* *Eminent Domain*, Cent. Dig. § 387.]

## 2. TRIAL (§ 261\*)—INSTRUCTIONS—REQUEST TO CHARGE.

Where a request to charge was faulty as a whole, the court was not required to give a portion thereof which was correct.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 660, 671; Dec. Dig. § 261.\*]

## 3. TRIAL (§ 273\*)—INSTRUCTIONS—OBJECTIONS—TIME.

An objection to the court's statement of the contentions of the parties cannot be first made after verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 680-682; Dec. Dig. § 273.\*]

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Cabarrus County; Biggs, Judge.

Action by Robert F. Phifer against the Commissioners of Cabarrus County. Judgment for defendant, and plaintiff appeals. Affirmed.

Montgomery & Crowell, for appellant. L. T. Hartsell and H. S. Williams, for appellee.

CLARK, C. J. This proceeding was begun before the clerk to assess the damages caused to plaintiff's lands by opening a public road through them, and was tried on appeal in the superior court.

The plaintiff owned about 60 acres of land about three-fourths of a mile from the town of Concord. There were already two public roads through it before the defendant built this road. There is no exception except to the refusal of two prayers to instruct the jury and one for an instruction given—all three in reference to the nature of the special benefits to which his honor told the jury that they must restrict the deductions to be made from the damages which they might find the plaintiff's land had sustained. The jury found in response to the only issue submitted that the damages sustained to the land by reason of the road being laid out over it were not greater than the benefits which the plaintiff had received therefrom.

In *Miller v. Asheville*, 112 N. C. 768, 16 S. E. 764, the court said: "All the landowner can claim is that his property shall not be taken for public use without compensation. Compensation is had when the balance is struck between the damages and benefits conferred on him by the act complained of. To that, and that alone, he has a constitutional and vested right. The Legislature in conferring upon the corporation the exercise of the right of eminent domain can in its discretion require all the benefits or a specified part of them or forbid any of them to be assessed as offsets against the damages. This is a matter which rests in its grace, in which neither party has a vested right, and as to which the Legislature can change its mind always before rights are settled and vested by a verdict and judgment." But in *Bost v. Cabarrus*, 152 N. C. 536, 67 S. E. 1066, the court held that the statute now before the court was different from that in *Miller v. Asheville*, and that the general rule in condemnation proceedings applied. The judge therefore properly charged the jury that they should "deduct from the damages only those benefits which are special to the owner, and not such as he shares in common with other persons in similar circumstances." But, in fact, there was no evidence of benefits to the land which was common to others similarly situated. There were no others similarly situated.

[1] The first prayer for instruction was: "The jury in considering the special benefits are not permitted to consider the evidence that the land is near town, and may be cut into small lots of 100 feet front and sold, because that is not evidence of special or peculiar benefits contemplated by the statute which is not common to others similarly situated." This was properly refused. This was a special benefit to this particular land, not common to the neighborhood, because the road made a front on each side which would enable the plaintiff to sell lots, a benefit which would not accrue to land in the neighborhood off the road. Besides, evidence to



the above effect had been introduced by both parties without objection.

The second prayer was to instruct the jury "that the fact that said property could be cut into lots and sold is what the law calls speculative benefits, which may or may not accrue to the owner, and the jury will not consider any speculative benefits or damages in this case."

[2] The last paragraph of the prayer was correct, but the court was not required to give it, since the instruction asked as a whole was faulty. The fact that property could be cut into lots and sold was in evidence and a proper matter for consideration by the jury in estimating the benefits accruing to the plaintiff. This was not speculative, but practical.

[3] The last exception is because the judge in arraying the contentions of the parties recited a contention of defendant's counsel which he had made to the jury without objection on the part of the plaintiff. It is too late to object to it after verdict. *State v. Tyson*, 133 N. C. 692, 45 S. E. 838; *State v. Davis*, 134 N. C. 635, 46 S. E. 722.

No error.

BROWN, J. (dissenting). I am of opinion that the benefits permitted to be considered by the jury as inuring to plaintiff's land are entirely too remote and speculative. His land is occupied by the plaintiff as a residence, and is situated some three-fourths of a mile beyond the boundaries of Concord, and is on two public roads. The third road that has been cut through it takes six acres of it. The possibility of the plaintiff being able to cut up his property and sell it off in town lots is problematical and entirely too remote to be considered.

Again, I think, the benefits that should be considered are those which naturally accrue to the land in the condition it is in and the uses to which the owner puts it. I don't think the plaintiff should be compelled to sell his home in order to endeavor to realize these highly uncertain profits from sale of town lots.

WALKER, J., concurs in this opinion.

(157 N. C. 578)

#### STATE v. SMITH.

(Supreme Court of North Carolina. Nov. 9, 1911.)

#### 1. INDICTMENT AND INFORMATION (§ 189\*)—CONVICTION OF LOWER DEGREE OF OFFENSE—RAPE—ASSAULT.

Revisal 1905, § 1427, gives justices of the peace exclusive jurisdiction of assaults, batteries, etc., where the punishment cannot exceed a \$50 fine or 30 days imprisonment, etc., and gives the superior courts jurisdiction, if a justice does not take cognizance of an offense within one year. Section 3620, as amended by Laws 1911, c. 193, provides that punishment for cer-

tain assaults, etc., shall not exceed the punishment above prescribed, except as to assaults with intent to rape, and assaults upon a female by a male over 18 years old. Section 3268 authorizes conviction of an assault under an indictment for rape. Section 3269 permits conviction under any indictment of a lesser degree of the offense charged. *Held*, that one more than 18 years old, who is indicted for assault with intent to ravish, can be convicted of aggravated assault, without averment in the indictment as to his age.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 532-595; Dec. Dig. § 189.\*]

#### 2. CRIMINAL LAW (§ 330\*)—BURDEN OF PROOF.

The burden is on a defendant to show that a justice of the peace took cognizance of the assault involved, ousting the superior court's jurisdiction; that being a matter of defense.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 330.\*]

#### 3. CRIMINAL LAW (§ 90\*)—JURISDICTION—ASSAULT AND BATTERY.

It is only where there is a conviction of a simple assault, under an indictment which upon its face shows jurisdiction in the superior court, and the further allegation or finding that one year since the commission of the offense had not elapsed, that the jurisdiction of the superior court is ousted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 90.\*]

Appeal from Superior Court, Wake County; W. R. Allen, Judge.

Habeas corpus by Turner Smith. The writ was dismissed, and relator remanded, and he appeals. Affirmed.

J. C. L. Harris, Chas. M. Harris, and Aycock & Winston, for appellant. Attorney General Bickett and G. L. Jones, for the State.

WALKER, J. The defendant was indicted in the superior court for an assault with intent to commit rape, and was convicted by the jury, not of the felony charged in the indictment, but of an assault and battery upon a woman; he being, at the time of the assault, over the age of 18 years.

The indictment alleged that "the defendant, with force and arms, at and in the county aforesaid, in and upon one Lillian Whitson, then and there being, did make an assault, and her, the said Lillian Whitson, then and there, did beat, wound, and ill treat, with intent, her the said Lillian Whitson, violently and against her will, then and there, feloniously to ravish and carnally know, and other wrongs to the said Lillian Whitson then and there did, against the form of the statutes in such case made and provided, and against the peace and dignity of the state." Upon the verdict, the court below rendered judgment that the defendant be imprisoned in the common jail of Wake county for the term of two years, and assigned to work on the public roads of said county; his earnings during said term, as allowed by the commissioners of the county, to be applied to the payment of the costs. The de-

fendant did not appeal from that judgment, but submitted thereto, and, having served for 30 days on the roads and performed the judgment to that extent, he applied by petition for the writ of habeas corpus to Hon. W. R. Allen, one of the justices of this court, and alleged that the sentence of the court was excessive, upon the ground that the indictment failed to allege that, at the time of the assault, he was more than 18 years old, and that therefore the Laws of 1911, ch. 193, do not apply, as that was an essential averment to be made, in order to warrant the punishment inflicted; the finding of the jury as to his age not being allowed by law to aid the indictment in that respect.

Judge Allen, at the hearing of the petition, dismissed the proceeding and remanded the defendant, holding that it was not necessary for the indictment to allege that the defendant, at the time he committed the assault, was over the age of 18 years, and in this conclusion we unhesitatingly concur, although it may require a very careful and minute examination of our statutes, and the authorities bearing upon the subject, in order to clearly demonstrate the fallacy of the defendant's position.

The defendant was indicted, as we have seen, for an assault with intent to commit rape, and by the verdict was convicted of an assault upon a woman; he being then over the age of 18 years. The allegations of the bill gave the court jurisdiction to try the case, and to pronounce such a judgment as was authorized by law. As Judge Ashe observed, and subsequently repeated, in *State v. Moore*, 82 N. C. 860: "This kind of litigation would not recur if the Legislature would take the subject in hand, and free it of its many complexities and ambiguities. A statute or statutes intended to prevent or to cheapen litigation, or to speed the trial of cases, or to more adequately prevent crimes, should not defeat the purpose of the enactment by vague and ambiguous terms. There have been many cases brought to this court to ascertain what the Legislature meant in its attempt to carry out the following constitutional provision [article 4, § 27]: 'The several justices of the peace shall have jurisdiction under such regulations as the General Assembly shall prescribe, of all criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars, or imprisonment for thirty days.' The statutes relating to this subject have not been so codified in the Revisal as to remove the doubts and uncertainties suggested by this court in its former decisions, although it has been said that certain statutes which were in pari materia should be construed together, so as to ascertain the true legislative intention. But let us look at the statutes pertinent to this question. Revisal 1905, § 1427, provides that justices of the peace shall have exclusive jurisdiction of all assaults, batteries, affrays, when no

deadly weapon is used and no serious damage is done, and of all criminal matters arising in their counties, where the punishment, prescribed by law, shall not exceed a fine of \$50 or 30 days imprisonment, with a proviso preserving the jurisdiction of the superior courts when the offense is committed within a mile of the place where the court is held, and during its session. It further provides that the section shall not be construed to prevent superior courts from assuming jurisdiction of offenses whereof original jurisdiction is given to justices of the peace, if some justice of the peace, within 12 months after the commission of the offense, shall not have taken official cognizance of the same.

Revisal, § 3620, as amended by Laws of 1911, c. 193, provides as follows: "In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: Provided, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays, shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill, or with intent to commit rape; or to cases of assault or assault and battery by any man or boy over eighteen years of age on any female person." It was argued by the learned counsel for defendant that it is necessary to consider the statutes above mentioned, and as explained by Revisal, § 8268, which is as follows: "On the trial of any person for rape, or any felony whatsoever, when the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law, in cases of conviction when (if) the indictment was (had been) originally for an assault of a like character."

[1] Discarding all superfluities and rejecting nice distinctions and subtle refinements, and stripping these statutes to the bone, even to the marrow, the real intention of the Legislature is laid perfectly bare, and its meaning becomes apparent. It all, therefore, results in this: That a man who is indicted for an assault with intent to ravish, and is convicted of a simple assault and battery upon a woman, without the alleged intent, he being over the age of 18 years, can be punished at the discretion of the court, without any allegation in the bill as to his age, and cannot shield himself behind the statute conferring jurisdiction on a magistrate of simple assaults, nor limit the punishment, under the first proviso of Revisal, § 3620, to a fine of \$50 or imprisonment for 30 days, upon conviction in the superior court, where, by

the statute, it has acquired jurisdiction. It has been held uniformly that, where an exception, or even a proviso, to the enacting clause of a statute creating an offense is descriptive thereof, it is necessary to negative, in an indictment thereunder, the existence of the facts contained in the exception or proviso, though the burden of proof to establish them may rest upon the defendant. *State v. Blackley*, 138 N. C. 620, 50 S. E. 310. "Where the words contained in a proviso or exception are descriptive of the offense and a part of its definition, it is necessary, in stating the crime charged, that they should be negatived in the indictment, and where the statute does not otherwise provide, and the qualifying facts do not relate to the defendant personally, and are not peculiarly within his knowledge, the allegation, being a part of the crime, must be proved by the state beyond a reasonable doubt." *State v. Connor*, 142 N. C. 700, 55 S. E. 787. *Joyce on Indictments*, § 279, where the law is thus stated: "The general rule as to exceptions, provisos, and the like, is that where the exception or proviso forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated, if the exception is omitted, then it is necessary to negative the exception or proviso. But where the exception is separable from the description, and is not an ingredient thereof, it need not be noticed in the accusation; for it is a matter of defense. But where there is an exception, so incorporated with the enacting clause that the one cannot be read without the other, then it is held that the exception must be negatived."

But this case does not fall within that principle. The third proviso was not intended to create a separate and distinct offense in law, to be known as an assault and battery by a man, or a boy over 18 years old, upon a woman; but it merely excepted that case from the operation of the first proviso, by which the punishment for a simple assault was limited to a fine of \$50 or imprisonment for 30 days. It related solely to the degree of punishment for an assault committed upon a woman by a man, or by a boy over 18 years of age. It was always a crime for a man, or a boy over 18 years of age, to assault a woman, and the object of section 3620 was to provide that such an offense should be subject to the same punishment, at the discretion of the court, as any other assault, with or without intent to kill or injure, or to commit a rape, and not to deprive the court of the discretion, given by the first clause, in those cases where the assault was committed with a deadly weapon, or with intent to kill or to commit a rape, or where it was upon a woman by a man, or a boy over 18 years of age. This indictment for an assault with intent to commit rape includes, necessarily, an assault by a man upon a

woman, without any regard to the age of the man, and it was not necessary to allege that the defendant was over the age of 18 years. It was for the purpose of providing for just such a case as this one that the Legislature passed the act of 1885, c. 68, to the effect that on the trial of any person for rape, or any felony whatsoever, when the crime charged shall include an assault against the person, the jury may acquit of the felony and find a verdict for the assault against the person indicted, if the evidence warrants such finding; and the statute further provides that, where the conviction is for the inferior offense, the court shall have the power to imprison the person so found guilty of an assault for any time now allowed by law, where in cases of conviction the like punishment might be imposed, if the indictment had been originally for an assault of a like character. The Legislature did not mean to create separate and distinct criminal offenses, such as assault with a deadly weapon, assault with serious damage, assault upon a woman when the man is over 18 years of age, or any other kind of assault which is aggravated in its circumstances or of serious and lasting damage in its consequences. There is but one offense—the crime of assault—and the varying degrees of aggravation were mentioned only for the purpose of graduating the punishment. To hold otherwise would defeat the manifest intention of the Legislature. It must be observed that the language of the statute is that, if the indictment is for rape, or any felony whatsoever, "and the crime charged shall include an assault against the person," the jury "may find a verdict against the defendant for assault." It does not describe the kind of assault, but refers to an assault generally, and without regard to its degree of punishment under the law. If the assault is of that kind, which, if committed with intent to ravish or to commit any other felony, would subject him to punishment for the offense so charged, if convicted of the same, then, subject to the rule already stated, he can be punished at the discretion of the court, if convicted of the assault only. Can it be doubted that this assault is of that kind, unless it is held that a man, or boy over 18 years old, cannot be convicted of an assault with intent to ravish, or to commit any other felony? It is best, and certainly safe, that the court should require the jury, under a special issue submitted, to find the facts necessary to determine the grade of punishment, and we strongly commend this practice to the judges. There are one or more cases in which this same suggestion has been made.

The recent decisions in *State v. Shuford*, 152 N. C. 809, 67 S. E. 923, and *Ex parte Holley*, 154 N. C. 163, 69 S. E. 872, illustrate the view we have taken. In the last-cited case it was held, as it was in the *Shuford*

Case, that, while the statute graded the punishment of larceny according to the value of the stolen goods, it did not create any new offense, and the value of the property taken was not an essential element of the crime, but the provision was inserted in the statute only for the purpose of ameliorating the punishment, if it is shown on the trial by the defendant, or if it otherwise appears, that the goods are of less value than \$20. And so in this case the age of the man is mentioned merely to aggravate the offense and to increase the maximum of punishment. A male infant under the age of 14 years is presumed, at common law, incapable to commit a rape; but a boy 14 years old could, at common law, commit an unlawful assault upon a woman. If he is indicted for the crime, is it necessary to state his age? The courts of all jurisdictions have answered that question in the negative. The matter contained in the last proviso was not intended to be, and is not, descriptive of the offense, as in *State v. Connor*, 142 N. C. 702, 55 S. E. 787, and *State v. Burton*, 138 N. C. 576, 50 S. E. 214, but it was intended to leave it to the judge, upon conviction of an assault, to say what the sentence shall be.

The authorities to the effect that it is not necessary to allege the age in the indictment, even where the age of capacity is raised by statute from 14 years—the common-law limit—to 16 years or more, are very numerous; the age being held to be a matter of defense. "The office of a proviso generally is, either to except something from the enacting clause, to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extending to cases not intended to be brought within its purview." *Potter's Dwarries on Statutes*, page 118; *State v. Goulden*, 134 N. C. 743, 47 S. E. 450; *Huddleston v. Francis*, 124 Ill. 195, 16 N. E. 243; and *Sutton v. People*, 145 Ill. 279, 34 N. E. 420, and authorities cited. In that case it is said: "At common law, a boy under 14 years of age was conclusively presumed incapable of committing a rape, and that strictness is adhered to in some jurisdictions in this country; but it has never been held that, in charging the crime as defined at common law, it was necessary to aver that the accused was, at the time, of the age of 14 years or upwards"—citing 2 *Wharton on Criminal Law*, § 1458; *Commonwealth v. Scannel*, 11 Cush. (Mass.) 547; *People v. Ah Yek*, 29 Cal. 575; *Word v. State*, 12 Tex. App. 174; *Cornellius v. State*, 13 Tex. App. 349. In *Rex v. Jarvis*, 1 East, 943, Lord Mansfield said: "It is a known distinction that what comes by way of proviso in a statute must be insisted on, by way of defense, by the party accused; but, where exceptions are in the enacting part of the law, it must appear in the charge that the defendant does not fall within any of

them." It must be borne in mind that the proviso to Revisal, § 3620, inserted by the act of 1911, c. 193, does not refer directly to the enacting clause of the statute, but to a former proviso in the section, which withdrew certain assaults, simple in their character, from the operation of the enacting clause; and the proviso of 1911 was merely passed to prevent assaults by a man, or a boy over 18 years of age, upon a woman, from being included in the first proviso of the section. It was clearly the purpose of the Legislature to clarify the meaning of the section, and it was not intended to create or define any new offense, but the new clause related exclusively to the degree of punishment for such aggravated assault, it still being an assault as formerly; and by the terms of the last proviso it was placed in the same class with all other assaults, attended with circumstances enhancing defendant's guilt, and calling for a greater penalty. The case of *State v. Knighten*, 39 Ore. 63, 64 Pac. 866, 87 Am. St. Rep. 647, is so much in point and bears such a close resemblance to the case at bar, that we are permitted to quote liberally from it:

"The statute provides that, 'if any person over the age of sixteen years shall carnally know any female child under the age of sixteen years,' etc., he shall be deemed guilty of rape. It is argued that under this statute the age of the defendant is an essential ingredient of the crime, and must be averred in the indictment. But, as we understand the statute, its only effect is to raise the age of capacity of the male from 14, as it was at common law, to 16 years. At common law, a boy under 14 years of age was presumed to be physically incapable of committing the crime of rape, but (as we have seen) it was never held that it was necessary to allege the age of the defendant in an indictment for that crime. 16 Am. & Eng. Enc. Law (1st Ed.) 315; *Commonwealth v. Scannel*, 11 Cush. [Mass.] 547; *Sutton v. People*, 145 Ill. 279, 34 N. E. 420; *State v. Ward*, 35 Minn. 182, 28 N. W. 192. Nor is it necessary under the statute. If the defendant was below the requisite age, it is a matter of defense. Mr. Bishop says the age of the defendant need not be set out, 'though the statutory words are "any person of the age of fourteen years and upwards, who shall have carnal knowledge." If he is below 14, it is simply matter for defense.' Bishop, *Stat. Crimes* (2d Ed.) § 482. The statute of California provided that 'any person of the age of fourteen years and upward, who shall have carnal knowledge of any female child under the age of ten years, either with or without her consent, shall be adjudged guilty of the crime of rape;' and in *People v. Ah Yek*, 29 Cal. 576, it was held that an indictment, silent as to the age of the defendant, was good. Mr. Justice Sawyer, speaking for the court, said: 'It

does not appear upon the face of the indictment that defendant was under 14 years of age, and we see no better reason for averring that he is over 14 than in any other criminal case for averring that the party charged is of such an age as to render him capable in law of committing the crime. His capacity to commit the crime is as much an element in the crime in one case as in the other.' See, also, *People v. Wessel*, 98 Cal. 352, 33 Pac. 216. The statute of Vermont also made it an offense, punishable the same as rape, for a person over the age of 16 years to carnally know a female person under the age of 14 years, with or without her consent; and in *State v. Sullivan*, 69 Vt. 540, 35 Atl. 479, it was held that it was not necessary to allege in the indictment the age of the defendant, but that, if he was under 16 years of age, it was a mere matter of defense. We are of the opinion, therefore, that the indictment is sufficient."

There are numerous authorities sustaining that view of the law, and several of them are reviewed in the case already cited. *State v. McNair*, 93 N. C. 628, has some bearing upon the question, although not directly in point. It recognizes that the age of the defendant in such cases as this is a matter for proof by him, if not descriptive of the offense, as in *State v. Connor*, supra.

But Revisal, § 3269, provides that "upon the trial of any indictment, the prisoner may be convicted of the crime charged therein, or of a less degree of the same crime." This language is broad enough to cover the case. Under that section, when the charge is of an assault with intent to ravish, the prisoner may be convicted of an assault upon a woman, and if it is found that he was over 18 years of age at the time the offense was committed he may be punished, as for an aggravated assault, under Revisal, §§ 3268, 3620, whether his age is stated in the indictment or not. *State v. West*, 39 Minn. 321, 40 N. W. 249; *State v. Baldrige*, 105 Mo. 319, 16 S. W. 890; *Bolling v. State*, 98 Ala. 80, 12 South. 782; *Storrs v. State*, 129 Ala. 101, 29 South. 778. It has frequently been held by courts in states having statutes substantially like ours that, upon the indictment for an assault with intent to kill, or to commit rape, the defendant may be convicted of an aggravated assault, under a statute creating that as a distinct offense, although it is not by that name alleged in the indictment; it being considered within the description of the other crime, which is properly averred. *Pittman v. State*, 25 Fla. 648, 6 South. 437; *State v. Robinson*, 31 S. C. 453, 10 S. E. 101. In the case of *State v. Sullivan*, 69 Vt. 540, 35 Atl. 479, the court held that it was unnecessary to allege the age of the defendant to be over 16 years, as provided by the statute of that state, and that, under an indictment, not alleging such age, for an assault with intent, forcibly and against her consent, to ravish a child less than 14 years

old, a conviction, upon evidence, for an assault under the statute, which provides for the punishment of one over 16 years of age, who carnally knows a female under 14 years of age, even with her consent, was proper. See, also, *Commonwealth v. Scannel*, 11 Cush. (Mass.) 547; *Bishop*, St. Cr. (2d Ed.) § 482; *Wilkinson v. Dutton*, 113 E. C. L. (3 Best & S.) 821. Several of the states have passed statutes creating a separate and distinct offense by the name of "assault by an adult upon a female," and some of these courts have held that it is necessary, *for that reason*, that the fact of being an adult should be alleged in the indictment; it being a necessary ingredient of the offense. *Blackburn v. State*, 39 Tex. 153. But courts hold, in regard to facts similar to those in this case, and this seems to be the better accepted doctrine, that there is a presumption of capacity (*capax doli*), or that a defendant is an adult, or of sufficient age to know right from wrong, and it is incumbent upon him to show the contrary, or, at least, that he is under that age, say between 7 and 14 years, when the burden may shift to the state to prove that he actually had the capacity to know the true quality and nature of his act; that is, whether it is forbidden by morality and law, or not. This is not like the cases of *State v. Lanier*, 88 N. C. 658, and *State v. Wilson*, 101 N. C. 730, 7 S. E. 872, in which it was held that an indictment for embezzlement must negative the fact of defendant being an apprentice, or under the age of 16 years. Those exceptions are contained in the body of the enactment, and are descriptive of the offense.

[2] Defendant's counsel argued that, under our numerous decisions in regard to the jurisdiction of a justice of the peace in criminal matters, it was held to be necessary that the indictment should allege the facts and circumstances showing jurisdiction in the court, as that an assault was committed with a deadly weapon, or with intent to commit a rape, or more than 12 months before the finding of the bill, but that, where there is a conviction of a simple assault, even under a bill alleging the use of a deadly weapon, or that serious damage was done, the punishment is limited to \$50 fine or 30 days imprisonment. The conviction in this case, though, was not for a simple assault, but for a very aggravated one. The defendant can gain nothing by this argument. If a simple assault was charged in the bill, the superior court had jurisdiction, for it may be that no "justice of the peace had proceeded to take official cognizance of the crime within 12 months after its commission," in which case the superior court could retain jurisdiction, as the burden is upon the defendant to show the fact that jurisdiction had been taken by a magistrate within said time; it being matter of defense. *Pell's Revisal* 1908, § 1427, and cases in notes.

[3] So when the indictment charged an as-

sault with a deadly weapon, describing the same, or with serious damage, with proper averments as to the extent of the damage, the superior court can punish, upon conviction of a simple assault, nothing more appearing; and it is only where there is a conviction of a simple assault, under an indictment which upon its face shows jurisdiction in the superior court, and the further allegation or finding that the 12 months since the commission of the offense had not elapsed, that the jurisdiction of the superior court is ousted. Pell's Revisal, supra. But we do not understand how the decisions upon those questions can help the defendant, as, upon a bill charging an offense clearly within the jurisdiction of the court, he has been convicted of an aggravated assault. We have not laid any stress upon the provision as to offenses committed within one mile of the place where the court is held, and during its session, as it was not of sufficient consequence to require more than passing notice.

In no view of the case was there any error committed by Associate Justice Allen, when he refused to discharge the prisoner, but remanded him, as set forth in his order. No error.

(156 N. C. 496)

**ZACHARY v. NORTH CAROLINA R. CO.**  
(Supreme Court of North Carolina. Nov. 9, 1911.)

**1. COMMERCE (§ 27\*)—CARRIERS—RAILROADS—INTERSTATE COMMERCE.**

A railroad corporation whose tracks lay wholly within a certain state did not, by leasing its tracks to a railroad corporation engaged in interstate commerce, itself engage in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.\*]

**2. RAILROADS (§ 259\*)—OPERATION—LEASES—LIABILITY OF LESSOR.**

The lessor of a railroad is responsible for all negligence of its lessee in the conduct of the business of the road, regardless of whether such acts occur in intrastate or interstate commerce.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 802-818; Dec. Dig. § 259.\*]

**3. COMMERCE (§ 27\*)—INTERSTATE COMMERCE—EMPLOYER'S LIABILITY.**

A fireman, whose run was wholly within the state, having oiled and prepared his engine, which was not then attached to any train, was killed while crossing the tracks to his boarding house for a personal purpose. His engine was to have hauled some freight, which was interstate commerce, but the road upon which it operated was not an interstate carrier, though the lessee of the road was engaged in such commerce. *Held*, that the federal employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. Stat. 1909, p. 1171]), which applies only to a carrier by railroad while engaged in interstate commerce, and only to an employé suffering injury while employed in such commerce, did not apply, for the fireman was not then engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.\*]

**4. RAILROADS (§ 282\*)—INJURIES TO PERSONS ON TRACKS—ACTIONS—EVIDENCE.**

In an action for the death of a locomotive fireman, killed while crossing the tracks in a railroad yard, going from his engine to his boarding house by the usual path, evidence of negligence creating a liability for his death held sufficient to go to the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.\*]

**5. RAILROADS (§ 282\*)—INJURY TO LICENSEE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Where a fireman, after cleaning and oiling his engine, which was not yet attached to the train, left it, and in crossing the tracks to his boarding house was struck and killed by a switch engine, moving, tender forward, without any light or flagman, and another engine nearby was making a very loud noise, and the night was very dark, the fireman was not, as a matter of law, guilty of contributory negligence; it being the custom of the employes to cross the tracks as he did.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.\*]

**6. TRIAL (§§ 159, 168\*)—TAKING CASE FROM JURY—NONSUIT.**

Where, in an action for the death of one killed by a train, it appears from the evidence of the plaintiff that his intestate was guilty of contributory negligence, the court may grant a nonsuit, or direct a verdict for defendant.

[Ed. Note.—For other cases, see Trial, Dec. Dig. §§ 159, 168.\*]

**7. RAILROADS (§ 282\*)—INJURIES TO PERSONS ON TRACKS—LOOK AND LISTEN RULE.**

While a railroad employé must use reasonable care in crossing the railroad tracks, his failure to look and listen before crossing such tracks, in the performance of his duty, is not, as a matter of law, contributory negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.\*]

Appeal from Superior Court, Guilford County; Daniels, Judge.

Action by James A. Zachary, as administrator of Herbert H. Burgess, deceased, against the North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The action was for damages for the negligent killing of Herbert H. Burgess, a fireman in the employment of the Southern Railway Company, the lessee of the defendant, at Selma, N. C., April 29, 1909.

These issues were submitted to the jury:

"(1) Was the intestate of the plaintiff killed by the negligence of the lessee of the defendant as alleged in the complaint? Answer: Yes.

"(2) Did the intestate of the plaintiff contribute to his death by his own negligence? Answer: No.

"(3) What amount, if any, is the plaintiff entitled to recover? Answer: \$2,000."

Wilson & Ferguson and John K. Graves, for appellant. John A. Barringer, G. S. Bradshaw, and Thomas H. Calvert, for appellee.

BROWN, J. There are 23 assignments of error in the record; none of them relating to

the reception or rejection of evidence. These assignments present for consideration the three principal contentions of the defendant: (1) That the act of Congress of April 22, 1908, known as the federal employer's liability act, applies, and that the cause should have been determined under the provisions of that act. (2) That there is no sufficient evidence of negligence. (3) That, in any view of the evidence, the intestate was guilty of such contributory negligence as, under the law of this state, bars recovery.

Does the federal act apply?

Plaintiff's intestate was fireman of engine 862, which was standing at the time of the occurrence on the cinder track at Selma, N. C. He had been oiling his engine and preparing it to take a train from Selma to Greensboro, which was made up at Selma. He started across the tracks to go to his boarding house before leaving, and was struck and killed by a local switch engine, which at the time was backing down the main line for the purpose of cutting out two cars, which had come in from Pinners Point, Va., on train 72, for transportation to Greensboro, N. C. Train 72 is known as the Pinners Point train, via Selma, to Goldsboro, N. C. Engine 862 was not attached to any cars at the time, but was being prepared to haul a train from Selma to Greensboro, composed of miscellaneous cars. All cars brought in from Pinners Point, Va., by train 72, for points west of Selma, are included in this train. We are of opinion that the federal act does not apply, and that the case was properly tried under the state law. The act applies only to a carrier by railroad while engaging in interstate commerce, and only to an employé "suffering injury while he is employed by such carrier in such commerce."

[1] The point was not discussed on the argument or in the briefs, but it occurs to us that the North Carolina Railroad is not an interstate railroad; nor is that corporation itself engaged in interstate commerce. Its tracks and property lie wholly within the state of North Carolina, extending from Goldsboro to Charlotte. It is true the tracks and property are leased to the Southern Railway Company, a corporation of another state, that is engaged in both inter and intra state commerce, but that does not necessarily make the North Carolina Railroad Company an interstate carrier, within the meaning of the act of Congress, any more than A. would be made a wholesale grocery merchant, because he had leased his warehouse to B., who conducted such business in it, and had assumed responsibility for B.'s debts. The corporation, known as the North Carolina Railroad Company, is in existence, has its officers and directors, receives its annual rents from its lessee, the Southern Railway Company, and distributes them among its stockholders; but it is not an interstate

carrier, within the meaning of the federal act.

[2] It is also true that this court has held, in *Logan v. Railroad*, 116 N. C. 941, 21 S. E. 959, that this lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business on the lessor's road; it matters not what kind of commerce the lessee is engaged in at the time. But that is because a railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts, of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either.

[3] We do not think the federal act applies, for the reason that the deceased at the time when killed was not employed by the Southern Railway, the lessee, in interstate commerce. At the time he was killed, the deceased was not engaged in an act of any kind of commerce. He was on his way to his boarding house for a purpose entirely personal to himself, and not on the carrier's business. The deceased had oiled and prepared his engine to make the run from Selma to Greensboro, points within this state. The engine was stationary and had not been attached to any cars. The deceased was on his way to his boarding house, and was killed by a local switch engine, which was then unattached to any cars, but going for two cars from Pinners Point, Va., for the purpose of attaching them to the train that engine 862 was expected to pull. So far as the evidence shows, the deceased nor his engine had ever been engaged in any other work, except this local run from Selma to Greensboro. If the contention of the defendant can be maintained, then it follows that all employés of railways that do an interstate business are necessarily employed in interstate commerce. The ticket seller, who sells a ticket to a traveler going beyond the state, the car cleaner who cleans the car he is to travel in, the man who loads the engine tender with coal which is to pull him, and the gatekeeper who examines his ticket and passes him onto his car, are all employed in interstate commerce.

The employer's liability act of 1906 (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1148]) was declared repugnant to the Constitution, because by its terms it embraced all employés of a railroad, interstate and intrastate, and that the two were so interblended in the statute that they were incapable of separation. *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. If the contention of the learned counsel for defendant be well founded, then the subsequent act of 1908 would apply to all employés of a railway engaged in both kinds of commerce, however remotely they are connected with it. This would accomplish the very end which it would seem could not be accomplished by the federal

Congress under the first act. This contention would extend the power of Congress to almost every conceivable subject of railway transportation however inherently local, and would destroy the authority of the states over matters which, from the beginning, have been under their control.

[4, 5] Was the evidence of negligence sufficient to justify the court in submitting the matter to the jury? We think it was. The evidence offered by plaintiff tends to prove that the deceased was compelled to cross the several tracks of the railroad to go from his engine to his residence; that it was customary for all employes to pass to and fro over these tracks; that it was dark at the time, and the switching engine was running backwards, tender foremost, from 15 to 20 miles an hour. Two witnesses testify that there was no light whatever on the end of the tender that was moving forward, nor any flagman there. This is ample evidence of negligence to go to the jury. *Ray v. Railroad*, 141 N. C. 84, 53 S. E. 622; *Smith v. Railroad*, 132 N. C. 819, 44 S. E. 663; *Purnell v. Railroad*, 122 N. C. 832, 29 S. E. 953. Was the plaintiff's intestate, in any view of the evidence, guilty of such contributory negligence as bars recovery? We think not, and that his honor properly submitted that matter to the consideration of the jury.

[6] Had it appeared from the evidence offered by plaintiff that his intestate was guilty of contributory negligence, it is settled by precedents that the court may sustain the motion to nonsuit, or direct a verdict upon that issue. *Baker v. Railroad*, 150 N. C. 562, 64 S. E. 506, 29 L. R. A. (N. S.) 846; *Strickland v. Railroad*, 150 N. C. 4, 63 S. E. 161. Under the conditions surrounding the intestate, we cannot say, as matter of law, that in any view of the evidence he was guilty of contributory negligence. His honor properly submitted the matter to the jury under what is commonly known as the rule of the prudent man. There is strong evidence of contributory negligence, but the evidence is not all of that character from which only one inference can be drawn.

If nothing appeared in evidence, except the testimony of Oliver, the engineer of the switching engine that killed the intestate, it may be that the court might well have sustained the defendant's contention. But there are many facts and circumstances in evidence which tend to exculpate the intestate, and to explain his conduct. The intestate was evidently in a hurry to go to his residence and return to his engine; he was compelled to cross six tracks; there was no other way; it was the universal custom for the employes to cross these tracks, passing to and fro from their places of residence on the south side; the big freight engine 719 was standing on a track about eight feet from the main line, with its blower on, making a very loud noise, so that the bell of the switching engine could

not be heard by the intestate, who at the time came from behind No. 719, and started to step on main track, and was killed by the switch engine. The engineer of that engine says that the intestate did not look, and that if he had looked he could have seen the switch engine. That is the construction put by the engineer upon intestate's conduct from the engineer's point of view; but, under all the circumstances, taking the evidence as a whole, it ought not to be held to be conclusive. The intestate could not well hear the ringing bell or the approach of the switch engine because of the blowing off of 719. It was dark, and possibly he could not see the switch engine. He had the right to rely upon the invariable requirements that an approaching engine will display a headlight at night. Had there been a headlight, he would probably have seen it before he stepped upon the track. The absence of it may have misled him, and lured him to his death.

[7] While an employe must exercise reasonable care, the rule that one who crosses a railroad track must, as a matter of law, look and listen before doing so does not apply in all its strictness to one who is employed in a railroad yard, and whose duties make it necessary for him to go frequently upon the tracks. *Wolf v. Railroad*, 54 N. C. 571, 70 S. E. 993; *Sherrill v. Railroad*, 140 N. C. 255, 52 S. E. 940; *Wells v. Bethlehem Iron Co.*, 88 Fed. 23, 31 C. C. A. 363; *St. Louis, etc., R. Co. v. Jackson*, 78 Ark. 100, 93 S. W. 746, 6 L. R. A. (N. S.) 646; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044; *Shoner v. Pennsylvania Co.*, 130 Ind. 170, 28 N. E. 616, 29 N. E. 775; *McMarshall v. Chicago, etc., R. Co.*, 80 Iowa, 757, 45 N. W. 1065, 20 Am. St. Rep. 445; *Jordan v. Chicago, etc., R. Co.*, 58 Minn. 8, 59 N. W. 633, 40 Am. St. Rep. 486. It is well said by Mr. Justice Manning, in his clear and well-considered opinion in *Farris v. Southern Ry.*, 151 N. C. 483, 66 S. E. 457: "While we are in no wise inclined to relieve the person crossing the tracks of a railroad from the imperative duty of observing the measure of caution so well established for his safety by the well-considered decisions of this and other courts, yet 'it cannot always be said that he is guilty of contributory negligence, as a matter of law, because he did not continue to look and listen at all times continuously for approaching trains, where he was misled by the company, or his attention was rightfully directed to something else as well' (3 Elliott on Railroads, § 1166a), or that he failed to look in opposite directions at the same moment of time."

Taking into consideration the whole evidence, and weighing the conditions and circumstances surrounding the intestate, we are of opinion that his honor properly submitted the question of contributory negligence to the jury, and overruled the motion to nonsuit. The charge is a full and clear presentation



of both sides of the controversy, and we find no error in it of which the defendant can justly complain.

No error.

(157 N. C. 161)

### ELLETT v. ELLETT.

(Supreme Court of North Carolina. Nov. 22, 1911.)

#### 1. DIVORCE (§ 129\*)—ACTIONS—WEIGHT OF EVIDENCE.

Plaintiff in divorce need not prove adultery by clear, cogent, and convincing evidence; a preponderance of the evidence being sufficient.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 411-441; Dec. Dig. § 129.\*]

#### 2. EVIDENCE (§ 596\*)—WEIGHT OF EVIDENCE—CIVIL ACTIONS.

While in criminal cases the state must prove the material facts beyond a reasonable doubt, or to the jury's satisfaction, in civil cases the party having the burden of proof need only prove the material facts by a preponderance of the evidence, except in cases of an equitable nature, in which the facts would have formerly been found by the chancellor, such as where it is sought to reform a written instrument, or prove the terms of a lost will, etc., when the evidence must be clear, strong and convincing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2446-2448; Dec. Dig. § 596.\*]

#### 3. DIVORCE (§ 54\*)—GROUNDS—ADULTERY—DEFENSE.

The fact that a husband willfully abandoned his wife would not justify her adultery, so as to prevent him from procuring a divorce; she being entitled under the statute to alimony and a limited divorce, if abandoned.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 190-196; Dec. Dig. § 54.\*]

#### 4. HUSBAND AND WIFE (§ 278\*)—SEPARATION AGREEMENTS—VALIDITY.

A separation agreement is not of itself void, because against public policy; the law now recognizing the validity of such agreements under certain conditions, as shown by Code, § 1831 (now Revisal 1905, § 2116), providing that every woman living separate from her husband, under a deed of separation, shall be held a free trader.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.\*]

#### 5. HUSBAND AND WIFE (§ 283\*)—ACTIONS FOR SUPPORT—ABANDONED WIFE.

Under Code, § 1292 (now Revisal 1905, § 1567), providing that, if any husband separate himself from his wife, and fail to provide her with necessary subsistence, she may apply to the judge of the superior court to have a reasonable subsistence secured for her and her children from the husband's estate, an abandoned wife may sue her husband to compel the support of herself and her children, without asking for a divorce.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.\*]

Hoke, J., dissenting in part.

Appeal from Superior Court, Rockingham County; Adams, Judge.

Action by F. M. Ellett against Elizabeth B. Ellett. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

F. L. Fuller, C. O. McMichael, A. D. Ivie, and W. P. Bynum, for appellant. A. L. Brooks, for appellee.

CLARK, C. J. This is an action for an absolute divorce, brought by the husband against the wife.

[1, 2] The seventh issue was as follows:

"(7) Did the defendant commit adultery with one George B. Gatling, as alleged in the complaint?" On this issue, the judge charged: "The plaintiff must show such adulterous intercourse by evidence which is clear, cogent, and convincing. If you find from the evidence, which is clear, cogent, and convincing, that the defendant committed adultery with George B. Gatling, your answer to the seventh issue will be, 'Yes.' If not, your answer to the seventh issue will be, 'No.'" The exception of the plaintiff to this charge must be sustained. In criminal cases the burden is upon the plaintiff to prove the charge "beyond a reasonable doubt," or "to the satisfaction of the jury." But in civil cases the rule is that the party upon whom lies the burden of proof is called upon to establish his allegation merely "by the preponderance of the evidence." There are some exceptions to this in matters of an equitable nature, as to which the evidence must be "clear, strong, and convincing."

For instance, when a party asserts and endeavors to prove by parol that a deed which is absolute on its face was in fact a mortgage. 8 Encyc. Ev. 714; Watkins v. Williams, 123 N. C. 174, 31 S. E. 388; Porter v. White, 128 N. C. 45, 38 S. E. 24, and cases cited therein. The same rule as to intensity of proof applies, also, where a party seeks the reformation of a written instrument. Ely v. Early, 94 N. C. 1; Kornegay v. Everett, 99 N. C. 30, 5 S. E. 418; Hemphill v. Hemphill, 99 N. C. 436, 6 S. E. 201; Warehouse Co. v. Ozment, 132 N. C. 846, 44 S. E. 681. Also the same intensity of proof is required to prove the terms of a lost will, and there are a few other instances. But they are all cases in which formerly the facts would have been found by the chancellor. Such intensity of proof is not required as to the issues in divorce, which is an action at law. Certainly it has never been required in this state.

It is true that in Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97, the judge charged the jury that the evidence of adultery must be "strong, convincing, and conclusive," but, notwithstanding this erroneous charge, the jury found the issue "Yes," and therefore there was no appeal by the plaintiff which would have presented the question as to the correctness of that part of the charge.

[3] The plaintiff contends, however, that, inasmuch as the jury found "Yes," in response to the eighth issue, "Did the plaintiff, before the time of the alleged adultery,

maliciously turn the defendant out of doors?" that the error in the instruction as to the intensity of the proof on the seventh issue was harmless error. But this proposition is neither good law nor good morals. There is no legal or moral reason why a woman who has been abandoned by her husband, shall be privileged to commit adultery any more than if she were a widow or a single woman. It is true that, prior to the act of 1872 (now Rev. § 1561 [2]), such was deemed the law in this state (*Moss v. Moss*, 24 N. C. 55), and that the same was practically reiterated after that act in *Tew v. Tew*, 80 N. C. 316, 30 Am. Rep. 84, but, as was strongly intimated in *Steele v. Steele*, 104 N. C. 636, 10 S. E. 707, the latter decision cannot be sustained, "and was evidently tinged by the restrictive ideas of the older law." The court further says in the latter case that the reason of the former law was that the wife, having no property (which at that time all belonged to the husband, as the law was formerly), might be forced, and probably would be, to form a new connection, in order to obtain a support, "but now, under our statutes of 1869, 1874, and 1879 she can compel her husband to provide her adequate support, both for herself and her children." *Steele v. Steele* in effect overruled *Tew v. Tew* on that point.

[4, 5] Nor is an agreement for separation, as formerly, ipso facto void, because "against law and public policy." As *Smith, C. J.*, pointed out in *Sparks v. Sparks*, 94 N. C. 532, the law now recognizes the validity, under certain conditions, of such a deed by providing in Code, § 1831 (now Rev. 2116), "that every woman living separate from her husband \* \* \* under a deed of separation, executed by said husband and wife and registered, \* \* \* shall be deemed and held \* \* \* a free trader," etc. *Sparks v. Sparks*, supra, has been cited as authority in *Smith v. King*, 107 N. C. 273, 12 S. E. 57; *Cram v. Cram*, 116 N. C. 294, 21 S. E. 197. Besides, under Code, § 1292 (now Rev. 1567), the wife, who has been abandoned or deserted by her husband, can sue for a support for herself and children, without asking for a divorce. *Cram v. Cram*, 116 N. C. 288, 21 S. E. 197; *Skittletharpe v. Skittletharpe*, 130 N. C. 72, 40 S. E. 851; *Bidwell v. Bidwell*, 139 N. C. 409, 52 S. E. 55, 2 L. R. A. (N. S.) 324, 111 Am. St. Rep. 797. Our older authorities, therefore, which made the adultery of the wife, committed after desertion or abandonment by her husband, no ground for divorce, are without the reason which gave support to such rulings. They have now as little support in law as they ever had in morals.

The remedy which the statute gives to a

wife, abandoned or deserted by her husband, is alimony and divorce a mensa et thoro. It does not privilege either one to commit adultery. If she does, the husband is entitled to a divorce. This was the ecclesiastical law. *Nelson on Divorce*, § 430. His wrong does not authorize her to commit a greater one. She can go back to live with him after his desertion; but he cannot be required to live with her after her adultery. The American decisions are conflicting, being based upon statutes of varying tenor.

Besides, in this case, the husband placed the wife in a sanitarium for the cure of her habit of drunkenness, and paid her, or for her benefit, regularly \$50 per month for her support under the agreement of separation. He also paid her \$400 per year rent for a home worth \$5,000, which he had given her, and supported the children himself. She was not therefore subjected to temptation by the necessity of procuring a support, which was the reason for the rulings of the court in *Tew v. Tew*, 80 N. C. 316, 30 Am. Rep. 84, and cases prior thereto.

It may be that on another trial the jury will again find the wife was not guilty, but the plaintiff is entitled to a new trial, to the end that the issue may be submitted under proper instructions as to the intensity of proof required to establish the charge.

Error.

ALLEN, J., concurs in result.

HOKE, J. (concurring in the result). I concur in the decision awarding a new trial in this case for the error in the charge of the court on the degree of proof required to establish the seventh issue, and it may be that there are no facts amounting to legal evidence tending to show that plaintiff maliciously turned defendant out of doors. I do not agree to the position, however, nor do I think that it has the support of any authoritative decision, that a husband, who has wrongfully abandoned his wife, may successfully maintain an action for divorce a vinculo on account of her adultery. Under a long line of well-considered precedents, relief in such case was denied, not because the act of the wife was justifiable—it was never so regarded—but because the husband, on account of his own conduct in wrongfully withdrawing his association and protection from the wife, was not in a position to ask relief from the court. Neither the moral nor the legal aspect of this position is changed, because the wife may, under certain conditions, now obtain alimony. The doctrine and the principle upon which it rests lie deeper, and, in my opinion, should now and always prevail.

(187 N. C. 148)

**SEXTON v. GREENSBORO LIFE INS. CO.**  
(Supreme Court of North Carolina. Nov. 22, 1911.)

**1. TRIAL (§ 251\*)—INSTRUCTIONS—APPLICATION TO ISSUES.**

An instruction which recites the submission of an issue, not within the issues actually submitted, is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 587; Dec. Dig. § 251.\*]

**2. INSURANCE (§ 349\*)—FORFEITURE OF POLICY FOR NONPAYMENT OF PREMIUM NOTE.**

Where a note for a part of an annual premium for a policy stipulated that, should the note not be paid at maturity, the policy should become void without notice, a failure to pay at maturity worked a forfeiture of the policy; the note being merely an extension of the time of payment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 897; Dec. Dig. § 349.\*]

**3. INSURANCE (§ 665\*)—PREMIUMS—PAYMENT—RECEIPT AS EVIDENCE.**

A receipt for the premium, pinned to a note for the premium, is not evidence of payment, where it has not been delivered by insurer to insured, and where insurer produces it in court, pursuant to notice.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1707; Dec. Dig. § 665.\*]

Appeal from Superior Court, Davidson County; Lyon, Judge.

Action by Savannah Sexton, administratrix of U. E. Sexton, deceased, against the Greensboro Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Civil action to recover on a policy of life insurance issued by the defendant on the life of U. E. Sexton. The policy is for \$1,000, numbered 742, with an accident clause requiring the insurer to pay double the amount in the event of death by external, violent, and accidental means. The insured was killed in a railway wreck December 15, 1909.

These issues were submitted to the jury, to which defendant excepted, and tendered other issues:

"(1) Did the defendant issue and deliver to the plaintiff's intestate the policy No. 742 sued on? Answer: Yes.

"(2) Is U. E. Sexton dead, as alleged in the complaint? Answer: Yes.

"(3) Did the plaintiff's intestate pay or cause to be paid the annual premiums required, and within the time stipulated by the policy? Answer: Yes.

"(4) Did said policy lapse, as alleged in the answer? Answer: No.

"(5) What sum, if any, is the plaintiff entitled to recover of the defendant? Answer: \$2,000, less \$80, with interest from date of note."

The following issues were tendered by the defendant:

"(1) Did the defendant issue and deliver to the plaintiff the policy No. 742 sued on?

"(2) Did the plaintiff's intestate die on the 15th day of December, 1909, as alleged in the complaint?

"(3) Did the defendant accept, in settlement of the premium of \$34.57, due August 1, 1909, a cash payment and the intestate's note for \$18.17, dated August, 1909, and due November 1, 1909?

"(4) If such note was given, was it paid at maturity?

"(5) What sum, if anything, is the plaintiff entitled to recover?"

The court rendered judgment for plaintiff, and defendant appealed.

Walser & Walser and King & Kimball, for appellant. E. E. Raper and McCrary & McCrary, for appellee.

BROWN, J. In respect to the issues, we are of opinion that under those submitted by the court every defense can be presented; but, as the case is to be tried again, it is well to say that those tendered by the defendant present rather more directly to the minds of the jury the real fact in controversy.

The controversy is over the payment of the premium, due August 1, 1909, of \$34.57. If that was paid, the plaintiff is entitled to recover. If it was not paid, or payment waived, plaintiff is not entitled to recover. The evidence shows that on September 2, 1909, the insured paid in cash on this premium \$16.40, and gave his note for \$18.17, of which the following is a copy, dated the day the premium became due: "\$18.17. August 1, 1909. Ninety days after date, for value received, I promise to pay to the order of Greensboro Life Insurance Company eighteen and 17/100 dollars, without discount or defalcation, with interest at 6 per cent. per annum, at — being the premium due August 1, 1909, on policy No. 742 in said company. Should this note with interest not be paid when due, said policy shall immediately become null and void without notice, subject to the non-forfeiture provisions contained in the policy, and in that event any money paid on account of premium for which this note is given shall become the property of the company. U. E. Sexton. [Signature of Person Insured.] Denton, N. C."

His honor charged the jury, as copied from the record: "Now, as I told you, by consent you will answer the first and second issues, 'Yes.' Now, as to the third issue, 'Did the defendant accept, in settlement of the premium of \$34.57, due August 1, 1909, a cash payment and the intestate's note for \$18.17, dated August, 1909, and due November 1, 1909?' the only premium that is in controversy is the premium that was payable on the 1st of August, 1909. Now, you find the facts from the evidence, and if you find

from the evidence that the intestate, U. E. Sexton, paid the premium by giving his note and cash accompanying the note, and that the company accepted that as a payment on the premium, not conditionally, but accepted it as a payment of the annual premium, then it would be your duty to answer that issue, 'Yes'; but if you find from the evidence that the note and part of the premium, due the 1st of August, 1909, was not accepted and treated by the company as a payment, and you find that that note was never paid at all after the death of the intestate, or before his death, why, you should answer that issue, 'No.'"

[1, 2] There are two objections to that charge, both of which must be sustained. There was no such issue submitted to the jury as the one recited in the charge as the third issue; that is, the third issue tendered by the defendant, and which was refused. There must be some mistake in printing this record, or in copying the charge of his honor, for the record does not disclose that the third issue tendered by defendant was ever substituted for the other. But the chief and most important exception is that there is no evidence that the defendant accepted the note as a payment of the premium. It is merely an extension of the time of payment. In express terms, the note on its face declares that the policy is void, if the note is not paid when due. This note is similar to the one construed in *Ferebee v. Insurance Co.*, 68 N. C. 11. Cooley says: "It is commonly stipulated by insurance companies that if a note is accepted for a premium a failure to pay the note at maturity shall terminate the insurance. When the policy, or the policy and the note, contained a stipulation to this effect, a failure to pay at maturity a note given for a premium will work a forfeiture of insurance." Cooley's *Briefs on Insurance*, vol. 3, p. 2269, and cases cited; *Pitt v. Insurance Co.*, 100 Mass. 500.

[3] The plaintiff was permitted to introduce this receipt in evidence, as Exhibit C: "Greensboro Life Insurance Company. Greensboro, N. C., Sept. 13, 1909. Received from the holder of policy No. 742 issued by this company on the life of Ulysses E. Sexton \$34.57, being the annual premium due August 1, 1909. Premiums are payable at the home office, but may be paid to an authorized agent in exchange for an official receipt countersigned by that agent. Otherwise no receipt will be binding. Julian Price, Secretary. Countersigned by C. Scarborough." On the reverse side of the said Exhibit C is the indorsement: "Pay to the order of Shuford National Bank, Newton, N. C. [Signed] Greensboro Life Insurance Company. W. E. Allen, President." The defendant in apt time objected to the introduction of the paper writing, called "Exhibit C," pur-

porting to be a receipt for premium on said policy, for that the said receipt was never delivered to the plaintiff's intestate, but was produced by the defendant at the trial, in open court, in response to notice, having been retained by the defendant and attached to the intestate's note for above premium. Objection overruled; exception by defendant. The exception must be sustained. This receipt was pinned to the aforesaid note, evidently ready for delivery whenever the note should be paid. It was in defendant's possession, and produced in court by it, by order of the judge, and was introduced by plaintiff as evidence of payment of the premium. Had the receipt been in the plaintiff's possession, it would be very strong evidence of payment, but, as it was in defendant's possession, and had never been delivered, it is no evidence of payment, and the introduction of it as evidence by the plaintiff, under the circumstances, was inadmissible.

New trial.

(157 N. C. 234)

# EARNHARDT et al. v. BOARD OF COM'RS OF TOWN OF LEXINGTON.

(Supreme Court of North Carolina. Nov. 22, 1911.)

## 1. MUNICIPAL CORPORATIONS (§ 377\*)—PUBLIC IMPROVEMENTS—CHANGE IN GRADE OF STREET—LIABILITY TO ABUTTING OWNERS.

An abutting owner may not recover damages for diminution in the value of his property caused by a duly authorized change of grade in the street which has been established, unless the municipal authorities proceed or have the work done in a negligent manner.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 914, 915; Dec. Dig. § 377.\*]

## 2. LIMITATION OF ACTIONS (§ 32\*)—LIMITATIONS APPLICABLE—INJURIES TO ABUTTING PROPERTY.

An action by an abutting owner for damages for the negligent construction of a street improvement by municipal authorities accrues at the time the work is negligently done and the abutting property is thereby sensibly impaired; and an action for the recovery of the damages in one suit is barred in three years by Revisal 1905, § 395, subd. 5.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 143; Dec. Dig. § 32.\*]

Appeal from Superior Court, Davidson County; Lyon, Judge.

Action by M. C. and L. A. Earnhardt against the Board of Commissioners of the Town of Lexington. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Plaintiff alleged that defendant had changed the grade of a public street in front of his home, and in doing this and in the construction of the sidewalk had so done the work that, whenever there was a hard or beating rain, a lot of water was collected and thrown in bulk upon his premises and the residence thereon, causing serious dam-

age to his property and the family residents thereon. Defendant denied the wrong, and plead the three-year statute of limitations thereto, in case same should be established. At the close of plaintiff's evidence, and again at close of entire testimony, there was motion of nonsuit. Last motion sustained.

McCrary & McCrary, for appellants. E. E. Raper, for appellee.

HOKE, J. (after stating the facts as above). [1] It is well recognized with us that an abutting owner may not as a rule recover damages for diminution in the value of his property, caused by a duly authorized change of grade in a street, which has been already established. *Dorsey v. Henderson*, 148 N. C. 423, 62 S. E. 547; *Wolfe v. Pearson*, 114 N. C. 621, 19 S. E. 264. The position is allowed to prevail on the supposition that the municipal authorities shall not proceed or have the work done in an "unskillful or negligent manner," and, where it is shown that there has been a breach of duty in this respect, an action lies. This principle announced in *Meares v. Wilmington*, 31 N. C. 78, 49 Am. Dec. 412, has been upheld in numerous cases in our court (*Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894; *Wright v. Wilmington*, 92 N. C. 156, etc.), and was approved and applied in the recent case of *Harper v. Lenoir*, 152 N. C. 723, 68 S. E. 228.

[2] On a perusal of the record, we are inclined to the opinion that there was evidence to show in this instance a negligent construction of the sidewalk, causing unnecessary damage to plaintiff's premises, but this view cannot avail plaintiff, for the reason that on the face of the complaint and the uncontroverted facts it appears that plaintiff's cause of action is barred by the three-year statute of limitations, and, the statute having been duly pleaded, the order of nonsuit should in any event be considered and treated as harmless error. *Oldham v. Rieger*, 145 N. C. 254, 58 N. E. 1091; *Cherry v. Canal Co.*, 140 N. C. 422, 53 S. E. 138, 111 Am. St. Rep. 850. In *Harper's* case it was held that the measure of damages, in actions of this character, was ordinarily the impaired market value of the property, and that on action brought recovery should be had for the entire wrong, past, present, and perspective. Speaking to this question and the principle upon which it was properly made to rest, the court said: "And having been caused by a change of grade done, as a rule, under statutory authority and considered of a permanent nature, under our decisions there may, and ordinarily must, be but one recovery for the entire wrong. This general principle is well stated by Justice Avery in *Ridley v. Railroad*, 118 N. C. 998, 24 S. E. 731, 32 L. R. A. 708, as follows: "But even where the injury complained of, either by the servient owner or an adjacent

proprietor, is due to the negligent construction of such public works as railways, which it is the policy of the law to encourage, if the injury is permanent and affects the value of the estate, a recovery may be had at law of the entire damages in one action"—citing *Smith v. Railroad*, 23 W. Va. 453; *Troy v. Railroad*, 3 Foster (N. H.) 83, 55 Am. Dec. 177; *Railroad v. Maher*, 91 Ill. 312; *Bizer v. Railroad*, 70 Iowa, 146, 30 N. W. 172; *Fowle v. Railroad*, 112 Mass. 334, 338, 17 Am. Rep. 106; s. c., 107 Mass. 352; *Railroad v. Esterle*, 13 Bush (Ky.) 667; *Railroad v. Combs*, 10 Bush (Ky.) 382, 383, 19 Am. Rep. 67; *Stodghill v. Railroad*, 53 Iowa, 341, 5 N. W. 495; *Cadle v. Railroad*, 44 Iowa, 11—and is said by Mr. Elliott, in his work on *Roads and Streets*, to obtain very generally in determining the damages recoverable on a change of grade by the authorities. On this subject the author said: "Sec. 488. All Damages Are Recoverable in One Action.—The change of grade is a permanent matter, and all resulting injury must be recovered for in one action, for the property owner cannot maintain successive actions as each fresh annoyance or injury occurs. The reason for this rule is not far to seek. What is done under color of legislative authority and is of a permanent nature works an injury as soon as it is done, if not done as the statute requires, and the injury which then accrues is, in legal contemplation, all that can accrue, for the complainant is not confined to a recovery for past or present damages, but may also recover prospective damages resulting from the wrong. It is evident that a different rule would lead to a multiplicity of actions, and produce injustice and confusion. It is in strict harmony with the rule which prevails, and has long prevailed, in cases where property is seized under the right of eminent domain."

It will be noted that this principle of awarding permanent damages for a certain class of injuries made obligatory as to railroads (*Revisal*, § 394), is placed upon the ground that the work complained of is of a permanent nature, done by virtue of statutory authority and for the public benefit, and is thus differentiated from nuisances maintained by private persons, individual or corporate, and causing recurrent damages, as in *Roberts v. Baldwin*, 151 N. C. 407, 66 S. E. 346, and *Spillman v. Navigation Co.*, 74 N. C. 675, and, further, that an action of this kind is not held to have necessarily accrued only when there has been actual physical interference or invasion of a claimant's property, the correct position when section 394, subsec. 2, or section 395, subsec. 3, applies (*Stack v. Railroad*, 139 N. C. 366, 51 S. E. 1024). But, as shown in the *Harper Case*, the cause of action is for negligence, subject to the limitation established in section 395, subsec. 5, and is properly held to accrue at

the time the work is negligently done and the value of claimant's property thereby sensibly impaired. This action was commenced on September 1, 1909. On the allegations of the complaint and the uncontroverted facts, the work was done and substantial injury caused by the negligent construction commenced in 1904. The plaintiff's cause of action is therefore clearly barred by lapse of time, and, the statute having been properly pleaded and insisted on, the results of the trial should not be disturbed.

There is no reversible error, and the judgment of nonsuit affirmed.

Affirmed.

(157 N. C. 6)

GOODMAN et al. v. HEILIG et al.

(Supreme Court of North Carolina. Nov. 15, 1911.)

1. EVIDENCE (§ 22\*)—JUDICIAL NOTICE—EXISTENCE OF RAILROADS.

The Supreme Court takes judicial notice of the existence of a railroad belonging to a quasi public corporation, chartered by the General Assembly.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 26-28; Dec. Dig. § 22.\*]

2. COVENANTS (§ 100\*)—NOTICE—EXISTENCE OF EASEMENTS.

A purchaser of land has constructive notice of the existence of an easement in favor of a railroad company, maintaining a railroad thereon; and hence existence of such easement is no breach of the vendor's covenant of warranty.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 139-155; Dec. Dig. § 100.\*]

Appeal from Superior Court, Rowan County; Lyon, Judge.

Action by E. A. Goodman and another against John D. Helig, administrator, and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Civil action to recover damages for breach of covenant against incumbrances contained in a deed from A. S. Helig to W. J. and Julia Crowell, and a deed from B. H. Hamilton, grantee of Crowell, to plaintiffs. The covenants are practically the same in both deeds. The incumbrance is charged in these words: "But such portion of said land was, at the time of the execution of said deeds, and has been ever since, owned by the North Carolina Railroad Company as a right of way." The defendants' demurrer sets out six grounds. It is necessary to consider only one, viz.: "That plaintiff's complaint does not state facts sufficient to constitute a cause of action, in that, as a question of law, the use and occupation of a portion of the lands described in the complaint, as a right of way, by the North Carolina Railroad Company under its charter, pursuant to the acts of the Legislature of 1849 (Pub. Laws 1848-49, c. 82), was constructive notice of said company's right of way, and does not constitute a breach of warranty or

covenant on the part of defendants. That, as a matter of law, the right of way alleged to be claimed by the North Carolina Railroad Company does not constitute any valid incumbrance upon the title of plaintiffs, nor any breach of the covenants of warranty and seisin, as alleged by the plaintiffs." The demurrer was sustained by his honor, Judge Lyon, at May term, 1911, superior court of Rowan county, and plaintiffs appealed.

J. L. Rendleman and Jerome & Price, for appellants. John S. Henderson, R. Lee Wright, and P. S. Carlton, for appellees.

BROWN, J. [1] We take judicial notice of the fact that the North Carolina Railroad is a great public highway, running from Goldsboro to Charlotte, through Rowan county. It belongs to a quasi public corporation, chartered in 1849 by an act of the General Assembly that gives the corporation full power of eminent domain, and provides that where land is not condemned for a right of way within a certain time the corporation acquires 100 feet on each side of the center of the track. The road has been in actual operation since 1853. It was admitted upon the argument that the road is now being double-tracked, and the injury set up in the complaint is the construction of a "fill" upon a small part of the right of way upon which the additional track is laid. Plaintiffs claim that the boundaries of the deed take in some part of the right of way.

[2] We are of opinion with his honor that the demurrer should be sustained. The railroad corporation has not acquired the fee simple to the land covered by its right of way, but only an easement in it. If the railroad should be discontinued, the land would revert to the owner of the fee, relieved of the burden of the easement, and the owner would then have an absolute title without incumbrance. While this easement may be in one sense an incumbrance or burden upon the fee, it is in this particular case such an incumbrance as a purchaser has knowledge of, and is bound to take into consideration before purchasing. The railroad right of way is a great public highway, of which all persons must take notice, and, as said by Kennedy, J., in Patterson v. Arthurs, 9 Watts (Pa.) 152: "It is fair to presume that every purchaser, before he closes his contract for his purchase of land, has seen it and made himself acquainted with its locality and the state and condition of it, and consequently, if there be a public road or highway open or in use upon it, he must be taken to have seen it, and to have fixed in his own mind the price he was willing to give for the land with reference to the road."

In Hymes v. Estey, 116 N. Y. 505, 22 N. E. 1087, 15 Am. St. Rep. 421, Justice Brad-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ley says: "It must be deemed the settled doctrine in this state that the fact that part of the land conveyed with covenant of warranty was at the time of conveyance a highway, and used as such, is not a breach of the covenant. This is so for the reason that the grantee must be presumed to have known of the existence of the public easement, and purchased upon a consideration in reference to the situation in that respect." To same effect are *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272; *Huyck v. Andrews*, 113 N. Y. 85, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 452; *Wilson v. Cochran*, 46 Pa. 229; *Jordan v. Eve*, 72 Va. (31 Grat.) 1; *Pomeroy v. Railroad Co.*, 25 Wis. 644; *Pick v. Hydraulic Co.*, 27 Wis. 443; *Trice v. Kayton*, 84 Va. 219, 220, 4 S. E. 377, 10 Am. St. Rep. 886, citing and approving *Jordan v. Eve*; *Des Vergers v. Willis*, 56 Ga. 515, 21 Am. Rep. 289.

In *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85, the Supreme Court of Wisconsin says: "That such a right does not constitute a breach of the covenant of seisin, see *Rawle on Covenants*, 83, 142. It may have been an incumbrance. But there is a principle, recognized by adjudged cases, and resting upon sound reason and policy, which holds that purchasers of property obviously and notoriously subjected at the time to some right of easement or servitude affecting its physical condition take it subject to such right, without any express exceptions in the conveyance, and that the vendors are not liable on their covenants by reason of its existence. This principle has been applied in the case of a highway opened and in use upon the land at the time of the conveyance. *Rawle on Covenants*, 141 et seq."

There are a few adjudications looking to the contrary, especially in Indiana, where the rule is different. But the great weight of authority, we think, concurs with our own precedents. The point was considered in *Ex parte Alexander*, 122 N. C. 727, 30 S. E. 336, and this court held that: "The fact that a railroad was in actual operation over a tract of land at the time of the sale of the land was sufficient notice to the purchaser of the occupant's equity or easement, and made it his duty to inquire for information."

While the point was not squarely presented or decided in the more recent case of *Tise v. Whitaker*, 144 N. C. 515, 57 S. E. 212, Mr. Justice Hoke recognizes the rule as we have here laid it down, and refers to it in these words: "The weight of authority is to the effect that, when the existence of a public right of way over land is fully known at the time of the purchase and acceptance of a deed for the land, its existence is no breach of the covenant of warranty, and there are well-considered decisions to the ef-

fect that such an easement is not a breach of the covenant against incumbrances. The parties are taken to have contracted with reference to the existence of a burden of which they are fully aware."

When the plaintiffs purchased the land, they knew of the existence of the railroad and its right of way running over a portion of the land, and they are conclusively presumed to have purchased with reference to it.

The action cannot be maintained. The judgment sustaining the demurrer is affirmed.

(157 N. C. 157)

**FULP & LINVILLE et al. v. KERNERSVILLE LIGHT & POWER COMPANY.**

**Appeal of GREENSBORO SUPPLY CO.**  
(Supreme Court of North Carolina. Nov. 22, 1911.)

**1. MECHANICS' LIENS (§ 258\*)—JURISDICTION—POWERS OF COURT.**

The superior court, taking charge of the entire property of a debtor, under its general jurisdiction, by means of a creditor's bill, has power to collect and dispose of all the assets, and to determine liens and priorities, and to apply the funds accordingly, irrespective of the amount of any claim, and may enforce mechanics' liens in amounts less than \$200.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Dec. Dig. § 258.\*]

**2. MECHANICS' LIENS (§ 134\*)—NOTICE OF LIEN.**

Under Revisal 1905, § 915, subd. 21, and § 2026, requiring a lien docket, properly indexed, showing the names of the lienor and lienee, and requiring the filing of lien claims, specifying the materials furnished or labor performed, and the time thereof, a notice of lien, as entered on the lien docket, which shows the names of the lienor and lienee, the amount claimed, and an accurate description of the property, and the dates between which the material was furnished, and which refers to a schedule of prices and material attached to the notice, and asks that it be taken as part of the notice of lien, is sufficient; the schedule containing an itemized statement of the material furnished, and that it went into the construction of a building.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 208; Dec. Dig. § 134.\*]

**3. FIXTURES (§ 9\*)—CONDITIONAL SALE CONTRACTS—CREDITORS OF VENDEE—LIEN.**

Where a conditional sale contract of articles which are fixtures, and consequently realty, save for the reservation of title in the seller until the price is paid, was not recorded until lienors had furnished materials and labor, the liens included such articles; the lienors having a right to rely on the apparent character of the property as realty.

[Ed. Note.—For other cases, see *Fixtures*, Dec. Dig. § 9.\*]

Appeal from Superior Court, Forsyth County; Lyon, Judge.

Creditors' suit by Fulp & Linville and others, on behalf of themselves and all creditors of the Kernersville Light & Power Company, in which the Greensboro Supply

Company was made a party plaintiff by order of court and referee. From a judgment foreclosing a mechanic's lien as against the property sold by the Greensboro Supply Company under a conditional sale contract, it appeals. Modified and affirmed.

T. C. Hoyle and F. P. Hobgood, Jr., for appellant. D. H. Blair, for Fulp & Linville and Kernersville Mfg. Co. Manly, Hendren & Womble, for Crawford Plumbing & Mill Supply Co.

CLARK, C. J. This was a creditors' bill, brought by the plaintiffs Fulp & Linville, on behalf of themselves and all other creditors of the Kernersville Light & Power Company, which had built a power plant, intending to furnish that town with electric power. It bought from the Greensboro Supply Company certain property, among which was a dynamo, boiler, and engine, and the necessary pipes to connect said boiler and engine with the plant. The contract under which this property was bought was dated June 21, 1909, and title was retained by the Greensboro Supply Company till full payment. This contract was not recorded, however, till September 7, 1909. On August 10, 1909, the Greensboro Supply Company sold the defendant a deep well pump, and other fixtures, retaining title thereto, but this contract was not recorded till October 27, 1909. From July 3 to September 10, 1908, the Kernersville Furniture Manufacturing Company and Fulp & Fulp furnished material, which was used in the construction of the building, to an amount less than \$200 to each, and attempted to docket that lien in the clerk's office, but the appellants claim that they failed to do so, because the claims upon which the lien was based were not itemized and set out in detail upon the lien docket of the clerk. From July 5 to September 4, 1909, Fulp & Linville also furnished materials which were used in constructing the building of defendant company, and the Crawford Plumbing Company furnished labor which was performed upon the said building, each in an amount of less than \$200, and docketed their liens in the clerk's office within the time required within the statute. On September 9, 1909, W. H. Clinard obtained judgments before a justice against the defendant, aggregating \$677.82, which he docketed on the same day in the office of the clerk of the superior court. These judgments were, on January 24, 1910, transferred to the plaintiff Mary Lou Sapp.

The appeal of the Greensboro Supply Company presents three grounds of exception:

[1] (1) "That the mechanic lienors, Fulp & Linville, Kernersville Furniture Manufacturing Company, Fulp & Fulp, and the Crawford Plumbing Company cannot enforce their liens in this action in the superior court, because each of the amounts is less than \$200." But the superior court, having taken charge

of the entire property, under its general jurisdiction, by means of a creditors' bill, has jurisdiction to collect and dispose of all the assets, and to determine the liens and priorities, and to make application accordingly of the funds, irrespective of the amount of any claim. *Albright v. Albright*, 88 N. C. 238; *Long v. Bank*, 85 N. C. 356. If any creditor in such case should institute an independent action, he would be enjoined and forced to seek his remedy in the creditors' bill. *Dobson v. Simonton*, 93 N. C. 270. The very purpose of the creditors' bill is to "discharge a multiplicity of suits and prevent a costly scramble among creditors." *Wadsworth v. Davis*, 63 N. C. 253.

[2] (2) "That the mechanic lienors, the Kernersville Furniture Manufacturing Company and Fulp & Fulp, even if the superior court had jurisdiction in this action, failed to file a valid lien, because the notice of lien filed does not specify in detail the materials furnished and the time thereof." The purpose of the statute is to give public notice of the plaintiff's claim, the amount of it, the material supplied, or the labor done, and when done, on what property, specified with such detail as will give reasonable notice to all persons of the character of the claim and the property on which the lien attached. *Cook v. Cobb*, 101 N. C. 70, 7 S. E. 700. The notice of lien here filed by these parties is not recorded as fully as it might be, but we think is in substantial compliance with Rev. 2026. *Cameron v. Lumber Co.*, 118 N. C. 266, 24 S. E. 7. It is true the clerk recorded the notice, giving each bill with its date and amount, which together made the amount of the lienors' claim, without specifying the articles and the price of each. Rev. 915 (21) requires that the clerk shall keep "a lien docket which shall contain a record of all notices of lien filed in his office properly indexed showing the names of the lienor and lienee." The part of the notice which the clerk did enter on his docket in each of these instances shows the names of the lienor and the lienee, the amount claimed by each, an accurate description of the property by metes and bounds, the dates between which the material was furnished, and refers to "the schedule of prices and material" attached to the notice, and asks that it "be taken as a part of this notice of lien." The appellants admit that this schedule contained a full, itemized statement in detail of the material furnished, and that it went into the construction of the building.

[3] (3) The last objection of the supply company is that the appellant, having retained title to the boiler, engine, pump, dynamo, etc., by a written instrument, duly recorded, is entitled to possession of said articles freed from the liens of any one. But for the reservation of title, the above articles were clearly fixtures, and conse-



quently realty. *Horne v. Smith*, 105 N. C. 322, 11 S. E. 373, 18 Am. St. Rep. 903. But, by virtue of the agreement of the parties, and the retention of the title, they remained personalty as between the parties. But as to these lienors the retention of title was not operative, because the contract was not recorded till the work and labor was done and the material furnished out of which these liens arose. *Clark v. Hill*, 117 N. C. 11, 23 S. E. 91, 53 Am. St. Rep. 574. There being no retention of title recorded, the parties furnishing material and labor had a right to rely upon the apparent character of such property as realty. The liens of the appellees are valid for the furnishing of any material prior to the date when the conditional sale of the articles furnished by the Greensboro Supply Company was recorded.

The judgment of Clinard was a lien on the realty from the date of its docketing, September 9, 1909. It is therefore not a lien upon the boiler, engine, etc., as to which the contract retaining title was docketed, September 7, 1909. As thus modified, the judgment in the appeal by the Greensboro Supply Company is affirmed.

Modified and affirmed.

(157 N. C. 154)

FULP & LINVILLE et al. v. KERNERSVILLE LIGHT & POWER CO.

Appeal of BALTIMORE SUPPLY CO.

(Supreme Court of North Carolina. Nov. 22, 1911.)

MECHANICS' LIENS (§ 31\*)—RIGHT TO LIEN —“MATERIALS.”

Electrical appliances furnished to a light and power plant are not “materials,” within Revisal 1905, § 2016, giving a lien for materials furnished in the erection and repair of buildings, where none of the appliances ever became any part of the plant, and where transformers and wires supplied were merely strung on electric light poles.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 36; Dec. Dig. § 31.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4409-4413.]

Walker, J., dissenting.

Appeal from Superior Court, Forsyth County; Lyon, Judge.

Consolidated actions by Fulp & Linville and others, on behalf of themselves and all other creditors of the Kernersville Light & Power Company and by the Baltimore Supply Company, to foreclose a lien against the Kernersville Light & Power Company. From a judgment refusing to foreclose the lien, the Baltimore Supply Company appeals. Affirmed.

L. M. Swink, for appellant. T. C. Hoyle and F. P. Hobgood, Jr., for Greensboro Supply Co.

CLARK, C. J. The Baltimore Supply Company furnished the defendant for its

light and power plant material consisting of insulators, wires, cross-arms, transformers, locust pins, oak brackets, and other electrical supplies and equipments. The wires furnished were attached to the dynamo, but were blown down, disconnected, rolled up, and are now in the possession of the receiver in this action, which is a creditors' bill. The appellant properly itemized its claim and filed the same, but the appellee denies that the materials are such as entitle the Baltimore Supply Company to obtain a lien under the statute, because the materials sold were not put in the plant of the Light & Power Company, so as to lose their identity, but were articles which did not become a part of the building or realty, and hence were not “materials furnished,” in contemplation of Rev. 2016.

The referee found as a fact that the transformers and wire were strung on the electric light poles, and that the oak brackets, locust pins, cross-arms, and other items are not shown to have become any part of the building, and held that such material did not come within the meaning and intent of the statute. This finding of fact and conclusion of law were approved by the judge. In this we find no error. *James v. Lumber Co.*, 122 N. C. 157, 29 S. E. 358; *Electric Co. v. Power Co.*, 122 N. C. 599, 30 S. E. 314. Both these cases, it is true, were under Code 1255, now Rev. 1131. The word “material” has been stricken out of this last section, but the construction placed upon it while it was in that section is applicable to the same word in Rev. 2016.

In *James v. Lumber Co.*, supra, it was said in the concurring opinion: “This is the test: Where the material furnished to keep the business going is something that is consumed in the use, as coal, for instance, or labor performed, or a tort committed, which is intangible and unmortgageable, or is such material as goes into and makes part of the realty, or the product, in such a way as to be indistinguishable from the mass, as timber put into a building, or cotton that is manufactured, these things come within the purview of the remedy provided by the Code (section 1255); but, where the subject-matter for which the debt is incurred keeps its identity, as an engine, even though built into the wall, this section does not apply, because the party had his remedy by retaining title or taking a mortgage on the property sold.”

In *Electric Co. v. Power Co.*, 122 N. C. 599, 30 S. E. 314, the above was approved; the court saying that articles, perfect in themselves, and not put into a building so as to lose their identity, would not constitute “material” upon which the seller would have priority over mortgage bonds, since the seller could “protect himself by retaining ti-

tie, as by conditional sale, or by taking a mortgage on the property sold."

The reasoning in the above cases, though upon a different section of the Revisal, applies to this. In *Pipe & Foundry Co. v. Howland*, 111 N. C. 615, 16 S. E. 857, relied on by the appellant, the point decided was that the property of a corporation, chartered for supplying water to a city, is subject to a lien for materials furnished. It was admitted that the claim was sufficient in its form and in its nature to make it a lien, and the question whether the "materials furnished" were such for which a lien would lie was not before the court.

The judgment is affirmed.

WALKER, J., dissents.

(187 N. C. 118)

**LEXINGTON GROCERY CO. v. PHILADELPHIA CASUALTY CO.**

(Supreme Court of North Carolina. Nov. 22, 1911.)

**1. INSURANCE (§ 151\*)—CREDIT INSURANCE—CONTRACT AND APPLICATION AS POLICY.**

Where a merchant applied for a credit bond, and the application referred to Schedule A, the application, the bond, and the schedule constituted the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 308-311; Dec. Dig. § 151.\*]

**2. INSURANCE (§ 2\*)—CREDIT INSURANCE—WHAT IS.**

An agreement protecting a merchant against loss by sales on credit is a contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1½; Dec. Dig. § 2.\*]

**3. INSURANCE (§ 432\*)—CREDIT INSURANCE—CONSTRUCTION OF CONTRACT.**

The application for a credit bond stated that experience should be the basis of credit, and that Schedule A should describe the classes of customers covered. Schedule A named three classes of customers—old customers, new customers, and those who are solvent, owing outstanding debts; but nothing was said concerning the solvency of old or new customers. *Held* that, as the extension of credit was to be based upon experience, another section of the policy, making solvency a requisite of the extension of credit to old and new customers, was inconsistent, and could not be given effect; ambiguities being resolved against the insurer.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 432.\*]

**4. INSURANCE (§ 432\*)—CREDIT INSURANCE—CONSTRUCTION OF CONTRACT.**

An application for a credit bond provided in subsection "a" that the debtors included in the bond were those covered by Schedule A. Subsection "b" enumerated the evidences of liability by the insurer. Clause 12 of that subsection provided that, where a claim does not exceed \$150, and a designated mercantile agency has reported that the debtor has absconded, or that the claim is uncollectible, and the issue of an execution would be useless, it shall not be covered by this clause, but shall be, so far as the same is covered by this bond, included in the calculation of losses, provided the insolvency occurs between the date of the execution and the termination of this bond. *Held* that, as the policy stated that credit was to be extended

on the basis of experience, and as insolvency was not specified as a ground for refusal of credit, clause 12 must be taken to refer wholly to the remedy, and not to be in conflict with other portions of the policy, so as to except losses because of insolvency of customers.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 432.\*]

Appeal from Superior Court, Davidson County; Lyon, Judge.

Action by the Lexington Grocery Company against the Philadelphia Casualty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff is a corporation, doing business as a wholesale grocer at Lexington, N. C., and the defendant is a corporation which issues credit bonds upon certain conditions, and in consideration of premiums paid.

On or about the 22d day of January, 1908, the plaintiff made application to the defendant to issue for its benefit a credit bond, and in said application it is provided: "Experience shall be the basis for credit under the bond as specified on Schedule A, with a single account limit not exceeding \$2,000, shall be covered by said bond." The premium was paid, and on the 27th day of January, 1908, said bond was issued in accordance with the application, and contains the following stipulations, among others, not necessary to be stated:

"First. If between the date of the execution of this bond and the 22d day of January, 1909, on goods usually dealt in and at the time of shipment and delivery solely owned by the indemnified and shipped bona fide and in the regular course of business since the 23d day of February, 1908, the company receives preliminary notices of loss as required by this bond and Schedule A upon which claim the actual loss sustained by the indemnified thereon as covered by this bond and Schedule A is in excess of \$1,000 hereinafter called the initial loss, on sales and shipments not exceeding \$400,000, or, if such sales and shipments as aforesaid exceed such sum, a proportionally increased initial loss, the company agrees to pay such excess loss not exceeding the amount of this bond, provided:

"(a) That such losses shall have been sustained on claims against debtors, each of whom is covered by Schedule A attached hereto, signed by the president and secretary and countersigned by the actuary and one of the registrars of the company, and which is made a part hereof: Provided further, that when a mercantile agency is designated in the application as a basis for some or all of the credits to be covered by this bond, that the last book printed by such agency prior to the shipment of the goods shall be the basis for covering such shipments from and including the first of the month appearing on such book.

"(b) That only claims on which losses occur, which exist (1) against a debtor who has effected a general compromise with his creditors; (2) against a debtor by or against whom a petition to be declared a bankrupt or insolvent has been filed under the federal bankruptcy law, or under some insolvency or assignment law of any of the United States or any territory thereof; (3) against a debtor against whom an execution in favor of the indemnified or some other creditor has been returned unsatisfied; (4) against a debtor whose stock in trade has been sold in judicial proceedings; (5) against a debtor against whom, upon the ground of insolvency, a writ of attachment or replevin or other process has been issued; (6) against a debtor who, upon the ground of insolvency, has transferred his stock in trade to a trustee or assignee under some assignment law for the benefit of his creditors; (7) against a debtor who has died, leaving his estate insufficient to pay his debts in full, and such fact is certified to by the executor or administrator or any court having jurisdiction thereof, and such certificate or a copy thereof is attached to the preliminary notice of loss; (8) against a debtor who being a corporation, firm or individual for whom a receiver has been appointed upon the ground of insolvency; (9) against a debtor where the legal proceedings show that, to defraud his creditors or avoid the payments of his debts, he has sold out or transferred his stock in trade; (10) against a debtor who has given a chattel mortgage for the benefit of his creditors; (11) against a debtor who has been found to be insolvent through judicial proceedings; (12) where a claim does not exceed \$150 and none of the above state of facts have arisen, but the designated mercantile agency, a collection agency, or a practicing attorney in or near the place where the debtor did business reports, in writing, as to each of such claims, and such report is attached to the preliminary notice of loss, that the debtor has absconded, leaving no assets applicable to the payment of his debts, or that such claim is uncollectible and the issue of an execution would be useless, and that during a period of at least thirty days prior to the making of such report diligent efforts have been made to collect such claim or claims, and any claim which is more than three months overdue prior to commencement of said bond, and any claim that has been placed in the hands of such mercantile agency, collection agency, or attorney prior to the execution of said bond shall not be covered by this (12th) clause, but shall, so far as the same are covered by this bond and riders attached hereto, be included in the calculation of losses, provided the insolvency and one of the foregoing facts as enumerated in this subsection 'b' occurs between the date of the execution and the termination of this bond.

"Second. Said Schedule A shall describe the class of customers to be covered by this bond and the limit of credit to be extended to each of such customers."

Schedule A is as follows:

"CC. Customers to whom the indemnified has shipped goods within twelve (12) months prior to shipping the first item of the goods, wholly or partly included in the account upon which the loss was incurred, shall be considered old customers, and customers to whom the indemnified has shipped no goods within said twelve (12) months, or to whom the indemnified never sold any goods, shall be considered new customers.

"KK. Subject to the terms and conditions of the attached bond and this rider, old customers of the indemnified shall be covered for goods shipped during the term of the attached bond for an amount not exceeding the highest indebtedness such customer owed to the indemnified at one time, for goods shipped by the indemnified to such customer within twelve (12) months prior to shipping the first item of the goods wholly or partly included in the account upon which the loss was incurred, not exceeding, however, the amount paid upon such highest indebtedness during said period, but in no event exceeding \$2,000 to one customer.

"LL. New customers of the indemnified shall be covered for an amount not exceeding fifty per cent. (50%) of the first bill, but the gross amount of such first bill shall not exceed \$1,000 and such customer shall be considered an old customer as to goods shipped after the first bill has been paid, and shall then be covered accordingly.

"RR. As a condition precedent to having any claim for excess loss under the attached bond and this rider, by reason of any loss or losses on such old or new customers, the indemnified shall attach to the preliminary notice of each loss, if an old customer, a copy of the account upon which the loss was incurred, and a copy of the account, with debits and credits, showing the highest prior indebtedness within said twelve (12) months, and if a new customer, a memorandum must be attached to the preliminary notice of the loss, stating that such customer was a new customer, or else such loss or losses shall be excluded from the calculation of losses.

"The words 'and the aggregate of all such claims filed does not exceed one-half of the initial loss,' in lines 51 and 52 of the attached bond, have been made void.

"The words beginning with the word 'there' in line 70, and ending with the word 'and' in line 82, have been made void.

"O. Outstandings on the books of the indemnified against solvent debtors on January 23, 1908, shipped since October 1, 1907, shall be covered upon the same conditions and shall be included in the same manner as if the goods had been shipped since the execution of the bond. Subject to the terms and conditions of the attached bond."

This action is to recover on said bond for losses which the plaintiff alleges it has sustained.

An account between the parties was stated by a referee, and upon his report being filed judgment was entered in favor of the plaintiff for the sum of \$3,693.38, and the defendant excepted and appealed.

The exceptions present one question, and that is whether accounts, made after the execution of the bond, by persons who were then insolvent, are covered by the bond, if based on the past experience of the plaintiff with the persons making the accounts; and the defendant relies particularly on the proviso to clause 12 of subsection "b" of the bond, which reads as follows: "Provided the insolvency and one of the foregoing facts in this subsection 'b' occurs between the date of the execution and the termination of this bond." The referee and his honor held that such accounts were covered by the bond, and defendant excepted.

Walser & Walser, for appellant. E. E. Raper and McCrary & McCrary, for appellee.

ALLEN, J. [1, 2] The application bond and Schedule A constitute the contract between the plaintiff and defendant, and it is a contract of insurance. *Shakman v. Credit System Co.*, 92 Wis. 374, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.

[3] Speaking of such contracts, Lacombe, Circuit Judge, says in *Tebbetts v. Guarantee Co.*, 73 Fed. 96, 19 C. C. A. 282: "Insurance against mercantile losses is a new branch of the business of underwriting, and but few cases dealing with policies of that character have as yet found their way into the courts. The necessarily nice adjustments of the respective proportions of loss to be borne by insurer and insured, the somewhat intricate provisions which are required in order to make such business successful, and the lack of experience in formulating the stipulations to be entered into by both the parties to such a contract have naturally tended to make the forms of policy crude and difficult of interpretation." And he quotes the rule of construction of ambiguous clauses laid down by him in *Guaranty Co. v. Wood*, 68 Fed. 529, 15 C. C. A. 563: "As that contract is a voluminous document, prepared by the company, any ambiguity in its phraseology should be resolved against the draftsman. \* \* \* If the particular clause requiring interpretation cannot be brought into harmony with the rest of the contract, and the instrument considered as a whole is ambiguous touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured."

Frost on Guar. Ins. (page 572) also says, as to the rule of construction, that: "All conditions limiting liability are to be strictly con-

strued. In the interpretation of conditions, they are to be construed liberally in favor of the insured, and strictly against the insurer. The policy should be interpreted in such a way as to accomplish the general purpose had in view, and at the same time give effect to all of its conditions, according to their fair and reasonable meaning."

The contract before us is based on experience, not on rating, and this means "the plaintiff's experience with the several customers. In other words, the defendant was willing to insure the credit of each of plaintiff's customers to an amount that plaintiff's experience with such customers indicated would be a reasonably safe credit." *Steinwender v. Casualty Co.*, 141 App. Div. 432, 126 N. Y. Supp. 271; *Casualty Co. v. Cannon*, 133 Ky. 748, 118 S. W. 1004.

It is also expressly stipulated in the bond that Schedule A shall describe the class of customers to be covered by the bond, and if we turn to Schedule A we find three classes of debtors, which may be termed old customers, new customers, and those who are solvent, owing outstandings. The fact that nothing is said in this schedule about insolvency at the time of the execution of the bond, when defining old and new customers, and that it is expressly provided that as to outstandings only those of debtors who were solvent when the bond was executed are insured, indicates clearly that it was the purpose of the defendant to insure the debts of old and new customers, created after the execution of the bond, although insolvent, provided the credit extended was based on experience.

If we were to construe the proviso to clause 12 of subsection "b" as the defendant contends, and hold that claims against debtors who were insolvent at the time the bond was executed, although based on experience, are not protected by the bond, we would change the entire contract between the parties, and say that experience is not the basis of credit under the bond, but solvency.

It is argued that the construction contended for by the plaintiff is unreasonable, and that it cannot be supposed that the defendant would permit sales to insolvent persons, and insure them. It would be sufficient answer to say that it has done so; but if the contract is examined it will be found that the rights of the defendant are carefully safeguarded.

The plaintiff did not have an unlimited discretion in making sales. Claims against old customers were not insured beyond the highest amount paid by them on indebtedness created within 12 months prior to the execution of the bond, and in no event in excess of \$2,000, and the indemnity as to the new customers does not exceed 50 per cent. of the first bill, which could not exceed \$1,000, and after the first bill new customers were classed as old customers.

The experience of wholesale and retail

dealers has doubtless shown that it is reasonably safe to sell to men who are not solvent, but who have good character and good habits, and who are accustomed to pay, and for this reason experience, and not solvency, has been adopted as the standard. This being the plain purpose of the contract, if the proviso relied on by the defendant is repugnant to it, it would be our duty to reject it; but we do not think the repugnancy exists.

[4] Subsections "a" and "b" are provisos to the first stipulation or agreement in the bond; and subsection "a" provides that the debtors included in the bond are those covered by Schedule A, while subsection "b" enumerates the evidences of liability by the defendant.

Clause 12 of subsection "b" is obscure, and it is difficult to ascertain its meaning. Some word is evidently omitted before the word "shall," and the test of insolvency is to be applied to some claim. It cannot be applied to the claims of \$150 first mentioned in the clause, because it says that, in addition to insolvency, one of the foregoing facts enumerated in subsection "b" must exist; and it is provided as to the claims first mentioned that it is not necessary for any of the foregoing facts to exist, and it cannot be applied to all the claims covered by the bond, because that would give it an effect which would withdraw claims covered by Schedule A, and would make solvency the test.

If we bear in mind the purpose of the contract, and that experience is the basis of credit, that the claims to be insured are those covered by Schedule A, and that subsection "b" is intended to furnish the evidences of liability, and read clause 12 in the light of these facts, we think the purpose of the clause was to provide evidences of liability that would be satisfactory for small claims that did not exceed \$150, and that these small claims are divided into three classes, and that the proviso applies only to those three months overdue, or such as had been placed in the hands of a mercantile agency prior to the execution of the bond. As thus construed, the clause reads as follows:

"(12) Where a claim does not exceed \$150, and none of the above state of facts have arisen, but the designated mercantile agency, a collection agency, or a practicing attorney, in or near the place where the debtor did business, reports in writing as to each of such claims, and such report is attached to the preliminary proof of loss, that the debtor has absconded, leaving no assets applicable to the payment of his debts, or that such claim is uncollectible, and the issue of an execution would be useless, and that during a period of at least thirty days prior to the making of such report diligent efforts have been made to collect such claim or claims, they shall, so far as they are covered by this bond and riders attached hereto, be

included in the calculation of loss, and also any such claim which is more than three months overdue prior to the commencement of this bond, or that has been placed in the hands of such mercantile agency, collection agency, or attorney prior to the execution of this bond, shall also be included, provided the insolvency and one of the foregoing facts from 1 to 11 inclusive, as enumerated in this subsection 'b,' occurs between the date of the execution and the termination of this bond."

In our opinion, there is no error.

Affirmed.

(156 N. C. 539)

REA v. REA.

(Supreme Court of North Carolina. Dec. 6. 1911.)

For majority opinion, see 72 S. E. 573.

BROWN, J. (concurring). I have heretofore always concurred in the decisions of this court in respect to the powers of feme covert. These cases began with *Harris v. Jenkins*, 72 N. C. 183, and ended, I believe, with *Bank v. Benbow*, 150 N. C. 781, 64 S. E. 891. By the Martin act (introduced by Senator J. C. Martin in the General Assembly of 1911) the wives have been emancipated and are placed on an equal footing with their single sisters, except that in order to convey their real estate they must still have the written assent of their husbands. I see no especial reason now for withholding from them the privilege of conferring gifts upon their husbands without the supervision and sanction of a justice of the peace or other judicial officer.

I think the opinion of the Chief Justice is a fair construction of Revisal, § 2107, and also of the Constitution, and I give it my approval.

WALKER, J. (concurring). The transaction in this case was a gift, which excludes the idea of any contract between the husband and wife, and for this reason there is no law forbidding it, in substance or in form. If it had been an executed contract of sale, I think in that form it also would have been valid, and in neither case does Revisal, § 2107, apply. The law in regard to a married woman's dealings with reference to her separate property, up to its present stage of development, I think, may be stated thus:

1. She may will her property without the consent of her husband, and as if she were a feme sole (Const. art. 10, § 6), and in this way she may deprive him of his estate by the curtesy (*Tiddy v. Graves*, 126 N. C. 620, 36 S. E. 127; *Id.*, 127 N. C. 502, 37 S. E. 513; *Ex parte Watts*, 130 N. C. 237, 41 S. E. 289; *Hallyburton v. Slagle*, 132 N. C. 947, 44 S. E. 655; *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218).

2. She may convey her real property, with

the written consent of her husband, evidenced by her privy examination.

3. She may dispose of her personal property by gift or otherwise, without the assent of her husband, and as if she were unmarried. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461; Act of 1911, c. 109.

4. By virtue of the Martin act (Public Laws 1911, c. 109), she may now contract and deal, so as to affect her real or personal property, in the same manner and with the same effect as if she were unmarried, unless the contract belongs to the class of those described in Revisal, § 2107, or unless it is a conveyance of her real property, when the formalities required by the existing law, for its validity, must be observed; those two cases being expressly excepted in the act of 1911. But Revisal, § 2107, does not embrace gifts or sales of personal property by the wife to the husband, as the general right to make these, as if she were unmarried, is given by the Constitution, and cannot be restricted or impaired by legislation.

Section 2107, which is still in force, applies, therefore, only to her executory contracts, and she cannot enter into any such contract with her husband which will affect or change any part of her real estate, or the accruing income thereof, for a longer period than three years from the making of the contract, or which will impair or change the body or capital of her personal estate, or the accruing income thereof, for a like period; the Constitution not having removed her common-law disability as to executory contracts, and the act of 1911 having expressly excepted section 2107 from its operation. *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747.

Subject to the views herein stated, I assent to the conclusion reached by the Chief Justice in the opinion delivered by him for the court.

(157 N. C. 131)

#### WALKER v. CANNON MFG. CO.

(Supreme Court of North Carolina. Nov. 22, 1911.)

#### 1. APPEAL AND ERROR (§ 927\*)—REVIEW—PRESUMPTIONS—EFFECT.

On appeal from a motion for a nonsuit, plaintiff's evidence must be considered most favorably in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3748, 4024; Dec. Dig. § 927.\*]

#### 2. MASTER AND SERVANT (§§ 101, 102\*)—INJURIES TO SERVANT—APPLIANCES AND PLACES OF WORK.

A master must furnish a servant a place to do the work assigned as reasonably safe as the nature of his business will admit; and, where engaged in the operation of a mill, or other plant, having machinery more or less complicated and driven by mechanical power, he must provide methods, implements, and appli-

ances, such as are known, approved, and in general use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171-174, 180-184; Dec. Dig. §§ 101, 102.\*]

#### 3. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for death of an employé, caused by the alleged negligence of the employer in failing to provide a proper machine at which to work, evidence *held* to show that the machine provided was out of order, "wobbly," and dangerous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 961; Dec. Dig. § 278.\*]

#### 4. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action against an employer for an injury, alleged to have been caused by failure to furnish proper machinery, evidence *held* to show that a belt running a saw, which ran horizontally to the saw, should, in accordance with the best usage of manufacturing, have been placed in perpendicular position, or covered by a casing.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 961; Dec. Dig. § 278.\*]

#### 5. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for death of an employé, caused by his being hit by a board, evidence *held* to raise the inference that the board gained its momentum by being thrown from an improperly placed belt.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 961; Dec. Dig. § 276.\*]

#### 6. MASTER AND SERVANT (§ 296\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

A charge, that if the jury believed the evidence of a defendant's witness that he warned a person, killed while employed by the defendant, of the way to operate, and the danger in the operation of, a machine at which the deceased was placed at work, and that if the jury believed from the greater weight of evidence that the deceased was injured because of a failure to observe the warning, and to operate his machine in the manner specified, to find for the defendant, is a proper submission of the question of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.\*]

#### 7. MASTER AND SERVANT (§ 295\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS—ASSUMPTION OF RISK.

An instruction, that if the jury should find from the greater weight of evidence that a machine, at which a person was killed while at work, was so defective and dangerous that only a reckless man would have worked at it, etc., they should find that such person assumed the risk of dangers incident to its operation, properly submits the issue of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.\*]

#### 8. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for the death of a person while at work at a machine, evidence as to his continuing to work in the presence of a known

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and obvious danger held not to show assumption of risk as a matter of law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

Appeal from Superior Court, Rowan County; Lyon, Judge.

Action by Ola Walker, administrator of Odell Walker, deceased, against the Cannon Manufacturing Company. From a judgment for plaintiff, defendant appeals. No error.

The action is brought to recover damages for the death of Odell Walker, alleged to have been caused by the negligence of the defendant. These issues were submitted:

"(1) Was the death of plaintiff's intestate caused by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) Did plaintiff's intestate contribute to his own injury and death by his own negligence, as alleged in the answer? Answer: No.

"(3) Did plaintiff's intestate voluntarily assume the risks and dangers incident to and attendant upon the operation of the machinery, as alleged in the answer? Answer: No.

"(4) What damage, if any, is the plaintiff entitled to recover? Answer: \$4,951.40."

The defendant appealed from the judgment rendered.

Davis & Davis, for appellant. Theo. F. Klutz & Son and R. Lee Wright, for appellee.

BROWN, J. There are a very large number of exceptions in the record that are made the basis of 25 assignments of error. It is impossible to discuss these assignments seriatim, without going over much ground that has heretofore been covered by adjudications of this court, as well as unduly lengthening this opinion. Sixteen assignments of error relate to the admission of evidence. Upon a careful examination of them, we find no substantial error, at least nothing that would justify us in granting a new trial.

[1] The principal contention of the learned counsel for the defendant is based upon his seventeenth and eighteenth assignments of error, presenting the question as to the sufficiency of the evidence of negligence. The evidence introduced by the plaintiff, taken in its most favorable light, as it must be considered upon a motion to nonsuit, tends to prove that her intestate, Odell Walker, was employed by defendant in its manufacturing establishment at Kannapolis, and at time of his injury was operating a rip saw, used for splitting boards, as well as sawing them up in short pieces. The saw was operated by a belt, which ran from the pulley operating the saw to another pulley, so that the belting was nearly horizontal with the saw,

and did not run perpendicularly to a pulley above or below the saw. The machine was operated by electric power overhead. There is evidence that this machine was very old, antiquated, "wobbly," and out of repair; that the table upon which the saw operated was of a disused and antiquated pattern; that the saw should have been operated on an adjustable table.

But the principal ground of negligence is that the belting was not cased, and, instead of running perpendicularly above or below to reach the power, it was horizontal, and so placed that a plank was very liable to fall on it from the saw table, or elsewhere, and be hurled against the operator; and plaintiff avers that her intestate was killed by a plank falling on this belt, and striking him on the head with such force as to crush his skull and produce death.

There is evidence that rip saws in general use are now run by a countershaft, and that, if the power is above, the countershaft is below, and, if power is beneath, the countershaft is underneath; that the saw always extends beyond the table, with countershaft hung above the ceiling. One belt runs the main-line pulley over countershaft; on that countershaft the pulley belt runs to that third pulley underneath the saw table. If the power is underneath the house, the countershaft is beneath also.

There is also some evidence to the effect that, this being a horizontal belt, running somewhat on a level with the saw, the belt should be cased, so as to avoid the danger of objects falling on it, and injuring the operator by being hurled against him.

[2] It is now familiar learning that the employer of labor must furnish a reasonably safe place in which to do the work assigned, as reasonably safe as the nature of the business will admit. It is equally as well settled that, where the employees are engaged in the operation of mills and other plants having machinery more or less complicated, and usually driven by mechanical power, in such case a standard of duty has been fixed, and the employer is required to provide methods, implements, and appliances, such as are known, approved, and in general use. *Bradley v. Railroad Co.*, 144 N. C. 558, 57 S. E. 222; *Hicks v. Manufacturing Co.*, 138 N. C. 319, 50 S. E. 703; *Horne v. Power Co.*, 141 N. C. 50, 53 S. E. 658; *Fearington v. Tobacco Co.*, 141 N. C. 80, 53 S. E. 662; *Avery v. West*, 146 N. C. 592, 60 S. E. 646; *Shaw v. Manufacturing Co.*, 146 N. C. 235, 59 S. E. 676; *Phillips v. Iron Works*, 146 N. C. 209, 59 S. E. 660.

[3] There is abundant evidence in the record that the machine used in this case was of "ancient lineage," possibly belonging to the antebellum days; that it was sadly out of order, "wobbly," and dangerous to operate. In his able argument, counsel for de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fendant did not undertake to defend the character of his machine, but contends with much ingenuity that the condition of the machine did not cause the injury; that the injury was the result of an accident, unaccounted for in the evidence.

[4, 5] The evidence shows that, according to present usage, the belt should have been placed in a perpendicular position, or else, as it was nearly on a line with the saw, casing should have been put around it, to prevent objects falling on it from being hurled against the operator. In answer to which it is contended there is no evidence that the plank which crushed the intestate's skull was thrown from the belt. This is undoubtedly a debatable question, as no witness saw it on the rapidly moving belt, or strike the intestate. Yet that the plank struck the intestate must be admitted; that it struck his head with crushing force is demonstrated; that it could not have acquired such momentum from the ordinary passing of it over a rip-saw is evident. It is a fair inference that it must have been thrown from the belt, as it is hard to account for its force in any other manner. This is not a necessary inference, but a legitimate one, from the circumstances of the case, and the jury seem to have taken that view. We think upon the question of proximate cause, as well as negligence, his honor's charge is a fair and clear presentation of the case to the jury.

[6] We do not think the assignments of error in respect to the charge upon the second issue can be sustained. The negligence set up in the answer is that, while the intestate was sawing a board on the said table, and before the board had gone through the saw, he put another board into the saw, and negligently and recklessly sawed said second board, and shoved it forward until it knocked the first board, which he was sawing, onto the saw, causing it to be caught in the saw and thrown back, striking him in the head, and in this way was guilty of negligence which directly contributed to bring about the injury complained of. His honor charged upon this phase of the case that, if the jury believes the evidence of the defendant's witness Lyerly, that he instructed and warned the plaintiff's intestate not to put a second board into the saw until after he had completely sawed the first board, upon the ground that it was dangerous to do so, and that, if the jury should find from the greater weight of the evidence that the plaintiff's intestate was injured in this manner, the plaintiff cannot recover in this case, and the jury will answer the second issue, "Yes." We do not see how the question of contributory negligence could have been put more fairly or clearly to the jury.

[7] Upon the third issue of assumption of risk, his honor submitted the matter to the

jury in as favorable a view for defendant as it could expect under the adjudications of this court, when he charged: "That if the jury finds from the greater weight of the evidence that the condition of the machine at which the plaintiff's intestate (Odell Walker) was working at the time he was hurt was so defective and dangerous that only a reckless man would have worked at it, and that the probabilities of the plaintiff's intestate (Odell Walker) of getting hurt were greater than the probabilities of his safety, the jury are instructed to answer the third issue, 'Yes.'"

[8] The evidence that the intestate negligently continued to work on in the presence of a known and obvious danger, which should have deterred a man of ordinary prudence, is not so striking as to warrant the conclusion, as matter of law, that the intestate assumed the risk to such extent as to bar recovery.

Upon a careful review of the entire record, we find no error that justifies us in directing another trial.

No error.

(157 N. C. 239)

#### SANDERS v. SANDERS.

(Supreme Court of North Carolina. Nov. 22, 1911.)

#### 1. DIVORCE (§ 210\*)—TEMPORARY ALIMONY—VALIDITY OF ORDER.

Under Revisal 1905, § 1562, prescribing the grounds for divorce from bed and board, under section 1563 requiring an affidavit to be filed with the complaint, showing that the grounds relied on existed, to plaintiff's knowledge, at least six months before filing of the complaint, and under section 1566, authorizing alimony pendente lite when it appears that defendant is attempting and about to remove from the state, and is about to dispose of his property, whereby plaintiff may be deprived of alimony, if the judge finds the facts alleged by a wife, suing for divorce, on application for alimony under section 1566, to be true and sufficient to entitle her to divorce, if established at the trial, an action may be instituted, and an order for alimony properly made, before such six-month period has elapsed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 610-612; Dec. Dig. § 210.\*]

#### 2. DIVORCE (§ 90\*)—PLEADING—REQUISITES.

While generally a party to a divorce suit, in pleading under oath as to facts necessary or naturally within his personal knowledge, should do so in positive terms, yet an allegation in a complaint for divorce that plaintiff is informed and believes that defendant is about to remove from the state, and to dispose of his property, whereby plaintiff may be deprived of her alimony, is not insufficient for failing to set out the facts upon which plaintiff's belief could properly be made to rest.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 90.\*]

#### 3. DIVORCE (§ 27\*)—DIVORCE FROM BED AND BOARD—GROUNDS—CRUELTY.

Under Revisal 1905, § 1562, authorizing divorce from bed and board for indignities rendering one's condition intolerable, a wife, free from blame, is entitled to a divorce for a long



course of neglect, cruelty and humiliating insult.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62-83; Dec. Dig. § 27.\*]

Appeal from Superior Court, Union County; Justice, Judge.

Action by Chloe Sanders against R. M. Sanders. From an order allowing alimony pendente lite, defendant appeals. Affirmed.

Civil action to obtain a divorce from bed and board, instituted by the wife against the husband, heard on motion for alimony pendente lite. The court, having duly considered the case on the complaint, properly verified, with affidavits supplementary thereto, and a verified answer, used as an affidavit by defendant, made full and extended findings of fact sufficient to sustain an order for alimony, and to justify a divorce a mensa, if established at the hearing, and thereupon made an order allowing alimony pendente lite, and defendant excepted and appealed.

Redwine & Sikes, for appellant. Stack & Parker, for appellee.

HOKE, J. (after stating the facts as above). [1] It was chiefly objected to the validity of his honor's order "that it was based mainly upon illegal evidence, in that the court considered alleged facts within six months of the institution of the suit." In our view, there are facts, found by his honor anterior to the six months, and on relevant testimony, amply sufficient to justify the order allowing plaintiff alimony; but, apart from this, the ordinary jurisdictional affidavit of plaintiff, annexed to the complaint, contains the additional averment "that plaintiff is informed and believes that defendant is attempting and about to remove from the state, and is about to dispose of his property and remove the same from the state, whereby plaintiff may be disappointed of her alimony," and under our statute (Revisal, §§ 1562, 1563, 1566), and authoritative interpretations of it, as in *Scoggins v. Scoggins*, 85 N. C. 348, Id., 80 N. C. 319, *Gaylord v. Gaylord*, 57 N. C. 74. Where this is made to appear, and the judge finds facts to be true and sufficient to entitle plaintiff to divorce, if established at the trial, the action may be instituted, and an order for alimony properly made, before the six months have elapsed. In *Scoggins' Case*, supra, the judge quotes with approval from *Gaylord's Case*, as follows: "The act certainly requires that in ordinary cases the facts upon which the petitioner founds her claim to relief shall have existed, to her knowledge, at least six months prior to the filing of the petition, and the seventh section of the act expressly enacts that she shall so state and swear. But the eighth section makes an exception to this whenever 'the husband is then re-

moving or about to remove his effects from the state.' In such a case, the wife may exhibit her petition at any time, and if she shall state and swear 'that she doth verily believe that she is entitled to alimony, and that by delaying her suit she will be disappointed of the same, by the removal of her husband's property and effects from the state,' any judge may thereupon make an order of sequestration, or otherwise, as the purpose of justice may seem to require." And in the conclusion of the opinion the judge adds: "There is nothing in this or any other section of the act which indicates a necessity that she should file another bill, or a supplemental bill, after the expiration of six months from the time when the facts which entitled her to relief occurred."

[2] Defendant contends, also, that this additional allegation referred to is insufficient, because made upon information and belief; and, further, because the same is too general in its terms, and should set out the facts upon which plaintiff's belief could properly be made to rest. Neither of these objections may be sustained. It is a general rule of pleading, and one particularly insistent in divorce causes, that when litigants are required to make averment or answer under oath, as to facts necessary or naturally within their personal knowledge, they should do so in positive terms. *Avery v. Stewart*, 136 N. C. 432, 433, 48 S. E. 775, 68 L. R. A. 776; but the principle does not apply to an allegation of this character. Under the facts shown forth in evidence, this plaintiff would not likely have opportunity to know of her husband's plans and purposes as to a removal of his property, and her allegation concerning it are almost necessarily made on information and belief, and should therefore be held in proper form. See citation from *Gaylord v. Gaylord*, supra. And in reference to a fuller statement of the facts, when an allegation of this character becomes essential, before an order is passed, depriving defendant of his property, the facts upon which plaintiff's belief is formed should always be in evidence so that the court may intelligently pass upon the questions involved; but it is sufficient when, as in this case, such facts are made to appear in the supplementary or additional affidavits of plaintiff. As a part of the jurisdictional affidavit, it is better, if made in general terms, following, as it does, the language of the statute (Revisal § 1563).

[3] Defendant objected further, "that many of the allegations of fact alleged in the complaint as to the conduct of the defendant toward the plaintiff were unexplained, and in particular as to what prompted or caused them, and did not set forth the conduct of the plaintiff at that particular time, as required by law." There are decisions in this

state to the effect that when divorce is sought from bed and board, on the ground of cruel and barbarous treatment, alleging specific acts of cruelty and violence, etc., that the entire occurrence should be set forth showing particularly circumstances of provocation, if any existed. *Martin v. Martin*, 130 N. C. 23, 40 S. E. 822; *O'Connor v. O'Connor*, 109 N. C. 142, 18 S. E. 887; *Jackson v. Jackson*, 105 N. C. 438, 11 S. E. 173. But the facts as found by the court do not bring this case within this principle. As the cause will not unlikely come before the jury, we do not deem it necessary or desirable to make a detailed or extended reference to the testimony; the relevant and essential facts are for them entirely unaffected by these preliminary findings. But the facts in evidence, as disclosed by this action of the court, will establish that the plaintiff in her married life has been free from blame, and that by a long course of neglect, cruelty, and humiliating insult, repeated and persisted in on the part of defendant, plaintiff's cause has been brought well within the provisions of our statute, on which she chiefly relies (section 1562, subsec. 4): "If he shall offer such indignities to her person as to render her condition intolerable and life burdensome."

Speaking to this question, in *Taylor v. Taylor*, 76 N. C. 436, a case not unlike the present in its general aspects, the court said: "The decisions of the court in *Coble v. Coble* [55 N. C. 392], and *Erwin v. Erwin* [57 N. C. 82], have not been controverted, and must be taken to have settled the meaning of the words 'indignities to the person,' as used in the statute. Insulting and disgraceful language by itself, addressed to the wife by the husband, may not be an 'indignity to the person' in a legal sense, and so slight personal violence, without injury to the body or health, of itself, will not justify a divorce; but both combined, and frequently repeated, would indicate such a degree of depravity and loss of self-command as much more readily to induce a court to believe there was danger of bodily harm, and such a just apprehension of personal injury as to render cohabitation unsafe. No undeviating rule has been as yet agreed upon by the courts, or probably can be, which will apply to all cases in determining what indignities are grounds of divorce, because they render the condition of the party injured intolerable. The station in life, the temperament, state of health, habits, and feelings of different persons are so unlike that treatment which would send the broken heart of one to the grave would make no sensible impression upon another." And further: "We may assume then that the Legislature purposely omitted to specify the particular acts of indignity for which

divorces may in all cases be obtained. The matter is left at large under general words, thus leaving the courts to deal with each particular case, and to determine it upon its own peculiar circumstances, so as to carry into effect the purpose and remedial object of the statute."

Applying the principle, there is no error in the order allowing plaintiff her alimony, and the judgment below is affirmed.

Affirmed.

(90 S. C. 50)

**LAURENS TELEPHONE CO. v. ENTERPRISE BANK et al.**

(Supreme Court of South Carolina. Nov. 15, 1911.)

**1. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.**

Where the jury found for defendant on the issue of liability, any error in excluding evidence of damages sustained by plaintiff is not reversible.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4207; Dec. Dig. § 1056.\*]

**2. LANDLORD AND TENANT (§ 180\*)—WRONGFUL EJECTION OF TENANT—EVIDENCE—ADMISSIBILITY.**

In an action by a tenant for actual and punitive damages caused by his eviction, evidence that the management of the landlord and of the tenant were on amicable terms was admissible to disprove the charge that the landlord acted willfully and maliciously.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 715-729; Dec. Dig. § 180.\*]

**3. EVIDENCE (§ 244\*)—ADMISSION BY AGENT—ADMISSIBILITY.**

An admission by a representative of a company through whom its contracts were made that the company was a tenant from month to month was competent against the company claiming to be a tenant from year to year.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 916-936; Dec. Dig. § 244.\*]

**4. LANDLORD AND TENANT (§ 180\*)—TENANCY—RIGHTS OF PARTIES.**

A tenant by the year entitled to hold the premises until a designated future date may recover damages for the act of the landlord in removing the roof from the building prior to such date and thereby making it necessary for the tenant to vacate, but a tenant from month to month or a tenant at will, who refuses to quit after due notice, cannot recover because the landlord takes possession of the premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 715-729; Dec. Dig. § 180.\*]

**5. LANDLORD AND TENANT (§ 114\*)—TENANCY—PRESUMPTIONS.**

Where a landlord allows his tenant for a term of years to remain in possession after the term, and collects the usual rent, the presumption is that the tenant becomes a tenant from year to year, but the presumption may be rebutted.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 373-381; Dec. Dig. § 114.\*]

**6. LANDLORD AND TENANT (§ 180\*)—WRONGFUL EVICTION—DEFENSES—"TENANCY AT WILL"—INSTRUCTIONS.**

An instruction that, where one rents from another without any definite time for duration of possession, the landlord may terminate the tenancy by reasonable notice to quit, and that a tenancy at will is where one person lets land to another to hold at the will of the landlord, etc., sufficiently states that, to constitute a tenancy at will, there must not only be a tenancy for an indefinite time, but it must be understood to be subject to the will of the landlord, and such instruction is not subject to criticism on the ground that the statute provides that a tenancy shall be understood to be for one year, unless it is stipulated to be for a shorter term.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 180.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6906-6907, 7814.]

**7. APPEAL AND ERROR (§ 1033\*)—INSTRUCTIONS FAVORABLE TO PARTY COMPLAINING—REVIEW.**

A party may not complain on appeal of an instruction favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**8. APPEAL AND ERROR (§ 1033\*)—ERROR FAVORABLE TO PARTY COMPLAINING—INSTRUCTIONS.**

An instruction that there must be a reasonable notice not less than 30 days to terminate a tenancy from month to month is sufficiently favorable to the tenant because it leaves the jury to find that a 30-day notice is insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**9. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

Where the jury refused to find actual damages, though there was undisputed evidence of actual loss, an exception to the charge on punitive damages was immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4230; Dec. Dig. § 1068.\*]

**10. DAMAGES (§ 179\*)—PUNITIVE DAMAGES—WILLFUL VIOLATION OF LEGAL RIGHTS.**

The jury in an action of tort for actual and punitive damages may consider that defendant took the advice of counsel, and defendant may rebut the presumption that he knew the law which he is alleged to have violated, and meet the charge of willfulness authorizing punitive damages by showing that he made an honest mistake as to the law and his rights thereunder.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 476, 477; Dec. Dig. § 179.\*]

**11. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.**

Where, in an action of tort for actual and punitive damages, the jury found that defendant had not violated the law, the error in an instruction as to the presumption of knowledge of the law was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4230; Dec. Dig. § 1068.\*]

Appeal from Common Pleas Circuit Court of Laurens County; C. C. Featherstone, Special Judge.

"To be officially reported."

Action by the Laurens Telephone Company against the Enterprise Bank and others. From a judgment for defendants, plaintiff appeals. Affirmed.

John Gary Evans, Cannon & Blackwell, and Richey & Richey, for appellant. Dial & Todd and Nicholls & Nicholls, for respondents.

WOODS, J. On May 3, 1907, the Enterprise Bank purchased from E. W. Martin and Mrs. Essie Martin, his wife, a corner lot in the city of Laurens, on which was situated a two-story frame building. The Laurens Telephone Company, plaintiff in this action, occupied two rooms in the second floor of this building as a telephone exchange. Shortly after the purchase Mr. Dial, the president of the bank, notified Mr. Richey, the manager of the telephone company, that the bank intended to erect a new banking house on the lot, that the building then standing would soon be torn down, and that the telephone company would be required to move its offices. Plaintiff, however, continued to occupy the rooms until the morning of August 6, 1907, when E. L. Hertzog, a contractor, acting under the written authority of Mr. Dial and E. W. Martin, entered upon the premises with a force of hands, and began to tear off the roof of the building. Thereupon the plaintiff moved its property out. This action is brought by the telephone company to recover of the defendants actual and punitive damages for the alleged unlawful, willful, and malicious ejection on the morning of August 6th. The plaintiff alleges that it was a tenant of the premises from year to year, that the term under which it was then holding possession did not expire until January 1, 1908, and that the action of the defendants in forcibly ejecting its operators and agents was wrongful and malicious. The defendants in their answer allege that plaintiff was a tenant from month to month, and that it had received ample notice to vacate from both defendants Martin and Dial, but refused to do so. They further deny that the ejection was malicious, and allege that the telephone company by its board of directors had expressly waived any right it may have had to occupy the premises longer. Plaintiff appeals from a judgment in favor of defendants, assigning error in the admission of testimony, in the charge of the circuit judge, and the refusal of the motion for a new trial.

The undisputed facts bearing on the character of the plaintiff's possession are these: The upper floor of the building was leased by the telephone company on January 1, 1901, for a term of five years, from J. M. Robertson, who then owned the property. Upon his death in 1904 the building passed to Reuben Robertson, his son, who died

in April, 1906, leaving all his estate to his two granddaughters, Mrs. Martin and Mrs. Harris. The latter afterwards transferred her interest to E. W. Martin, who, with his wife, conveyed to the defendant bank. During the continuance of the lease plaintiff paid its monthly rent first to J. M. Robertson and then to Reuben Robertson. At the expiration of the lease on January 1, 1906, there was no written contract of renewal, but plaintiff paid the same monthly rent to Reuben Robertson, and after his death to E. W. Martin as the agent for his wife and her sister. Martin testified that he and Mr. Richey could not agree on the rent for 1907; that he told Mr. Richey that he had plans to sell or improve the property; that for the year 1907 he could rent the property only by the month; that he told the defendant bank when he sold to it in May, 1907, that the telephone company was a tenant from month to month; that on May 5, 1907, he notified Mr. Richey of his sale to the bank and of the necessity of surrender of possession, so that the building could be removed to make place for the new bank building; and that at Mr. Richey's request he allowed him until June 15th to vacate. There was other testimony on behalf of the defendants tending to show that the tenancy of 1907 was from month to month, and that after June 15, 1907, it became a tenancy at will under an arrangement that the plaintiff should not be required to vacate until the contractor for the new bank building was ready to commence work. There was also testimony that the board of directors of the plaintiff company had passed a resolution not to claim the property for the year, and to vacate it as soon as other property could be obtained, and that the new location for the telephone exchange had been rented from July 1, 1907.

On behalf of the plaintiff, the testimony of Mr. Richey, the manager, was that he had not agreed to hold as tenant from month to month, and that he claimed under the law and his contract with the owners to have a right to the property for the entire year 1907; that he did not agree to vacate on June 15th, or on any other definite date; that he had waived the plaintiff's right to hold until January, 1908, only to the extent that he agreed to vacate when he had installed a new switchboard in the new location of the telephone exchange; that he had not been able to get the new location ready and install the new switchboard when the defendants began to take the roof away against his protest and his claim of right to hold the property.

The evidence is very voluminous, but the above statement is sufficient to indicate that the issue of both fact and law was sharply made as to the nature of the plaintiff's tenancy. We take up the grounds of appeal in

the order in which they were argued by counsel for plaintiff.

[1] 1. The plaintiff proved beyond dispute that it had suffered actual loss of several hundred dollars from the sudden interruption of its business by having to remove its exchange without preparation. If this necessity was forced upon it by any wrongful action of the defendants, then damages would have followed as a matter of course. But the jury on this issue found in favor of the defendants, and it would not therefore have affected the result to allow the plaintiff to introduce evidence that its business at this particular time would have been unusually large because a strike by the employees of the telegraph company at Laurens would have made the public more dependent on the telephone company for quick communication. The exception, therefore, alleging error in the exclusion of such evidence, is of no consequence, unless there was error on other points requiring a new trial.

[2] 2. The evidence to the effect that the management of the bank and the telephone company were on amicable terms, that the bank had allowed the telephone company to overdraw its accounts, that Mr. Dial the president of the bank had been informed by Martin from whom the bank purchased that the plaintiff was renting by the month, that Mr. Dial had no ill will towards the plaintiff, that he took the advice of counsel, and acted thereon in the belief that he was within his legal rights, was all competent as tending to disprove the charge that the defendants acted willfully and maliciously in taking the roof off the building, and thus forcing the plaintiff to vacate.

[3] 3. Mr. Richey being the representative of the company through whom its contracts were made, the testimony of the witness Brooks that he had admitted that the tenancy was from month to month was clearly competent. *Southern Ry. v. Howell*, 79 S. C. 281, 60 S. E. 677.

[4] 4. In view of the issue of fact as to the character of the holding of the telephone company which so plainly appears from the above statement of the evidence adduced, there was no error in this instruction to the jury: "Now, gentlemen, the pivotal question in this case, the crux of this case, is simply this: How was the Laurens Telephone Company there? Was it rightfully and legally in possession of the premises, and did it have a right to stay there?" Nearly all the testimony was directed to this issue. Certainly in view of the positive and strong testimony of a tenancy from month to month followed by a tenancy at will, there was not the least ground for the plaintiff to contend that the question of the character of its possession was not a difficult and perplexing one. Under the law as established in this state and charged by the presiding judge, this was without doubt also the pivotal question. The

charge was, in substance, that if the jury found that the plaintiff was a tenant by the year entitled to hold until January 1, 1908, then the act of the defendants in taking off the roof of the building in August, 1907, thus making it necessary for plaintiff to vacate, was wrongful and the plaintiff should recover damages; on the other hand, if they found that the plaintiff was a tenant from month to month, or a tenant at will, and refused to quit after due notice, then the defendant bank as the owner of the property had a right to go upon the premises and take possession if it could do so without committing a breach of the peace or a trespass upon the tenant's person or personal property, and the plaintiff should not recover. The principle of law so charged was laid down in *Willoughby v. Atlantic C. L. Ry. Co.*, 32 S. C. 410, 11 S. E. 339, and *Rush v. Aiken Mfg. Co.*, 58 S. C. 145, 36 S. E. 497, 79 Am. St. Rep. 836. The case of *Wright v. Willoughby*, 79 S. C. 438, 60 S. E. 971, relied on by appellant, was not a case of tenancy, and has no application.

[5] 5. The eighth exception was as follows: "The plaintiff requested the presiding judge to charge the jury as follows: 'If A. enters upon real property and takes possession thereof as the tenant of B. under a contract or lease for a definite term of years, at a specified rent to be paid monthly, and B. or his grantee allows A. to remain in possession of said property after the termination of the lease without any agreement as to how long he shall remain in possession, and collects the usual rent, A. thereby becomes a tenant from year to year, and would have the legal right to the possession of the premises until the end of the calendar year.' It is respectfully submitted that his honor erred in modifying plaintiff's first request to charge, which modification was as follows: 'I charge you that is the law in the absence of any change of contract. The law presumes that in the absence of testimony. But, after all the facts are out, presumptions disappear, and it is a question of fact for you to say whether or not plaintiff was a tenant from year to year, or a tenant at will. With that modification, I charge you that is a sound proposition of law.' The error being that the plaintiff had the right to have the first request to charge charged without modification." In *Hillhouse v. Jennings*, 60 S. C. 392, 39 S. E. 596, one of the propositions laid down by Mr. Justice Gary for the court was: "A parol lease under which the tenant enters upon the premises shall after the term of 12 months from the time of entering upon the premises, have the effect of an estate at will only." But, as held in *Hellams v. Patton*, 44 S. C. 454, 22 S. E. 608, and *Matthews v. Hipp*, 66 S. C. 162, 44 S. E. 577, such a tenancy at will may be converted into a tenancy for the year by acts of the parties indicating that intention. The direct issue of fact as to the nature of the tenancy was properly submitted to the jury

under a statement of the law required by these cases.

[6] 6. Exception is taken to this definition of tenancy at will given to the jury: "Now what is a tenancy at will about which I have been speaking? It is where one person rents from another without any definite time being fixed for the duration of the possession, where the tenant has not the right under his contract to stay for any definite or certain length of time, where he is there at the will of the landlord, where the landlord has the right to sever the relation of landlord and tenant by giving reasonable notice to quit. And in that connection I want to read you from the *Encyclopedia of Law*. I read from page 670. Now, I am talking about a tenancy at will, not a tenancy from year to year: 'A tenancy at will is where one person lets land to another to hold at the will of the lessor.' In other words, Mr. Foreman, you rent there to your fellow juror. You rent him a farm. He holds that as long as you want him to hold it, holds it at your will, no definite time is fixed." The context makes perfectly clear the meaning of the instruction to be that, to constitute tenancy at will, there must not only be tenancy for an indefinite time, but it must be understood to be subject to the will of the landlord. There is therefore no ground for criticism of the instruction on the ground that the statute provides that a tenancy "shall be understood to be for one year unless it is stipulated to be for a shorter term."

[7] 7. The contention that there was error in instructing the jury that a tenant at will is entitled to reasonable notice to quit cannot avail the plaintiff, because the instruction was favorable to it.

[8] Nor can it avail the plaintiff that the circuit judge instructed the jury that there must be a reasonable notice not less than 30 days in order to terminate a tenancy from month to month, for the requirement of not less than 30 days notice prevented the jury from considering less notice sufficient, while they were left at liberty to consider that notice insufficient.

[9] 8. Since there was undisputed evidence of actual loss suffered by the plaintiff and the jury refused to find actual damages, and thus found that the defendant bank had acted within its legal rights, the exception as to the charge on punitive damages becomes unimportant.

[10] Error is charged in the first three sentences of the following extract from the charge: "If the jury believe that the defendants took legal counsel and honestly submitted all the facts to a competent and safe attorney, and that they acted under advice of counsel, that is a circumstance which may be considered by you in determining whether or not punitive damages should be awarded. In other words, if all the facts and circumstances in this case show you that the defendants honestly believed that they were

acting within their legal rights, and that they did not act in a willful and high-handed manner, and did not consciously, knowingly invade the rights of the plaintiff, punitive damages cannot be awarded. In this connection, I charge you, gentlemen, as I charged you awhile ago, every man is presumed to know the law, but such presumption is only for certain purposes, and such rule has no application when you come to determine whether or not a man is liable for punitive damages. Before punitive damages could be awarded, a man must consciously, knowingly, violate the law. Now, gentlemen, I think you understand that. The law does not allow any man to take law into his own hands, and if he knows that he is doing wrong, and in utter disregard for his neighbor he willfully and wantonly and in a high-handed manner invades the rights of his neighbor, the law says it is your duty to award punitive damages." The specifications of error are: "(a) That acts committed by one person in utter disregard of the rights of another under advice of counsel are acts from which jury may find actual and punitive damages. (b) The rule is that every man is presumed to know the law, and said rule is applicable when the jury comes to the consideration of the question whether or not a man is liable for punitive damages." The rule that the advice of counsel may be taken into consideration on the question whether one party has willfully violated the rights of another was laid down in *Baker v. Hornick*, 57 S. C. 213, 35 S. E. 524.

The statement of the instruction that the presumption of knowledge of the law "has no application when you come to determine whether or not a man is liable for punitive damages" we do not think is accurate. True, there is no such conclusive legal presumption as obtains in the administration of the criminal law; but every man is allowed to order his life and conduct his affairs on the presumption that all others know and will obey the law, and not invade his legal rights. In an action of tort this presumption may be weak or strong, according to the clearness or obscurity of the law or other circumstances, and may be so weighed by the jury on the issue of willfulness. Furthermore, the defendant may completely rebut the presumption and completely meet the charge of willfulness by evidence convincing to the jury that he made an honest mistake as to the law and his rights thereunder.

[11] The instruction on this subject was made immaterial, however, by the holding of the jury that the defendants had not violated the law.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, C. J., and GARY, A. J., and HYDRICK, J., concur.

(90 S. C. 132)

**HARRELSON et ux. v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of South Carolina. Nov. 27, 1911.)

**1. TELEGRAPHS AND TELEPHONES (§ 38\*)—OPERATION—DELIVERY OF MESSAGE AFTER HOURS—RULES.**

A telegraph company is not liable for a failure to immediately deliver a message received after hours, for telegrams are accepted subject to the company's right to make reasonable regulations, including the time its offices shall be open.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 38\*)—OPERATION—DELAY IN DELIVERY OF MESSAGE RECEIVED AFTER HOURS—RULES—WAIVER.**

A showing that a telegraph operator made an effort to deliver a message received after office hours, and that about a year previous a message received after office hours had been delivered, does not establish a waiver of the company's rule not to deliver messages after hours.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 68\*)—OPERATION—DELAY IN DELIVERY OF MESSAGE—MENTAL ANGUISH—PROXIMATE CAUSE.**

To recover damages for mental anguish, the anguish must be the direct and proximate result of a telegraph company's failure to deliver the message; and hence, where a telegraph company delayed the delivery of a message, announcing to a daughter the death of her father, it was not liable, where, had the message been delivered at the earliest possible moment, the daughter would not have been able to attend the funeral.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.\*]

**4. TELEGRAPHS AND TELEPHONES (§ 68\*)—OPERATION—DELAY IN TRANSMISSION OF MESSAGE—MENTAL ANGUISH—RIGHT TO RECOVER.**

Prior to Act March 2, 1909 (26 St. at Large, p. 84), amending Civ. Code 1902, § 2223, one whose name was not connected with a telegraph message could not recover damages for mental anguish, occasioned by delay in transmission, in the absence of proof that the company's agent had notice that such party would be injured by delay.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.\*]

**5. TELEGRAPHS AND TELEPHONES (§ 68\*)—OPERATION—DELAY IN DELIVERY OF MESSAGE—MENTAL ANGUISH—PERSONS ENTITLED.**

Where a husband, as a nominal party, joined with his wife in an action against a telegraph company for damages for mental suffering, he cannot recover; there being no allegations showing that he sustained any damage peculiar to himself.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.\*]

**6. TELEGRAPHS AND TELEPHONES (§ 29\*)—OPERATION—STATUTES—CONSTRUCTION.**

Act March 2, 1909 (26 St. at Large, p. 84), entitled "An act to amend section 2223, volume 1, Code of Laws of South Carolina (1902) so as to further define and extend the

liability of telegraph companies in cases of mental anguish or suffering," changed the section so as to allow recovery without regard to relationship, or whether messages afforded notice of the relationship, or that mental anguish would result from the failure to deliver the same, and added a provision that, when a telegram shows on its face it relates to death, the party suffering mental anguish, by reason of the failure of the telegraph company to deliver it, may recover damages, without being required to prove that the company had notice of his or her relation to it, provided that this act shall not affect cases now pending in the courts. *Held*, that as this act created new liabilities and extended existing liabilities, it was not retrospective, for a statute should not be construed as retrospective, unless so required by express words or necessary implication.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 15; Dec. Dig. § 29.\*]

Appeal from Common Pleas Circuit Court of Darlington County; J. W. De Vore, Judge.

"To be officially reported."

Action by Isom Harrelson and Thettus Harrelson, his wife, against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Geo. H. Fearons, Willcox & Willcox, and S. W. McLemore, for appellant. Geo. W. Brown, for respondents.

JONES, C. J. This action was brought on August 1, 1909, to recover damages for mental anguish, caused to plaintiff Thettus Harrelson by the alleged negligent and willful failure of defendant to promptly deliver a telegram, filed by J. E. Parker in defendant's office at Chadbourn, N. C., May 1, 1909, for transmission to plaintiff Isom Harrelson, at Hartsville, S. C., reading as follows: "Come at once, old man Van Merritt is dead." Van Merritt was the father of Thettus Harrelson, the wife of Isom Harrelson. At the close of all the testimony, defendant moved for direction of verdict in its favor, on the grounds: (1) That there was no evidence of negligence; (2) no evidence of willfulness; (3) no evidence of damages proximately caused by any negligence or willfulness of defendant; (4) no evidence of notice to defendant that Thettus Harrelson, the real party plaintiff, would sustain damages as the result of delay in delivering the message. The motion was refused, and verdict and judgment were for plaintiffs in the sum of \$400.

The complaint alleged that the message was filed at the Chadbourn office at 6:30 p. m., May 1, 1909, which was denied by defendant. The only evidence of the time of filing that can be discovered in the testimony for plaintiff is that Van Merritt died on the evening of May 1st, and that thereafter, on that day, J. E. Parker, living five miles from Chadbourn, filed the message, and that

the message was received at the Hartsville, S. C., office at 8:20 p. m. of that day. Hence there is a complete failure of any evidence tending to show any negligence in the transmission of the message from Chadbourn to Hartsville.

[1] According to the undisputed testimony for the defendant, the office hours at the Hartsville office were from 8 o'clock a. m. to 8 o'clock p. m., and there was no testimony that these hours were not reasonable. The rule has been frequently declared that telegrams are accepted for transmission, subject to the reasonable regulations of the telegraph company, and that such company is not guilty of negligence in not delivering messages out of its reasonable office hours, in the absence of a special undertaking to the contrary. *Harrison v. Telegraph Co.*, 71 S. C. 386, 51 S. E. 119; *Bonner v. Telegraph Co.*, 71 S. C. 304, 51 S. E. 117; *Roberts v. Telegraph Co.*, 73 S. C. 520, 53 S. E. 985; 114 Am. St. Rep. 100.

[2] There was no evidence tending to show that defendant had waived the regulation as to office hours. The isolated instance shown, of a delivery of a telegram to Robert C. Carter, in May, 1908, at 9:30 p. m., does not tend to show such waiver. *Bonner v. Telegraph Co.*, 71 S. C. 309, 51 S. E. 117. Nor does the fact that the operator at Hartsville made some effort (the extent of which was disputed) to deliver the message in person, the regular messenger having been discharged at 8 p. m., tend to show waiver of the rule.

[3] The message was delivered next morning about 9 a. m.; but, even if the delay of one hour after office hours of opening was some evidence of negligence, still, according to the undisputed evidence, if the message had been delivered immediately on the opening of the office at 8 o'clock a. m., it would have been impossible for plaintiff to go to Chadbourn earlier than she did, as the first train for that point left Hartsville at about 6:30 a. m. on May 2d; hence the deprivation of seeing her father's face before burial, and attending his funeral, was not the proximate result of any neglect of duty by defendant's agent. In order to recover damages for mental anguish, the suffering must be the direct and proximate result of a negligent or willful breach of duty in transmitting or delivering a message. *Arial v. Telegraph Co.*, 70 S. C. 418, 50 S. E. 6. The only inference possible to be drawn from the testimony is that plaintiff sustained no damages as the proximate result of a breach of duty by defendant; and hence a verdict for defendant should have been directed.

[4] In view of the foregoing, it is not important to consider the point that there was no evidence of notice to defendant that plaintiff Thettus Harrelson would sustain

damages as a result of failure to transmit and deliver promptly, but we will not decline to notice the question. It is true that Mrs. Harrelson's name was not connected with the message, and there was no evidence of notice to defendant's agent that she would be affected by delay in delivery. Hence, under the law as it stood previous to the act of March 2, 1909 (26 St. at Large, p. 84), amending section 2223, vol. 1, Code of Laws, it is clear that Mrs. Harrelson could not recover. *Capers v. Telegraph Co.*, 71 S. C. 29, 50 S. E. 537; *Rogers v. Telegraph Co.*, 72 S. C. 290, 51 S. E. 773.

[5] The plaintiff Isom Harrelson is made a party merely as the husband of Mrs. Harrelson, as required by the Code in certain actions by a married woman, and his rights with respect to the message are not to be considered, as there are no allegations in the complaint that he has sustained any damage in connection with its transmission and delivery.

[6] Appellant contends that, since the acts with reference to the transmission and delivery of the message occurred previous to the adoption of the statute of 1909, the case is not affected by the statute, which is prospective only. Respondent contends that the statute relates merely to the remedy and the rules of evidence, and is retrospective as to all accrued causes of action, except cases pending in the courts at the adoption of the statute. The terms of the statute (section 2223), as amended in 1909 (the amendatory matter in italics), are as follows:

Sec. 2223: "All telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering even in the absence of bodily injury, for negligence in receiving, transmitting or delivering messages, *without regard to relationship by blood or marriage, or whether such messages afforded notice of such relationship or otherwise, or that injury or damage would result if such anguish or suffering resulted as a matter of fact.* Nothing contained in this section shall abridge the rights or remedies now provided by law against telegraph companies, and the rights and remedies provided for by this section shall be in addition to those now existing. In all actions under this section the jury may award such damages as they conclude resulted from negligence, *wantonness, willfulness, or recklessness* of said telegraph companies: *Provided, that when a telegram shows on its face that it relates to recklessness or death, the real party for whose benefit the telegram was sent and who suffered mental anguish by reason of the negligence or willfulness of the telegraph company, may recover damages as heretofore provided, without being required to allege or prove that the telegraph company had notice or knowledge at the time the message was sent of his or her relation to it,*

*or of the extent or scope of his or her damage: Provided, that nothing contained in this act shall affect cases now pending in the courts."*

"Recklessness or death" above was probably intended for "sickness or death," but that is not a matter of concern now. The title of the amending statute discloses a purpose to define and extend the liability of telegraph companies, etc. The body of the act creates a new liability or enlarges the existing liability of telegraph companies, and should not be regarded as intended to be retroactive, unless it clearly appears that such was the intention. The rule is that a statute must not be construed as retroactive, unless so required by express words or necessary implication. *Curtis v. Renneker*, 34 S. C. 468, 13 S. E. 664; *Mutual Inv. Co. v. Logan*, 55 S. C. 295, 33 S. E. 372; *Vesta Mills v. Charleston*, 60 S. C. 1, 38 S. E. 226. Construed by this rule, we do not think the statute was intended to be retroactive, and is not applicable to the present case.

The judgment of the circuit court is reversed.

GARY, A. J., and WOODS, J., concur.  
HYDRICK, J., did not sit in this case.

(90 S. C. 106)

#### HOLLADAY et al. v. HODGE.

(Supreme Court of South Carolina. Nov. 25, 1911.)

#### 1. JUSTICES OF THE PEACE (§ 96\*)—PLEADING—AMENDMENT.

In an action before a justice by an infant by his guardian ad litem to recover wages, the court, after sustaining a demurrer to the complaint for failure to show emancipation, had power to allow plaintiff to file an amendment making the guardian ad litem a party individually, and alleging that she was the mother of the infant and that his father was dead.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 328-332; Dec. Dig. § 96.\*]

#### 2. JUSTICES OF THE PEACE (§ 96\*)—PLEADING—AMENDMENT—SERVICE OF AMENDED PLEADING.

Where, in an action before a justice, the complaint was amended after demurrer sustained thereto, it was not necessary that the amended complaint be served on the defendant to give the justice jurisdiction to proceed with the trial.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 328-332; Dec. Dig. § 96.\*]

#### 3. JUSTICES OF THE PEACE (§ 174\*)—APPEAL—AMENDMENT OF PLEADING.

Where an infant, whose father was dead, sued in a justice court for wages by his mother as his guardian ad litem, and she was a party in her individual capacity and acquiesced in a judgment for the infant, an amendment on appeal, further alleging that she, as mother, made no claim to the amount, and that it belonged to the plaintiff, was immaterial.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 665; Dec. Dig. § 174.\*]



Appeal from Common Pleas Circuit Court of Clarendon County; J. C. Klugh, Judge.

"To be officially reported."

Action by Joseph Holladay, by Minnie Simpson, his guardian ad litem, and Minnie Simpson, against Joseph N. Hodge. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 84 S. C. 109, 65 S. E. 1019.

L. D. Jennings, for appellant. Chariton Dr Rant, for respondents.

JONES, C. J. Joseph Holladay, by his guardian ad litem, Minnie Simpson, brought this action in a magistrate court to recover wages for his services as a farm laborer in the employ of defendant. Defendant interposed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, "in that it appears from the complaint that the plaintiff is a minor, and it does not appear that the parent or parents having neglected or refused to supply the plaintiff with a home and living, nor does it appear that the plaintiff was forced to earn his own living, nor does it appear that the parents, either by word or act, have waived their rights to the plaintiff's earnings, nor does it appear that the parent or parents consented to the plaintiff making his own agreement and collecting his own wages, nor does it appear that the parents of the plaintiff relinquished any right to the services of the plaintiff." The magistrate sustained the demurrer, but upon motion of plaintiff's attorney allowed the complaint to be amended by making Minnie Simpson a party plaintiff, with an allegation that she is mother of Joseph Holladay and that his father is dead. The trial was postponed at defendant's request, who claimed to be taken by surprise by the amendment and wished a postponement to prepare for trial. When the case was called for trial on September 4, 1908, defendant objected to the jurisdiction of the court on the ground that the amended complaint had not been served upon him. This objection was overruled by the magistrate, whereupon defendant refused to answer and withdrew. After testimony in support of the allegations of the amended complaint, the magistrate rendered judgment for the plaintiff for \$48, directing that the money be paid to Minnie Simpson, mother of plaintiff, for his benefit. Defendant appealed from the judgment of the magistrate on the grounds that it was improper to allow the amendment, as there was nothing to show that Minnie Simpson had any interest in the controversy, or that she was a necessary or proper party, and that the magistrate was without jurisdiction because the amended complaint had not been served upon defendant. On the hearing of the appeal in the circuit court Judge Klugh

allowed the complaint to be amended so as to allege further "that the mother, Minnie Simpson, makes no claim to the amount due by defendant, and that same belongs to the plaintiff." Thereupon defendant moved for leave to answer the complaint as thus amended, which was refused by Judge Klugh on the ground that defendant's willful default deprived him of the right to further delay, that the last amendment was really immaterial, and its denial by defendant would not avail him. Holding that substantial justice had been done, Judge Klugh affirmed the judgment of the magistrate.

We find nothing in the exceptions warranting reversal.

[1, 2] That the magistrate had power to allow the amendment after demurrer, and that it was not necessary that the amended complaint should be served upon defendant to give jurisdiction to proceed with the trial, has been settled in the case of Holladay v. Hodge, 84 S. C. 109, 65 S. E. 1019.

[3] Since Minnie Simpson, the mother, was a party to the case before the magistrate after the amendment in that court and acquiesced in the judgment rendered, the amendment allowed in the circuit court was immaterial.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 122)

# PEE DEE RIVER LUMBER CO. v. FOUNTAIN.

(Supreme Court of South Carolina. Nov. 25, 1911.)

## 1. REPLEVIN (§ 12\*)—NATURE OF ACTION.

A counterclaim is not available in an action to recover personal property, unless there are exceptional circumstances requiring equitable relief.

[Ed. Note.—For other cases, see Replevin. Cent. Dig. §§ 98-110; Dec. Dig. § 12.\*]

## 2. SET-OFF AND COUNTERCLAIM (§ 13\*)—NATURE OF ACTION—EQUITABLE RELIEF.

Where a complaint alleged ownership of all the timber on a tract of land, that defendant threatened to and was about to remove and dispose of timber cut and lying on the land, by floating it down a river, and that plaintiff, being without an adequate remedy at law, prayed an injunction to restrain such removal, but did not allege that defendant had wrongfully taken or detained the logs, such action was not to recover specific personal property, but was for equitable relief; and hence it was error to sustain a demurrer to a counterclaim interposed thereto, on the theory that a counterclaim is not available in replevin.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 15-22; Dec. Dig. § 13.\*]

### 3. INJUNCTION (§ 241\*)—NATURE OF CLAIM—DAMAGES.

In a suit for injunctive relief, defendant may not plead as a counterclaim damages recoverable on the bond.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 241.\*]

### 4. INJUNCTION (§ 252\*)—WRONGFUL ISSUANCE—DAMAGES—BOND.

Recovery on an injunction bond for the wrongful issuance of a writ, authorized by Code Civ. Proc. 1902, § 243, is ordinarily limited to the damages resulting from the injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 586-598; Dec. Dig. § 252.\*]

### 5. INJUNCTION (§ 148\*) — BOND — INSUFFICIENCY.

Where an injunction bond as given affords insufficient protection, defendant's remedy is by a timely application to have the amount increased.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 323-334; Dec. Dig. § 148.\*]

### 6. DISMISSAL AND NONSUIT (§ 15\*)—RIGHT TO RELIEF—DISCRETION.

Motions to discontinue, in cases at law or in equity, are addressed to the discretion of the court, and will be refused where the discontinuance would work prejudice to the defendant.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 31; Dec. Dig. § 15.\*]

### 7. REPLEVIN (§ 89\*)—DISCONTINUANCE—RETURN OF PROPERTY.

Code Civ. Proc. 1902, § 299, provides that if property sued for in replevin has been delivered to the plaintiff, and defendant claims a return thereof, judgment for defendant may be for a return of the property, or for the value thereof, if a return cannot be had, with damages for taking and withholding the same. *Held* that, where plaintiff in replevin had seized the property from defendant's possession, it could not discontinue the action without restoring the status.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 349-351; Dec. Dig. § 89.\*]

Appeal from Common Pleas Circuit Court of Darlington County; J. W. De Vore, Judge. "To be officially reported."

Action by the Pee Dee River Lumber Company against W. D. Fountain. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

W. F. Dargan, for appellant. E. O. Woods, for respondent.

JONES, C. J. The plaintiff, a corporation organized under the laws of Delaware, brought this suit upon a complaint, alleging two causes of action: First, for recovery of possession of about 200 logs of ash, cypress, and cottonwood belonging to plaintiff, of the alleged value of \$400, cut and lying upon a described tract of land in Darlington county, on the Great Pee Dee river; second, alleging plaintiff's ownership of all the timber upon the said tract of land; that defendant threatens to remove, and is about to remove and dispose of, the timber cut and lying thereon, which is movable by floating down the Great Pee Dee river; and that, as plaintiff is without adequate remedy at law, injunction is sought to restrain removal of the

timber. The prayer of the complaint is for delivery of the property described in the first cause of action, and payment of \$100 damages for detention, and for injunction restraining disposal of any of the property referred to in either of the causes of action. A bond in the sum of \$800 was executed for the prosecution of the action, for delivery of the property and the wrongful detention, for the return of the property, if return be adjudged, and for payment of whatever sum may be recovered in the action against plaintiff. The property was seized by the sheriff, and the defendant did not replevy the same.

On January 29, 1908, Judge Watts granted a temporary restraining order, enjoining defendant from disposing of the timber on said premises, and, in pursuance of that order, an injunction bond in the sum of \$250, to pay damages sustained by defendant, if the court should finally decide that plaintiff was not entitled to injunction.

Using defendant's attorney's statement of the pleadings:

In his answer to plaintiff's first cause of action, the defendant denied the title of the plaintiff to the 200 logs, of the alleged value of \$400, and alleged that he was the owner of the same, and that his ownership was well known to the plaintiff; that the value thereof was \$800, instead of \$400; that by reason of the seizing and withholding of the same he was damaged \$800, and demanded a return of the property.

Further answering, the defendant alleged that there were, under plaintiff's deed of purchase, some 300 logs near the Pee Dee river, cut by the defendant, that were expressly excepted, and the title thereto did not pass under said deed of purchase, but these logs were recognized by the plaintiff and the sellers as the property of this defendant; that the value of said logs was \$2,800; that they were seized by the plaintiff and withheld from the defendant, to his damage, \$2,800.

Further answering plaintiff's second cause of action, the defendant denied plaintiff's title to the property described, alleging ownership to the same in himself, under a contract to cut on shares, entered in 1898, nearly nine years previous to plaintiff's deed of purchase, under which he was placed in possession and control of the entire property; that he had been in entire control of the said property ever since; that under said contract he had, at great cost and expense, deadened trees, cut canals, opened floatroads, and was actively engaged in preparing and marketing the timber aforesaid upon the terms aforesaid; that large numbers of trees had been deadened preparatory to cutting; that a large number had been cut, and were ready to ship and float to market; that, before the contract or agreement to purchase

was entered into by the plaintiff for the purchase of said timber, and before the plaintiff had acquired any rights thereto, it was notified by this defendant of his contract with the owners, and was informed of the work done and expense incurred by him under his said contract; that defendant's share in the said timber, under the contract aforesaid, is reasonably worth \$15,000; and that by reason of the taking and detention of said timber, and the forcible interference with the defendant's rights on the premises by the plaintiff, he has been damaged in the said sum of \$15,000.

Further answering, the defendant, in the sixth paragraph of his answer, recites the expenses mentioned by him in the fifth paragraph of his answer, and his interest in the timber, and alleges the same as a counterclaim against the plaintiff.

The plaintiff demurred to defendant's original answer to his first cause of action and the counterclaim set up by the defendant to plaintiff's second cause of action. The defendant then amended his answer to the plaintiff's first cause of action, and the plaintiff replied to the defendant's amended answer, denying any knowledge or notice of the alleged contract of the defendant with George W. Hopkins, and also any knowledge or notice at any time of any contract to cut said timber between the defendant and any other person, and alleging that if there was such a contract the plaintiff was a purchaser for value, without notice.

The case being called for trial at the fall term of 1910, before his honor, Judge De Vore and a jury, the plaintiff interposed his demurrer to so much of the answer as sets up a counterclaim to the second cause of action, which was sustained by the court. The plaintiff then elected to take a voluntary nonsuit on the legal claim, which was allowed by the court, and so ordered. Defendant appeals from the order sustaining the demurrer to defendant's counterclaim, to plaintiff's second cause of action, and from the order allowing plaintiff to take voluntary nonsuit.

[1] The ground upon which the demurrer was made and sustained was that a counterclaim cannot be interposed in an action for recovery of specific personal property, nor in an action for injunction. Counsel for appellant concedes that counterclaim is not available in an action to recover personal property, unless there are exceptional circumstances requiring equitable relief, as shown in *Williams v. Irby*, 15 S. C. 462, *Ludden & Bates v. Hornsby*, 45 S. C. 111, 22 S. E. 781, and *Badham v. Badham*, 54 S. C. 404, 32 S. E. 444, but contends that the second cause of action was not for the recovery of personal property.

[2] We think the appellant correct in this, as an inspection of the complaint will show. While the second cause of action alleges plaintiff's ownership of certain logs, it is not alleged that defendant has wrongfully taken

or detained the same, but that he has undertaken to remove the timber, and threatens to sell and dispose of the same; and with respect to the second cause of action there is no demand for a delivery of the timber. Hence it was error to sustain the demurrer on that ground.

[3] It appears, however, that matters alleged as a counterclaim to the second cause of action are matters which, in contemplation of law, are protected through the injunction bond, and therefore are not properly pleadable as a counterclaim. Section 243 of the Code of Civil Procedure provides: "When no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct."

[4, 5] The injunction bond thus required ordinarily limits defendant's recovery for damages resulting from the injunction, and such damages may be ascertained as the court shall direct. The rule may be different, if the injunction is sued out maliciously. 10 Ency. Pl. & Pr. 1119, and cases cited. The bond as given may be insufficient protection to defendant, but the remedy was a timely application to have the amount of the bond increased. We therefore sustain the action of the circuit court with respect to the demurrer, in so far as it rejects the matter pleaded in its aspect as a counterclaim. There was error in the order, in so far as it allowed plaintiff to take a nonsuit, because of the peculiar situation.

[6] It is now settled that motions to discontinue, in cases at law or equity, are addressed to the discretion of the court, and will be refused when a discontinuance would work prejudice to the defendant. *State v. Southern Ry.*, 82 S. C. 14, 62 S. E. 1116.

[7] The plaintiff has seized property from the possession of defendant, and could not discontinue the action without restoring the status. The defendant alleges that the property taken from him greatly exceeds the value as alleged in the complaint. Section 299 of the Code of Civil Procedure provides: "If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same." It is not sufficient to say that plaintiff has given a bond. If the property belonged to defendant, he was entitled to its return, or its value only in case a return could not be had, and could not be deprived of his rights

in this regard by a discontinuance. The law is thus stated in 34 Cyc. 407, and supported by citation of cases:

"In an action of replevin, both parties are regarded as equally actors; and where the plaintiff in replevying has been put in possession of the property under his writ he cannot be permitted to escape liability to defendant by suffering a nonsuit, or dismissing his action, without the consent of the latter. After the property had been seized and delivered to plaintiff, defendant becomes the virtual plaintiff in the case. Plaintiff cannot and does not thereby deprive defendant of his right to establish his title and right to possession, and obtain a judgment for the return of the property, or its value, and damages for the taking and withholding of the property. If the rule were otherwise, plaintiff, under color of legal process, would perpetrate a fraud on the law, and be allowed to keep property, the title to which was prima facie in defendant, from whom it was taken at the beginning of the suit."

The judgment of the circuit court, in so far as it sustains plaintiff's demurrer to the counterclaim of defendant, is affirmed, but, in so far as it allows plaintiff to discontinue the action, it is reversed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 109)

FLEMING et al. v. RIEGEL et al.

(Supreme Court of South Carolina. Nov. 25, 1911.)

CORPORATIONS (§ 320\*)—ACTION BY STOCKHOLDERS—SUFFICIENCY OF EVIDENCE—EXISTENCE OF CONTRACT.

In a suit by minority stockholders to enforce specific performance of an agreement by the individual defendants, claimed to have been made before they acquired a controlling interest in the corporation, to furnish money to it at a low rate of interest, evidence held not to show a definite agreement with the corporation as claimed.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 320.\*]

Appeal from Common Pleas Circuit Court of Greenwood County; J. A. McCullough, Special Judge.

"To be officially reported."

Action by J. C. C. Fleming and others against Benjamin Riegel and others. From a decree for defendants, plaintiffs appeal. Affirmed.

Simpson & Bomar, Simpson, Cooper & Rabb, F. P. McGowan, and A. C. Todd, for appellants. Cothran, Dean & Cothran and Grier & Park, for respondents.

JONES, C. J. This is a suit in equity, by the plaintiffs, as minority stockholders in the corporation called "Ware Shoals Manufacturing Company," against the corporation itself

and the other defendants above named, as majority stockholders, seeking specific performance of a contract partly oral and partly in writing, alleged to have been made by the defendants, and praying an injunction against the continuance of certain acts on the part of the defendants charged to be in violation of such agreement and of the rights of the plaintiffs as stockholders. The complaint also seeks an accounting by the individual defendants for certain moneys belonging to said corporation alleged to have been illegally and wrongfully expended in breach of such agreement and in disregard of the rights of the plaintiffs as minority stockholders; and there is a prayer for alternative relief by the cancellation of the alleged contract, in case the same cannot be enforced according to its terms as averred by the plaintiffs, and for a restoration of the status of the plaintiffs as stockholders as same is claimed to have existed prior to the making of the said contract under which the individual defendants became stockholders therein. It is further charged in the complaint that, by reason of the alleged wrongful, willful, and malicious acts of the individual defendants in violation of said contract, the value of the shares of stock held by the plaintiffs and other minority stockholders has been greatly impaired, to their damage \$100,000, for which amount judgment is also prayed against the said defendants individually. By consent of parties, all of the issues both of law and of fact were committed for determination by a referee, who took the testimony offered on behalf of the plaintiffs and thereafter made his report recommending the granting of a motion for the dismissal of the complaint, which motion was made by the defendants at the conclusion of the plaintiffs' case and without entering upon the evidence of the defense. Upon exceptions duly taken by the plaintiffs to the said report and recommendation of the referee, the cause came on for hearing by the circuit court, whereupon a decree was made affirming the findings and conclusions of the referee and overruling the exceptions in all particulars. From this decree the plaintiffs have now appealed to this court.

It appears that on June 30, 1905, the plaintiffs were stockholders in the said Ware Shoals Manufacturing Company, a corporation then duly organized with the plaintiff N. B. Dial as president and treasurer, having an authorized capital stock of \$500,000, of which about \$255,000 had been subscribed and about \$215,000 thereof had been paid in cash and property, and shares of stock to the amount last named had been issued and were then held by various shareowners, including the plaintiffs. On the day last mentioned, an agreement in writing was entered into between the defendant B. Riegel and the defendant Ware Shoals Manufacturing Com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pany, by which it was stipulated that the said B. D. Riegel would take and pay for the unsold portion of the capital stock of the defendant company, amounting in par value to \$285,000, upon condition that such subscription should not be binding until and unless, at the next annual meeting of stockholders, the number of the directors of the corporation should be fixed at nine and the defendant B. D. Riegel should be permitted to name five of that number. On the same day, an agreement in writing, expressed to be upon valuable consideration, was made between the plaintiff N. B. Dial and the defendant Benjamin D. Riegel, by which it was contracted that the former would use his best endeavors to procure the ratification forthwith of the above-mentioned written agreement by the directors of the Ware Shoals Manufacturing Company, and, at the next annual meeting of the corporation, would procure the election of five directors to be named by B. D. Riegel, who with four others to be named by other stockholders would constitute the board of directors, and that N. B. Dial would sell at par to the defendant N. B. Riegel sufficient stock in the corporation to make up the total amount of \$255,000 of stock thereof, in case the corporation itself should be unable to sell him stock to that amount at least. It was thereby further provided that such persons as should be designated by defendant B. D. Riegel should be elected treasurer of the corporation; and it was also thereby stipulated that the plaintiff N. B. Dial would cause the by-laws of the defendant corporation to be so amended at the said annual meeting of the stockholders as to provide, among other things, for a board of nine directors, who should manage and control the affairs of the corporation, and who should have power to borrow money for the benefit of the company as they might deem advisable and should elect the president and fix his salary. The written agreement in question contains no other provisions having any bearing upon the issues of the cause; there being no reference therein to the filling of the office of president other than such as is contained in the provision last above stated.

It appears from the evidence that the above agreements were carried at the annual stockholders' meeting of the defendant company, held on July 22, 1905, the contract made by the company, through its president, with B. D. Riegel, as already recited, was ratified and accepted in all its terms, provisions, and conditions, and nine directors of said company were unanimously elected to serve for one year, among them being six of the individual defendants in this action. Thereafter, in pursuance of this contract and agreement, Benjamin D. Riegel and his co-defendants became owners by purchase of a majority of the stock in the defendant corporation; and, at the annual meeting of the stockholders held in 1906, the same directors were unanimously re-elected. During

each of the years 1905 and 1906, the plaintiff N. B. Dial was elected by the directors to the position of president of the corporation, and he continued to serve as president during those years. Although there appear in the record no resolutions or other official action by the directors fixing the salary of the president during these years, it appears to have been the understanding that the salary of the president during that time should be the sum of \$3,000 per annum, payable in monthly installments, and the plaintiff Dial received payment of such salary.

At the meeting of the stockholders held on the 22d day of July, 1907, the same directors were unanimously re-elected, and, at the meeting of the directors held the same day, as appears by the minutes offered in evidence, the plaintiff, N. B. Dial was re-elected president for one year. Thereupon the president having by request temporarily retired from the meeting, the defendant B. D. Riegel was appointed a committee to confer with the president, Dial, and to fix the amount of salary of the latter. Being unable to come to an agreement with the plaintiff Dial, who refused to accept an annual salary of \$1,200 proposed, a further meeting of the directors was held on the same day, at which a proposition on behalf of the plaintiff Dial to fix his salary at \$2,500 was rejected by a vote of a majority of the directors, whereupon Mr. Dial tendered his resignation as president, which was accepted, and a new president was elected by the directors in his stead, on the same day, to serve without salary.

The foregoing are conceded facts bearing upon the issues here presented; but there are certain allegations of fact by the plaintiffs which are controverted by the defendants, and it is necessary to consider the testimony bearing upon these questions.

It is averred in the complaint, as a part of the contract by which the defendant Benjamin D. Riegel and his associates became the owners of the majority of the stock in the corporation, it was verbally agreed by defendant that the plaintiff N. B. Dial should be retained in the office of president of the corporation and be annually re-elected for that office, at a salary of \$3,000 per annum, for a period of time "as long as he could and would give to the duties of the office proper attention"; and plaintiffs ask that specific performance of this contract shall be adjudged by the court, it being alleged to be for the best interest of the plaintiffs and other stockholders that the same should be specifically enforced.

Without stopping to consider whether this alleged verbal contract comes within the provisions of the statute of frauds by which certain contracts are required to be in writing and signed by the party to be charged, and without passing upon the question so ably presented in argument as to whether, if

such contract was originally within the terms of that statute, there has been such a part performance thereof as would suffice to render the statute inapplicable, it is only necessary to say that we have been unable to find any evidence in the record which would warrant this court in overruling the concurrent findings of the referee and the circuit court that no such parol contract has been established by the testimony. Viewing the evidence in the light most favorable to plaintiffs, and accepting as true all the statements under oath by the plaintiffs and their witnesses as to what was said by the defendants, or any of them, at or about the time of the execution of the written agreement already mentioned, with regard to the retention of Mr. Dial as president of the corporation, we are unable to discover anything said or done by any of the defendants which could import into the contract in question an agreement to retain Dial as president for any definite or indefinite term of years. It is not to be doubted that the defendant Benjamin D. Riegel did, at the time of the negotiations for the purchase of the stock, represent in general terms that it was the then intention of himself and his associates to keep Mr. Dial in the office of president, and it might possibly be inferred from his words and conduct that he then entertained the purpose of so retaining plaintiff for some indeterminate period of years. But there is absolutely no proof, even by the testimony of the plaintiff N. B. Dial himself, of any statement made or act done by any of the defendants from which could reasonably be deduced an agreement to continue Mr. Dial in the office of president of this corporation during the remainder of his life, or "so long as he would and could give to the duties of said office proper attention," or for any other period capable of being definitely determined. It is true that the plaintiff N. B. Dial does say that "they agreed to continue me as president, a lifetime position, and pay me \$3,000, which was to be increased as the mill prospered"; but he does not undertake to say what was the language used or otherwise to state the terms in which such alleged agreement was phrased or to name the person by whom it was so agreed. It is evident from his testimony as a whole that he does not mean to say that any such agreement was in set terms so made, but that he merely intends to convey his general understanding of what were the intentions expressed by defendants with regard to the matter of his retention as president. The very action of plaintiff Dial in resigning his office of president when his salary was reduced by vote of the directors is inconsistent with his theory that he had a legal right to continue to hold said office and to demand the compensation originally stipulated; and this action on his part tends to show that, while he may then have

regarded the defendants as being morally bound to retain him in office of president at a salary of \$3,000 per annum, he could not at that time have considered them as being bound by contract to this duty.

Upon the whole evidence we are satisfied that some one or more of the defendants, in discussions had with some of the plaintiffs, expressed a general purpose to retain the plaintiff Dial in the presidency of this corporation for an undetermined period at an unfixed salary; but we are unable to discover any evidence in the record which would justify the conclusion that any contract upon consideration was made to keep him as such president for any period capable of definite determination.

Aside, therefore, from any question as to the lack of mutuality in any such contract as is claimed here to have been made and apart from any considerations as to the effect of the resignation by appellant Dial of his position as president, we must conclude that no agreement upon consideration has been established for the employment of said appellant for any term which can be rendered certain nor at any compensation definitely fixed. The exceptions, therefore, which complain of error in the circuit decree, in any particulars based upon the failure or refusal of the defendants to retain the plaintiff Dial in the office of president of the defendant corporation, cannot be sustained, and the same must be overruled.

Appellants further urge that there was error by the circuit court in failing to find that the individual defendants herein, as a part of the contract under which they purchased the stock in the defendant corporation, further contracted and agreed, verbally, to take the entire output of the mill of the defendant company, forever thereafter, at the prevailing market price; and that this contract was subsequently broken by the defendants, whereby the plaintiffs suffered damage by the impairment of the value of their stock resulting from such breach of contract on the part of the defendants. As is substantially found by the referee and confirmed by the circuit judge, the evidence wholly fails to establish any legal enforceable contract on the part of the individual defendants, or any of them, to take any definite portion or the whole output of the mill of the defendant company for any fixed or even indefinite time. The utmost that can reasonably be considered that the evidence shows is that the defendant B. D. Riegel, during the negotiations for the purchase by him of the controlling interest in the stock of the defendant company, represented that he and other individuals among his codefendants were in control of a corporation known as the "Riegel Sack Company," and that defendants would be in a position to market the output of the Ware Shoals Manufacturing Company by disposing of the same

to the Riegel Sack Company at prevailing market prices, and thus save the commission otherwise likely to be incurred in selling the products of the defendant company through the agency of middlemen. It is manifest from the entire evidence that the statements of the individual defendants as to this matter were mere representations of the incidental benefits which were likely to accrue from their contemplated connection with the defendant company, and that such representations were not intended and could not reasonably have been understood as amounting to any contract, either by the individual defendants or by the Riegel Sack Company, to take such output of the defendant company at prevailing prices during all future time. It is evident that no such far-reaching contract could have been intended, as otherwise some action of the defendant corporation would have been taken in pursuance thereof, since it is hardly reasonable to suppose that a contract so unlimited in extent of time should have been left to the verbal understanding of one or two individuals without any minute or memorandum made thereof and without any action thereupon or reference thereto in any record of the proceedings of any meeting of stockholders or directors at the time when the written agreement already mentioned was adopted and confirmed. As the conclusion has been reached that there is an entire failure of evidence to show any such meeting of the minds of the parties or any such mutuality of agreement between them as to constitute a contract with reference to the taking by the individual defendants of the products of the defendant company at any stipulated price, there is no necessity for a consideration of the questions as to the applicability of the provisions of the statute of frauds or as to the effect of any alleged part performance of such supposed contract.

The same finding of fact must be made with regard to the verbal contract charged to have been made by the defendants to furnish money from time to time for the use of defendant company at low rates of interest. Accepting all the testimony upon this point, even in the view most favorable to the plaintiffs, it merely shows that one or more of the individual defendants, at the time they were seeking to purchase a controlling interest in the stock of the defendant company, colloquially represented that they were in a position to procure loans of money for the uses of the defendant company, at low rates of interest, and that, in the event of their obtaining control of a majority of the stock in said company, they would procure and furnish such money "at lowest market rates of interest" from time to time as same might be needed; but there is no testimony as to any definite statement of the rate of interest at which such money could be furnished by them, and no proof of any corporate action on the part of the defendant

company in acceptance of any such proposition. It is true that it is testified by one of the plaintiffs that, at the time the matter was discussed and before the individual defendants became stockholders in defendant company, the statement was made by some unnamed one or more of the defendants that they could then "furnish money at 4 per cent., but it would fluctuate." There is no testimony in the case as to what was the "lowest market rate" at which money could have been furnished for the use of the defendant company at any particular time at which it was needed by said company, nor was any proof adduced that said company was compelled at any time to borrow money at any rate higher than the "lowest market rate" then prevailing.

In brief, there is no evidence to establish the making of any definite contract with defendant company to furnish money for its use at any fixed rate, nor is there any proof of any loss or damage resulting to any of the plaintiffs by impairment of the value of their stock or otherwise, caused by any breach of the alleged verbal contract of the individual defendants to furnish money for the corporate purposes of the defendant company.

In so far as concerns the other specifications of error in the findings with reference to the matter of alleged extravagance on the part of the individual defendants in their action as stockholders or directors in the erection of residences upon the corporate property and in the issuance and sale of preferred stock, a careful examination of the record fails to show any error in the circuit judgment dismissing the complaint in these particulars.

The conclusions already announced as to the matters of fact render it unnecessary to consider certain exceptions, ably argued both on behalf of the appellants and of the respondents, charging error of law by the circuit judge in the holding that an agreement between stockholders to elect from year to year a certain person, for an indefinite period at a fixed annual salary, would be void as contrary to public policy, and that such a contract must be held void in this case for the further reason that the same is in violation of the by-laws of the defendant company. Upon these exceptions, as well as upon all others which raise questions of law based upon a view of the evidence at variance with the facts as found by the circuit judgment and concurred in by this court, no opinion need now be expressed, since the questions thereby raised have become entirely speculative in consequence of the determinations reached as to the matters of fact.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(187 Ga. 104)

**MILLTOWN LUMBER CO. et al. v. LASTINGER.**

(Supreme Court of Georgia. Nov. 15, 1911.)

*(Syllabus by the Court.)***NEW TRIAL (§ 132\*)—PROCEEDINGS TO PROCURE—BRIEF OF EVIDENCE—TIME FOR PRESENTATION.**

At the September, 1910, term of the superior court a verdict was rendered. The losing party moved for a new trial; the rule nisi being made returnable in vacation on November 2d. An order was also granted, reciting that it was impossible to make out a complete brief of evidence before the adjournment of court, repeating the setting of the hearing, and declaring that the movant might amend the motion at any time before the final hearing, and that he should have until the hearing, whenever it might be, to prepare and present for approval a brief of the evidence. On the date fixed for a hearing counsel entered into a written consent to continue it to November 4th, and the judge passed an order setting the hearing for the agreed date, and allowing the movant until such date to make out and file a brief of the evidence. On the second day so fixed the judge, by agreement, passed an order declaring that the "motion for a new trial stands continued until" another named date in vacation (November 22d). On the last day so fixed counsel for respondent moved to dismiss the motion for a new trial, because no brief of the evidence was presented for approval on or before November 4th, and the order continuing the hearing from that date did not continue the time for presenting or filing a brief of the evidence. It was admitted that a brief of evidence had been agreed upon by counsel on Sunday, November 20th, but the agreement was dated November 3d, and an entry of filing thereon was dated November 4th. It did not appear that the brief was at any time presented to the judge for approval; nor was there any assignment of error based on a refusal to approve it. *Held* that, under such circumstances, the judgment of the presiding judge dismissing the motion will not be reversed.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 273-275; Dec. Dig. § 132.\*]

Error from Superior Court, Berrien County; J. H. Merrill, Judge.

Action between the Milltown Lumber Company and others and B. G. Lastinger. From the judgment, the Milltown Lumber Company and others bring error. Affirmed.

W. R. Smith and W. G. Harrison, for plaintiffs in error. Hendricks & Christian, for defendant in error.

**LUMPKIN, J.** Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(187 Ga. 107)

**BRIDGES v. SOUTHERN RY. CO.**

(Supreme Court of Georgia. Nov. 15, 1911.)

*(Syllabus by the Court.)***1. CARRIERS (§ 408\*)—CARRIAGE OF PASSENGERS—LOSS OF EFFECTS—EVIDENCE.**

The evidence was insufficient to support a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1595; Dec. Dig. § 408.\*]

**2. APPEAL AND ERROR (§ 1072\*)—REVIEW—HARMLESS ERROR—DECISION ON MOTION FOR NEW TRIAL.**

The refusal of the judge to grant a new trial, on account of alleged errors in refusing to admit evidence, or to require the defendant company to produce an original paper, will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4233½; Dec. Dig. § 1072.\*]

**3. APPEAL AND ERROR (§ 1067\*)—REVIEW—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.**

There was no error in refusing to grant a new trial on account of alleged errors in the charge, or in the failure to charge as complained of.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

*(Additional Syllabus by Editorial Staff.)***4. APPEAL AND ERROR (§ 1029\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

In an action by a passenger for the loss of a trunk, any error in a charge relating to the amount of damages was not harmful, where the plaintiff was not entitled to recover any sum.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.\*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action by T. H. Bridges against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. F. Lawson, for plaintiff in error. Graham & Graham, for defendant in error.

ATKINSON, J. T. H. Bridges instituted suit against the Southern Railway Company for damages on account of the loss of a trunk and its contents, alleged to be plaintiff's baggage while a passenger on the railroad of the defendant. A verdict having been rendered against the plaintiff, he moved for a new trial, which was overruled, and he excepted.

[1] 1. The plaintiff testified to the value of the trunk and its contents, and also, in substance, that he purchased a round-trip ticket from Hawkinsville, Ga., to Richmond, Va., to return by way of Norfolk, Va., by rail. The defendant's agent at Hawkinsville gave the plaintiff a check for his trunk to Richmond. He received his trunk at Richmond, and left there for Norfolk, over the Old Dominion Steamship Company's line, receiving from that company a check for his trunk from Richmond to Norfolk. The Southern Railway Company's line did not run into Norfolk. Upon his arrival at Norfolk, he received from a transfer company, in return for the steamship company's check, a transfer check. The trunk could not be found, and the transfer company then delivered to the plaintiff a check, purporting to be a Southern Railway Company's check for the transportation of the trunk from Norfolk to Hawkinsville. Upon his return to the lat-



ter place, the plaintiff presented the last-mentioned check to the local agent of the defendant at that place, and demanded his trunk. The trunk could not be found there, and the agent took the check and endeavored to trace the trunk, but failed to do so, and subsequently returned the check to the plaintiff. There was no evidence that the transfer company at Norfolk was the agent of the defendant company, which denied that the trunk was ever delivered to it, or its agent, after the plaintiff had received it at Richmond. The plaintiff testified that the agent of the transfer company was also the agent of the Southern Railway Company, but qualified this by saying that the only reason he had for saying so was because he issued this Southern Railway Company check. The only other testimony on this point was that the Southern Railway Company had an office in Norfolk. Under the facts stated, the plaintiff was not entitled to recover.

[2] 2. It was complained in the motion for new trial that the judge rejected evidence offered by the plaintiff to the effect that it was the universal custom in Norfolk for a person holding a check of one railway company to deliver it to the agent of another company and receive a check in return from the latter company; also that the court did not require the defendant company to produce, in response to a notice served upon it, the original ticket sold by defendant to the plaintiff. Relatively to the notice to produce, it was also urged that the response made by the defendant was insufficient, and that the plaintiff was entitled to a judgment by default, under the statute, on account of the alleged insufficiency of the response. The defendant did not contend upon the trial that it had not sold the ticket, as claimed by defendant, and a sworn copy was actually introduced by the defendant, without objection upon the part of plaintiff. If the original ticket had been introduced, it would not have been sufficient to have made out the plaintiff's case. No motion was made by the plaintiff for a judgment by default on account of the failure to make proper response to the notice to produce. If a proper case had been presented for such a judgment, in order to take advantage of the right, it was incumbent upon the plaintiff to move for a judgment. *Morris v. Wofford*, 114 Ga. 935, 41 S. E. 56; *Mayor, etc., of Macon v. Humphries*, 122 Ga. 800, 50 S. E. 986. The refusal of the judge to grant a new trial on refusal of alleged errors in refusing to admit evidence, or to require the defendant company to produce the original ticket, will not be disturbed.

[3, 4] 3. Error was assigned upon a charge of the court relating to the amount of damages recoverable in the case; but as, under the evidence, the plaintiff was not entitled to recover any sum, even if there had been error in the instruction, it would not have been

harmful. Error was also assigned upon the failure of the judge to instruct the jury as to the "rule of law in reference as to how the existence of agency may be proven," and also because the judge failed to give in charge "any rule of law in reference to the probative value of the railway baggage check as evidence of the delivery of the baggage to the railway company, or as evidence of the existence of the agency on the part of the person delivering said check to the plaintiff." Under the facts recited in the first division of the opinion, there was no evidence sufficient to show that after the trunk went into the hands of the Old Dominion Steamship Company, a different carrier from the Southern Railway Company, it went out of the possession of that company; nor was there sufficient evidence of agency for the defendant, the Southern Railway Company, of any person who issued and received checks for the trunk after it went into the hands of the steamship company, and there was no error in failing to charge as complained of.

Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 115)

#### HARRIS v. STATE.

(Supreme Court of Georgia. Nov. 15, 1911.)

(*Syllabus by the Court.*)

#### REVIEW ON APPEAL.

No error of law is complained of, and the evidence is sufficient to support the verdict.

Error from Superior Court, Crisp County; U. V. Whipple, Judge.

Johnson Harris was convicted of crime, and brings error. Affirmed.

J. T. Jeter and Crum & Jones, for plaintiff in error. W. F. George, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 124)

#### GORHAM et al. v. MONTFORT.

(Supreme Court of Georgia. Nov. 16, 1911.)

(*Syllabus by the Court.*)

#### 1. EVIDENCE (§ 314\*)—HEARSAY.

Testimony of a witness that he received a letter from the clerk of the superior court touching the result of the clerk's investigation of the records in his office is hearsay evidence and inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1168-1173; Dec. Dig. § 314.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 27\*)—ISSUANCE OF LETTERS—VALIDITY.

In a suit by an administrator in possession of land to enjoin a trespass upon the land, it cannot be said that the grant of letters of administration to him is void as matter of law

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

solely because more than 20 years elapsed from the death of the decedent to the issuance of letters of administration on his estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 171-176; Dec. Dig. § 27.\*]

### 3. DEEDS (§ 207\*)—EVIDENCE—FORGERY.

The evidence examined, and held to demand a finding that the deed attacked as a forgery was not a genuine instrument.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 614-624; Dec. Dig. § 207.\*]

Error from Superior Court, Wilcox County; U. V. Whipple, Judge.

Action by O. T. Montfort, administrator, against W. M. Gorham and others. Judgment for plaintiff, and defendants bring error. Affirmed.

E. H. Williams and Hal Lawson, for plaintiffs in error. Haygood & Cutts, for defendant in error.

EVANS, P. J. O. T. Montfort, as administrator of M. A. Bentley, filed his petition against Walter M. Gorham and others, praying to enjoin the defendants from interfering with the possession of lot of land No. 33 in the twelfth district of originally Dooly, now Wilcox, county, and to cancel a certain deed as a cloud upon his title. It was alleged in the petition: That the plaintiff was in possession of the land, and claimed title thereto under a grant from the state to his intestate, dated May 20, 1846; that the title on which the defendants based a pretended claim began with what purported to have been a deed made by M. A. Bentley to Robert S. Waters, dated July 1, 1854, and they claimed to have mesne conveyances from Waters to themselves; that the deed purporting to have been made by M. A. Bentley to Robert S. Waters was a forgery; that it was never executed by M. A. Bentley, and never did purport to have been executed by him, but, on the contrary, was originally written as having been executed by M. A. Bentley, by a certain other person as his attorney in fact, but, if such other person ever wrote the deed, he had no power of attorney to execute it; and that some person claiming under the deed, knowing that no proof could be made of the power of attorney, struck from the deed the words "by his attorney in fact," and the name signed to the deed as attorney in fact, so as to leave the deed purporting to have been executed by M. A. Bentley. The defendants filed answers. All of them disclaimed title, except Gorham, who, as surviving partner of Henry Lewis & Co., claimed to have title to the land, and to have been in the continuous possession of it for about 15 years. They denied the plaintiff's title, and averred him to be a trespasser on the land. The plaintiff filed an affidavit of forgery relative to the deed attacked for forgery in his petition. On the trial the parties stipulated: That the land

was originally granted by the state to M. A. Bentley on May 20, 1846, that the plaintiff was in possession at the time of bringing the suit, and that he should proceed by making out a prima facie case, and, after that was done, then, upon a tender in evidence by the defendants of the deed purporting to have been made by M. A. Bentley to Robert S. Waters on July 1, 1854, there should be a separate trial as to the issue of forgery, as provided under the law for the trial of forgery as a separate issue.

The plaintiff put in evidence his application for administration on the estate of M. A. Bentley, and letters of administration granted thereon of date of April 7, 1902. The defendants then tendered in evidence an original deed, the same purporting to have been made by Myron A. Bentley to Robert S. Waters, dated July 1, 1854, conveying the land in controversy, and purporting to have been executed in Clarke county, Ga., in the presence of H. H. Dean, J. P., and George K. Smith. Upon the coming in of this deed an issue of forgery was made up, and upon the issue the plaintiff read the testimony of Charles L. Bentley, taken by interrogatories, to the effect that he was a resident of Hall county, 48 years old, and was the son of O. S. Bentley, who died in 1889; that Myron A. Bentley and O. S. Bentley were brothers; that M. A. Bentley died in 1854; that upon inspection of the deed made by M. A. Bentley to Robert S. Waters, witnessed by George K. Smith and H. H. Dean, J. P., conveying land lot 33 in the Twelfth district of Dooly county, Ga., the witness declared the written parts of the same to be in the handwriting of his father, O. S. Bentley; that he had also examined other deeds purporting to have been made by M. A. Bentley, by his attorney in fact, O. S. Bentley, to Robert M. Braden, conveying different lots of land, and purporting to have been executed on August 11, 1854, and these deeds were in the handwriting of O. S. Bentley, and the signature to these deeds is the same signature as that on the deed from M. A. Bentley to Robert S. Waters; that he was interested in the recovery to the extent of one-sixth; that he had never paid any taxes on the land; and that Montfort was appointed administrator at the instance of his aunt, Mrs. Denison. M. B. Cannon testified that he saw the original deed purporting to be from Myron A. Bentley to Robert S. Waters; at the time he saw the deed it purported to have been signed by Myron A. Bentley, by his attorney in fact, O. S. Bentley; and that it had since been changed by being torn or mutilated. This deed was in the possession of the witness, who was attorney for Henry Lewis & Co. (the defendant in the present suit being the surviving partner of that firm), who claimed title under it, in a suit then pending in Wilcox superior court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

against A. J. Connor and Mrs. Sangster. A deed made by Myron A. Bentley, by his attorney in fact, O. S. Bentley, executed in Clarke county, Ga., July 1, 1854, conveying lot of land No. 36 in the Twelfth district of Dooly county to Robert S. Waters, said deed being witnessed by George K. Smith and H. H. Dean, J. P., duly recorded, and being upon the same blank and printed form as that of the deed upon which the issue of forgery is made, produced by the clerk of the superior court under a subpoena duces tecum, and identified by J. W. Haygood, was put in evidence.

The defendants offered J. L. Bankston, who testified: That he was an attorney at law, and the agent representing Henry Lewis & Co.; that to him was intrusted the sale of the lands belonging to them in Wilcox county; that some of the title papers of Lewis & Co. were incomplete, and among them was the title under which the land in controversy is claimed by Gorham as surviving partner of Lewis & Co.; that he examined through the old deed books of Wilcox county, trying to find a record of the power of attorney from M. A. Bentley to O. S. Bentley, and also made search in other places, but was unable to find the original or record of any power of attorney from M. A. Bentley to O. S. Bentley. J. W. Haygood, in behalf of the defendant, testified that in connection with the Bentley cases he had occasion to examine the records in Wilcox and Dooly counties, and had never seen the record of any power of attorney from M. A. Bentley to O. S. Bentley, and that he knew the signature of M. A. Bentley to the deed attacked was in the handwriting of O. S. Bentley. Eldridge Cutts, for the defendants, testified that he had never had occasion to examine the records in search of any power of attorney from M. A. Bentley, and that O. T. Montfort, the administrator, was in possession of the land a few months prior to the filing of the present suit.

Upon the conclusion of the evidence the court directed a verdict finding the deed attacked to be a forgery. A motion was made for a new trial, complaining of the rejection of certain testimony, and of the direction of a verdict on the issue of forgery. The motion was overruled.

[1] 1. The court rejected the following testimony of the defendants' counsel: "I was connected with the defense of this case at the first trial, after which my connection ceased. I was attorney for the defendants. In preparing the case for trial I made a search for the power of attorney authorizing O. S. Bentley, as attorney in fact for M. A. Bentley, to execute the deed now attacked as a forgery. I applied to the clerk of the superior court of Dooly county for a certified copy of such power of attorney from his records, and he failed to furnish such certified copy, stating by letter that he could find no such paper upon record." This testimony

was ruled out, on the ground that it was hearsay. Manifestly it was hearsay, in the sense that it was oral testimony concerning the contents of a writing which was neither produced nor accounted for.

[2] 2. It is contended that it was error to direct a verdict, because the plaintiff failed to make out a prima facie right to sue; the contention being that the lapse of 48 years from the death of M. A. Bentley to the grant of the administration on his estate afforded a presumption of law that the estate had been lawfully administered, and therefore that the grant of letters of administration on M. A. Bentley's estate to the plaintiff was speculative and void. This point was raised in the case of *Bullock v. Dunbar*, 114 Ga. 754, 40 S. E. 783, where it was ruled: "The old doctrine that a defendant in possession should be protected against an action instituted by the administrator of him who died clothed with the legal title to the property in dispute, when it appeared that the administration was stale and had been obtained for fraudulent or speculative purposes, did not apply in any case where the defendant's possession had not been of sufficient duration to support a title in him by prescription. The provision in the limitation act of 1856, that 'a prescription does not run against an unrepresented estate until representation, provided the lapse does not exceed five years,' was curative of the evil which rendered it necessary before the passage of that act to invoke the doctrine referred to above." We are asked to review and overrule this case, but, upon consideration and examination, we adhere to this ruling, and decline to overrule it. There was no evidence that the defendants had been in possession of the land, so as to support a prescriptive title.

[3] 3. It is further contended that the evidence was insufficient to show the deed to be a forgery. Notwithstanding the deed purporting to have been made by M. A. Bentley to Robert S. Waters had never been recorded, it was stipulated between the parties that the collateral issue of its forgery should be tried separately from the main case. Civil Code 1910, § 4210, is designed to supply a statutory remedy for determining the question as to whether a registered deed offered in evidence is or is not genuine. It has no application to an unregistered deed. *Payne v. Ormond*, 44 Ga. 515. Therefore we will consider the effect of the testimony independently of the statute. It is undisputed that the title to the land is in the plaintiff unless this deed is genuine. The plaintiff is in possession of the land. The defendant, some time prior to the present suit, had a litigation with a third person over the very same land, and in that litigation he based his claim of title upon this same deed, which at that time did not purport to have been executed personally by M. A. Bentley, but did purport to have been executed by O. S. Bentley as attorney in fact for M. A. Bentley. When

introduced in evidence in the present suit, the deed was found to have been altered, so as to make it appear to have been the personal deed of M. A. Bentley. No explanation is offered as to how, or by whom, the alteration was made, although the deed appears all the while to have been in the custody of the party who claims under it. The nature of the alteration shows that it was designedly done. As it did not appear that the deed was in the control or possession of any person other than the defendants, and as it did appear that they made fruitless effort to discover the power of attorney from M. A. Bentley to O. S. Bentley for the purpose of completing the deed as a muniment of title, and that they were claiming the land under the mutilated deed, and the nature of the mutilation being such as to entirely change its character, the conclusion is irresistible that the alteration was fraudulent, and with the intent to prejudice the rights of the true owner. No presumption of fact can arise in favor of a person out of possession of land that the deed was made pursuant to a valid power of attorney, simply because a long interval of time has elapsed since the date the deed is alleged to have been executed. On the contrary, the facts demanded an inference that the spoliation of the deed is attributable to the defendants, and the rule is that every inference is to be drawn against a party to a suit guilty of mutilating documentary evidence. *Hays v. Bayliss*, 82 Mo. 209; 1 Starkie on Ev. (3d Ed.) 564; 1 Wigmore on Ev. § 278. The fraudulent alteration of a deed by erasure, mutilation, or addition, with intent to prejudice the rights of another, will constitute forgery, if the alteration so made may have the effect intended. 13 Am. & Eng. Enc. Law (2d Ed.) 1090. The deed in its present form purports to have been executed by M. A. Bentley. There is nothing upon its face to show the contrary. The proof is uncontradicted that it was never executed by M. A. Bentley, and we think the evidence demanded a finding that it be declared to be a forgery.

Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 89)

**MERCK v. STATE**

(Supreme Court of Georgia. Nov. 14, 1911.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 655\*)—HOMICIDE (§ 309\*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.**

Neither the evidence nor the statement of the accused made during the trial to the jury authorized an instruction upon the law of voluntary manslaughter. Accordingly the judge did not err in refusing to give in charge a written request, presented by counsel for the accused, defining the offense of voluntary manslaughter. Nor did the judge err in informing

the solicitor general in the presence of the jury that he need not discuss the law of voluntary manslaughter to the jury, as no instruction would be given on that subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1535; Dec. Dig. § 655; \* Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

**2. CRIMINAL LAW (§ 762\*)—HOMICIDE—INSTRUCTIONS—INTIMATION OF OPINION OF JUDGE.**

The jury was instructed by the judge that they could find but one of two verdicts, "either one for murder, or for justifiable homicide, whatever the evidence and the defendant's statement, under the rules of law that I have given you in charge, convinces you of." There was a proper charge given upon the subjects of reasonable doubt and of accidental killing, as well as insanity, and at the close of the charge, after instructing the jury as to the forms of the verdicts for murder and for murder with a recommendation for life imprisonment, the charge was closed with the following instruction: "If you believe the state has not made out a case of murder, or for any of the reasons that I have given you in charge that the defendant is guilty of any offense, and should not be convicted, the form of your verdict would be: 'We, the jury, find the defendant not guilty.'" The instruction first quoted in this headnote was not erroneous, "in that it was a direct intimation to the jury that murder had alone been proven under the evidence, \* \* \* because the court nowhere in its charge either explained or defined justifiable homicide to the jury." The theory of justifiable homicide was not presented, either by the evidence or the statement of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1769; Dec. Dig. § 762.\*]

**3. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.**

The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Hall County; J. B. Jones, Judge.

Balus Merck was convicted of murder, and brings error. Affirmed.

B. P. Gaillard, Jr., for plaintiff in error. Robt. McMillan, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 105)

**SOUTHERN RY. CO. v. BUCHAN.**

(Supreme Court of Georgia. Nov. 15, 1911.)

(Syllabus by the Court.)

**RAILROADS (§ 439\*)—OPERATION—INJURIES TO ANIMALS ON TRACK—PLEADING.**

Where, in an action for damages against a railway company for the killing of a mule, the only allegation of negligence was that the defendant, "through the negligent operation" of a certain train, struck and killed a mule, it was error to overrule a special demurrer to the petition, based on the ground that the petition did not allege with sufficient certainty in what way or manner the defendant was negligent in operating its train, or what specific acts of negli-

gence of the defendant or its agents resulted in the killing of the mule.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 439.\*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action by W. G. Buchan against the Southern Railway Company. Judgment for plaintiff and defendant brings error. Reversed.

W. G. Buchan brought suit against the Southern Railway Company to recover damages. Beside the formal allegations, the petition contained the following: "On March 8, 1909, said railway company, through the negligent operation of its trains, struck and killed a mule belonging to petitioner, at Meyer's Crossing, a crossing and flag station on said road, in said county, about six miles from Hawkinsville, on the branch line between Hawkinsville and Cochran. Said mule was medium size, gray mare mule, about eight years old, and worth \$225. Petitioner has made demand on said road for payment, and the same has been refused, and petitioner has not received any compensation for the loss of said property." The petitioner therefore prayed judgment for \$225 as damages, and that process issue. The defendant demurred to the petition, on the ground that the allegation that the defendant "killed the mule through the negligent operation of its trains," without stating whether it was a freight or a passenger train, and the particulars of the killing, was insufficient.

The plaintiff amended the petition by striking the word "train" and inserting, in lieu thereof, "the regular afternoon passenger train coming from Cochran to Hawkinsville, August 12, 1910." The defendant demurred to the petition as amended, on the ground that it did not allege with sufficient certainty in what way or manner the defendant was negligent or what specific acts of negligence of the defendant or its agents resulted in the killing of the mule. The demurrer was overruled, and exception was taken thereto pendente lite. After a trial resulting in a verdict for the plaintiff, the defendant moved for a new trial, which was overruled, and it excepted. Error was assigned on the exception pendente lite.

A. C. Pate and Graham & Graham, for plaintiff in error. Herbert L. Grice, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The petition, as amended, alleged that the railroad company, "through the negligent operation" of its passenger train running between two named points on a certain day, struck and killed a mule belonging to the plaintiff at a certain crossing where there was a flag station. The entire allegation of negligence was contained in

the words "through the negligent operation" of one of its trains. Under several former rulings of this court, such an allegation was subject to special demurrer, and the court erred in overruling the demurrer thereto. *Macon, Dublin & Savannah R. Co. v. Stewart*, 120 Ga. 890, 48 S. E. 354; *Kemp v. Central Ry. Co.*, 122 Ga. 559, 50 S. E. 465 (4); *Southern Ry. Co. v. Pope*, 129 Ga. 842, 60 S. E. 157. The error was material, for it left the defendant without information as to the specific acts of negligence charged against it, and it did not afford sufficient information as a basis for preparing to meet the case brought against it. This being true, the verdict must be set aside, and it is unnecessary to discuss the details of rulings made in a trial thus improperly entered upon.

Judgment reversed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

ATKINSON, J., concurs in this decision, because concluded by former decisions. See special concurrence in *Southern Ry. Co. v. Pope*, 129 Ga. 842, 60 S. E. 157.

(187 Ga. 81)

#### ADKINS v. STATE.

(Supreme Court of Georgia. Nov. 14, 1911.)

(*Syllabus by the Court.*)

#### 1. INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

The evidence authorized an instruction on the law of voluntary manslaughter.

#### 2. INSTRUCTIONS—INVOLUNTARY MANSLAUGHTER.

Neither under the evidence nor the statement of the accused was the law of involuntary manslaughter involved in the case.

#### 3. CRIMINAL LAW (§ 954\*)—NEW TRIAL—PROCEEDINGS TO PROCURE—GROUNDS OF MOTION.

A ground of a motion for a new trial was without merit, which alleged that the court erred in making the following statement in the presence of the jury: "I will let it in to discriminate between murder and voluntary manslaughter"—it nowhere appearing in the motion to what the judge had reference.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2363-2367; Dec. Dig. § 954.\*]

#### 4. CRIMINAL LAW (§ 954\*)—NEW TRIAL—PROCEEDINGS TO PROCURE—GROUNDS OF MOTION.

A ground of a motion for a new trial, which did no more than complain that the court erred "in letting in evidence, over objection of defendant's counsel, the account of a scuffle over a jug of whisky, which took place at the home of the deceased about one hour before the killing," was without merit.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2363-2367; Dec. Dig. § 954.\*]

#### 5. CRIMINAL LAW (§ 954\*)—NEW TRIAL—PROCEEDINGS TO PROCURE—GROUNDS OF MOTION.

A ground of a motion for a new trial, assigning error upon the admission of evidence, over the objection of the accused, as to "the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

account of a fight," was without merit, where neither the substance of the evidence admitted nor the objection urged to the same was stated.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 864.\*]

**6. HOMICIDE (§ 309\*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.**

In defining the offense of voluntary manslaughter, the judge, in the language of the Penal Code (section 85), instructed the jury that "provocation by words, threats, menaces and contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder." This charge was not erroneous, because the judge did not further instruct "the jury that such words, threats, menaces, and contemptuous gestures, if sufficient to cause defendant to fear that a felony was about to be committed upon his person." The ground of the motion is incomplete; and, besides, the doctrine of reasonable fear has no connection with the offense of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

**7. CRIMINAL LAW (§ 1178\*)—WRIT OF ERROR—REVIEW—ABANDONMENT OF ASSIGNMENT.**

The grounds of a motion for a new trial, which are not referred to in the brief of counsel for plaintiff in error, will be treated as abandoned.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1178.\*]

**8. SUFFICIENCY OF EVIDENCE—NEW TRIAL.**

The evidence was sufficient to support the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Toombs County; B. T. Rawlings, Judge.

Cliff Adkins was convicted of homicide, and brings error. Affirmed.

W. E. Brown and L. J. Cowart, for plaintiff in error. Alfred Herrington, Sol. Gen., Hines & Jordan, and T. S. Felder, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 114)

**HENSLEE v. STAMPS.**

(Supreme Court of Georgia. Nov. 15, 1911.)

(*Syllabus by the Court.*)

**WILLS (§§ 274, 277, 355\*)—PROBATE—CAVEAT—APPLICATION OF PROOF IN SOLEMN FORM.**

No provision is made for the caveat of a will offered for probate in common form. The application of the plaintiff in error was in the nature of a caveat to a will already probated in common form. It was defective as a technical motion to set aside the judgment of probate, as no illegality in the judgment was alleged; and it is not good as an application for the executor to prove the will in solemn form, in that there was no prayer for the executor to probate the will in solemn form, or for citation to the heirs of the testator. See, in this connection, *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583; *Bullard v. Wynn*, 134 Ga. 636, 68 S. E. 439; Civil Code 1910, § 3856 et seq.

[Ed. Note.—For other cases, see Wills, Dec. Dig. §§ 274, 277, 355.\*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action between Rowena Henslee and W. M. Stamps. From the judgment, Henslee brings error. Affirmed.

J. S. James, for plaintiff in error. J. H. McLarty, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 119)

**WHITFIELD v. STATE.**

(Supreme Court of Georgia. Nov. 15, 1911.)

(*Syllabus by the Court.*)

**CRIMINAL LAW (§ 913\*)—NEW TRIAL.**

There being no complaint that any error of law was committed upon the trial, and the evidence being sufficient to authorize the verdict, the court did not err in refusing to grant a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2145; Dec. Dig. § 913.\*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Walter Whitfield was convicted of crime, and brings error. Affirmed.

Eubank & Mebane and W. H. Trawick, for plaintiff in error. Jno. W. Bale, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 86)

**TAYLOR v. STATE.**

(Supreme Court of Georgia. Nov. 14, 1911.)

(*Syllabus by the Court.*)

**CRIMINAL LAW (§ 1131\*)—APPEAL—DISMISSAL—DEATH OF PLAINTIFF IN ERROR.**

It appears from the announcement by one of the counsel of record for the plaintiff in error, F. T. Taylor, that since the argument of this case before this court the plaintiff in error has departed this life, prior to the decision of the case. It is ordered that the writ of error be and the same is hereby dismissed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1131.\*]

Error from Superior Court, Appling County; C. B. Conyers, Judge.

F. T. Taylor was convicted of crime, and brings error. Dismissed.

A. V. Sellers and W. W. Bennett, for plaintiff in error. J. H. Thomas, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

PER CURIAM. Dismissed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

Ga. 147)

**FIELDS v. CASE.**

(Supreme Court of Georgia. Nov. 16, 1911.)

(Syllabus by the Court.)

**1. EXECUTORS AND ADMINISTRATORS (§ 497\*)  
—COMPENSATION—TEMPORARY ADMINISTRATORS—EXTRA COMPENSATION.**

Section 4067 of the Civil Code of 1910, which provides that, "in other cases of extraordinary services [besides those previously enumerated], extra compensation may be allowed by the ordinary" to an administrator, applies to a temporary as well as a permanent administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2117-2124; Dec. Dig. § 497.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 497\*)  
—COMPENSATION — "EXTRAORDINARY SERVICES."**

"Extraordinary services," for which extra compensation may be allowed to an administrator, are services rendered by him while administrator, and in the discharge of his duties as such.

(a) They do not include voluntary services rendered by a person in procuring a cemetery lot and rendering assistance in connection with the funeral of a decedent, though the person so acting is afterward appointed temporary administrator of such decedent; nor do they include an application by him to be appointed permanent administrator, which is successfully resisted by an heir of the intestate, and which results in the appointment of the latter.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2117-2124; Dec. Dig. § 497.\*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2629.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

W. D. Fields was appointed temporary administrator. G. W. Case filed a caveat. From an order as to compensation of the temporary administrator, he appealed to the superior court, and from the judgment of the superior court, he brings error. Reversed.

Hines & Jordan, for plaintiff in error.  
Bell & Ellis, for defendant in error.

**LUMPKIN, J.** A person took out temporary letters of administration on the estate of a deceased woman, and on the same day applied for permanent letters. A caveat was filed by one who claimed to be an heir, and to have been selected by a majority of the heirs to administer the estate. The caveator was appointed. The temporary administrator then filed a petition to be allowed compensation, alleging that, when the intestate died, it was not known that she had any relatives; that she left a house and lot and a small amount of money and personalty; and that he had performed unusual and extraordinary services. He prayed to be allowed suitable compensation therefor, and fees for the attorneys who had represented him. The ordinary allowed \$75 as compensation for the administrator and \$50 as at-

torney's fees. The case was appealed to the superior court, where it was submitted to the presiding judge without a jury. The judge awarded to the administrator \$75 as compensation, but no attorney's fees. The permanent administrator excepted.

[1] 1. The case involves two questions: If it is necessary for a temporary administrator to render extraordinary services, can the ordinary allow him extra compensation above the usual commissions for receiving the estate, under Civil Code 1910, § 4067; or do the provisions of that section apply only to a permanent administrator? And, if such compensation can be allowed to a temporary administrator, was the basis of allowance in this case proper?

The Code nowhere provides for the compensation of a temporary administrator by name, save as he is classed with administrators generally. Section 4062 provides that as compensation for his services "the administrator" shall receive a commission of 2½ per cent. on all sums of money received by him and a like per cent. on all sums paid out by him. Section 4065 provides that no commissions shall be paid for delivering over any property in kind, but the ordinary may allow a reasonable compensation, not exceeding 3 per cent. of the appraised value. Section 4066 makes provision in regard to the allowance of traveling expenses and reasonable compensation, if an administrator is required, in the discharge of his duties, to travel out of his county. Section 4067 provides that, "in other cases of extraordinary services, extra compensation may be allowed by the ordinary." Section 4068 declares that, if a trust fund passes through the hands of several administrators, the fund shall not be diminished by charges of commissions by each successive administrator holding and receiving in the same right, but that commissions for receiving and those for paying out shall be paid to the trustee performing the service.

The general duty of a temporary administrator is to collect and preserve the estate. Sometimes extraordinary services may become necessary. Certainly the law does not contemplate that a temporary administrator shall serve without any compensation. But, as has been shown, no provision is made therefor, except in the general rules as to compensation of administrators. If it should become necessary in the discharge of his duty to travel out of the county and incur expenses, the law does not require him to pay the necessary expense from his own pocket, without reimbursement, or to let the estate go to waste. Nor is there any reason why the provision as to extra compensation should not apply to a temporary administrator as well as to a permanent one.

[2] 2. If a temporary administrator applies

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for extra compensation beyond the regular commissions, it must be on the basis of extraordinary services rendered by him while acting as administrator, and in the performance of his duties. The nature of the position and the duties of such an administrator must be borne in mind. It is not everything which he may do which will entitle him to extra compensation. Nor can he claim compensation for acts done before his appointment as temporary administrator. Funeral expenses to correspond with the circumstances of the deceased in life are a proper charge against the estate; but voluntary acts in assisting in the burial furnish no ground for allowing extra compensation to the person performing them, though he may afterward become the temporary administrator of the estate of the deceased. If he wishes to try to set up a charge for such services as extraordinary services of an administrator, he should become temporary administrator before rendering them. If he acts as a philanthropist or friend, he cannot claim extra compensation therefor as administrator, when later he becomes such. Neither can he claim extra compensation as temporary administrator on the ground that he has sought to be appointed permanent administrator and failed in the effort because an heir was appointed.

An examination of the evidence shows that a large part of it deals with acts of the character above indicated. It seems apparent that they entered into the determination of the presiding judge. The estate is small. If any allowance is made, it should be on the basis of extraordinary services of the administrator. We think the case should be returned for a rehearing under the principles here announced.

Judgment reversed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 120)

**CENTRAL GEORGIA POWER CO. v.  
MAYS.**

(Supreme Court of Georgia. Nov. 15, 1911.)

*(Syllabus by the Court.)*

**1. EMINENT DOMAIN (§ 222\*) — PROCEEDINGS TO TAKE PROPERTY — INSTRUCTION.**

On the hearing of a proceeding to condemn private property for public purposes as provided by statute, and to assess damages for same, it is error for the court to charge the jury that, "the right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a cause of action." Such charge may mislead the jury into believing that the condemnation proceedings were unlawful and that they should assess damages accordingly.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 562-567; Dec. Dig. § 222.\*]

**2. EMINENT DOMAIN (§ 201\*) — COMPENSATION — STATUTORY PROVISION.**

In condemnation proceedings authorized by the statute, the willingness or unwillingness of the property owner to part with his property is not a subject-matter of consideration. The statute (Civil Code 1910, § 5206 et seq.) provides how damages to private property condemned for public purposes may be assessed.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 201.\*]

**3. EMINENT DOMAIN (§ 136\*) — COMPENSATION — MEASURE.**

In assessing damages, under the facts in this case, there are two elements to be considered: First, the market value of the property actually taken; and, second, the consequential damages which naturally and proximately arise to the remainder of the owner's property from the taking of that part which is taken and devoting it to public purposes.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 363-366; Dec. Dig. § 136.\*]

**4. EMINENT DOMAIN (§ 200\*) — PROCEEDINGS TO TAKE PROPERTY — PRESUMPTIONS.**

It cannot be assumed in condemnation proceedings that there will be negligent construction or operation, so as to cause damages in excess of that which would naturally and proximately result from the construction and operation of a transmission line across the property sought to be condemned.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 540; Dec. Dig. § 200.\*]

**5. EMINENT DOMAIN (§ 202\*) — PROCEEDINGS TO TAKE PROPERTY — EVIDENCE AS TO VALUE.**

It is not error for a court, in condemnation proceedings, to allow the plaintiff's witness on cross-examination to answer the question, "What was it [the land over which the plaintiff sought to construct its transmission line] worth for building purposes? For building purposes it might be worth more?" by saying, "It might, if any one wanted to use it"—the value of the land for building purposes being one element in ascertaining what the market value of said land was.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 541; Dec. Dig. § 202.\*]

**6. EVIDENCE (§ 471\*) — OPINION EVIDENCE — EXAMINATION OF WITNESSES — FACTS ON WHICH OPINION IS BASED.**

It is not error for the court to overrule an objection to the following question, propounded to and answered by the defendant in proceedings to condemn land for public purposes: "How much do you say the transmission line depreciates the market value of your land there?" Answer: "Ninety dollars an acre"—where the witness has already testified what the market value of the land was before and after the transmission line was built.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

**7. EVIDENCE (§ 497\*) — OPINION EVIDENCE — EXAMINATION OF WITNESSES — FACTS ON WHICH OPINION IS BASED.**

It is not error to allow plaintiff's witness in condemnation proceedings, on cross-examination, to answer the question, "Do you think that transmission line would have any effect on this property [the property of defendant in issue] for building purposes?" when taken in connection with the testimony of other witnesses, who testified as to the market value of the land before and after the transmission line was built.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2285-2288; Dec. Dig. § 497.\*]



Error from Superior Court, Butts County; R. T. Daniel, Judge.

Condemnation proceedings by the Central Georgia Power Company against R. W. Mays. Judgment for defendant, and plaintiff brings error. Reversed.

Walter T. Johnson, for plaintiff in error.  
H. M. Fletcher, for defendant in error.

HILL, J. The Central Georgia Power Company, a corporation chartered under the laws of Georgia, sought to condemn certain lands in Butts county belonging to the defendant, R. W. Mays, under Civil Code 1910, § 5206 et seq., for the purpose of erecting, maintaining, repairing, and patrolling "a single line of towers, and wires strung upon the same, and from tower to tower, for the transmission of high and low voltage electric current, and also a telephone or telegraph line upon said towers, with all the necessary foundations, anchors, braces, cables, wires, appliances, and fixtures necessary to properly construct, support, protect, and operate the same upon and over and across" the land described in the notice, which was given by the Central Georgia Power Company to the defendant, Mays. Assessors were duly appointed, and they selected a third. The assessors awarded for "the rights of way and other interests and easements sought to be condemned" the sum of \$10, and as consequential damages to the property not taken they awarded the sum of \$25, and for the consequential benefits nothing. From this award the defendant, Mays, took an appeal to the superior court of Butts county. On the trial of the case in the superior court, the jury found for Mays the sum of \$215, and judgment was had upon said verdict accordingly. Whereupon the plaintiff in error made a motion for a new trial upon the various grounds set forth therein, which was overruled by the court, and plaintiff in error (the condemnor) excepted.

[1] 1. In the view we take of this case, it will not be necessary to consider each ground of the motion for a new trial separately, inasmuch as the principles of law here ruled may be applied to the various grounds covered by the motion. One ground of the motion for a new trial is as follows: "Because the court erred in charging the jury as follows: 'The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a cause of action.'" We think this charge was calculated to mislead the jury. The condemnor in this case, as appears from the record, was proceeding under the statutes of this state to exercise the right of eminent domain in the assessment of damages to the right of way through the lands of the defendant in error. It was proceeding, as the record discloses, in an orderly and lawful manner, as authorized by Civil Code

1910, § 5206 et seq., to condemn a right of way through the defendant's land. It was not insisted that the plaintiff in error did not have the right under the law, or procedure, to condemn the right of way for purposes stated in the notice; and therefore, in the exercise of this lawful right and authority, the effort to condemn according to the statute could not properly be termed an unlawful interference with the enjoyment of the property by the owner; and the use of the language by the court to the jury to the effect that, "the right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a cause of action," may have misled the jury into thinking that the entire proceedings were "unlawful," and that they should allow damages on the basis that the Central Georgia Power Company was "unlawfully" interfering with the defendant's property; whereas, the record shows it was proceeding in the way pointed out by the statute to condemn the right of way.

The principle here ruled is in entire accord with that laid down in the case of Atlanta Terra Cotta Company v. Georgia Ry. & Electric Co., 132 Ga. 537, 543, 64 S. E. 563, 565, where a similar charge to the one under review was in these words: "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances predominate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer." In that case the Georgia Railway & Electric Company was proceeding to condemn a right of way under the same statute that is here involved, and this court there held, with reference to that portion of the charge above quoted, that: "These charges embodied legal propositions relevant to a suit for a tort, but not to the determination of the amount to be awarded for the exercise of the power of eminent domain. If land is lawfully condemned for the right of way of a railroad, such condemnation and the taking and lawful use of the right of way under it did not constitute a tort." Atlanta Terra Cotta Co. v. Ga. Ry. & Elec. Co., 132 Ga. 537-543, 64 S. E. 563-566.

[2] 2-4. As the case is to go back for a second hearing, we desire to lay down briefly the rule for the measure of damages in condemnation proceedings like the one now before us. In condemnation proceedings authorized by the statute, the willingness or unwillingness of the property owner to part with his property is not a subject-matter of consideration. The law provides how the damages to private property taken for public purposes by corporations or persons authorized to take or damage such property shall be assessed. Civil Code 1910, § 5206 et seq.

[3] There are two elements of damages:

First, the market value of the property actually taken. In determining this, the nature and character of the property, its situation, its availability for different uses, and all the facts which may be disclosed by the evidence tending to throw light upon its market value may be taken into consideration, and from all of them the jury may arrive at what is the fair market value of the property taken. In the case of *Atlantic Coast Line R. Co. v. Postal Telegraph Co.*, 120 Ga. 281, 48 S. E. 20, this court held: "Where private property is taken for public use, as by condemnation by a railroad company, the owner is entitled to compensation for its whole value; not for any particular object, but for all purposes to which it may be appropriated." And see *Harrison v. Young*, 9 Ga. 359; *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206. *Lewis on Eminent Domain* (3d Ed.) § 706, well states the rule as follows: "In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. In estimating its value, all the capabilities of the property, and all the uses to which it may be applied or for which it is adapted, are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. \* \* \* All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value." "Generally speaking," says the same author, "the true rule seems to be to permit the proof of all the varied elements of value; that is, all the facts which the owner would properly and naturally press upon the attention of a buyer to whom he is negotiating a sale, and all other facts which would naturally influence a person of ordinary prudence desiring to purchase. In this estimation the owner is entitled to have the jury informed of all the capabilities of the property, as to the business or use, if any, to which it has been devoted, and of any and every use to which it may reasonably be adapted or applied. And this rule includes the adaptation and value of the property for any legitimate purpose or business, even though it has never been so used, and the owner has no present intention to devote it to such use."

[4] The second element for consideration is whether consequential damages will naturally and proximately arise to the remainder of the owner's property from the taking of that part which is taken, and the devoting of it to the purposes for which it is condemned, and including its maintenance and operation. The measure of such consequential damages is the diminution in the market value

of the remainder of the property proximately arising from the causes just mentioned. Remote, or merely speculative or possible, damages are not allowed in considering the maintenance or operation of the line of towers and wires of the company. The jury are to consider their maintenance and operation in the usual and ordinary methods of so doing. They cannot assume, in a condemnation proceeding, that there will be negligent construction or operation, so as to cause damages in excess of that which would naturally and proximately arise from proper construction and operation. If the company be negligent in such matters, causing damages beyond those naturally arising from such construction and operation, this might give rise to a subsequent separate cause of action.

The principles herein announced, or several of them, were invoked by requests to charge. Some of these requests were not aptly worded, and in some instances the same principle was invoked in more than one request, so that, if given, there would have been a repetition of such principles in the charge, and in other instances they were covered by the general charge. We do not think, however, that the charge sufficiently covered the rulings here made, and we think that it was deficient in not giving distinctly the measure of consequential damages to the property not taken.

[5] 5. It was not error for the court to allow plaintiff's witness, on cross-examination, to answer the question: "What was it [the land of defendant over which the plaintiff sought to construct its transmission wire] worth for building purposes? For building purposes it might be worth more?" by saying, "It might, if any one wanted to use it." What the property was worth for building purposes was only one element of its value, and it could be shown what it was worth for any other legitimate purpose, and its fair market value would be arrived at by estimating what it was worth for all purposes to which it could be applied, or for which it was adapted.

[6] 6. It was not error for the court to overrule an objection to the following question, propounded to and answered by the defendant: "How much do you say the transmission line depreciates the market value of your land there? A. Ninety dollars an acre"—where it appears that the same witness had already testified that the fair market value of the land was \$100 an acre without the transmission line, and \$10 per acre with the transmission line on it. This was but another way of saying that the fair market value of the land before the condemnation proceedings were had was \$100 per acre, but that the damage done by the transmission line was \$90 per acre, which left it worth only \$10 per acre. The answer, in view of all of the witness' testimony, was not a mere conclusion, but was based upon the witness' estimate of what the market value

of the land was before the transmission line was built, and the fair market value of the same after the transmission line was built on the land.

[7] 7. It was not error to allow the plaintiff's witness, J. A. Kimbell, on cross-examination, to answer the question: "Do you think that transmission line would have any effect on this property [the property of the defendant in issue] for building purposes? A. I think it would"—when taken in connection with the testimony of other witnesses, who testified as to the market value of the land before and after the transmission line was built, for farming and building purposes.

The rulings hereinbefore made cover the remaining assignments of error, and it is not necessary to deal with each of them separately. We will not anticipate that the statements of the defendant which were set out in the seventh ground of the motion for a new trial, and which the court rebuked, though he did not grant a mistrial, will be made or permitted on another trial.

Judgment reversed. All the Justices concur, except BECK, J., absent.

(127 Ga. 143)

ABRAMS v. CADWALADER et al.

(Supreme Court of Georgia. Nov. 16, 1911.)

(Syllabus by the Court.)

#### DIRECTING VERDICT.

This case, under the admissions in the answer of the defendant in the court below, and upon the evidence submitted, is controlled by the principal announced in the decision rendered in the case of Tatum v. Leigh, 136 Ga. 791, 72 S. E. 236, without reference to the admission of evidence alleged to have been improperly admitted; and there was no error in directing a verdict against the defendant.

Error from Superior Court, Glynn County; L. A. Parker, Judge.

Action between J. B. Abrams and John Cadwalader, Jr., and others, executors. From the judgment, Abrams brings error. Affirmed.

Harry F. Dunwody, for plaintiff in error. G. W. Owens and R. D. Meader, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(127 Ga. 140)

CADWALADER et al. v. FENDIG.

(Supreme Court of Georgia. Nov. 16, 1911.)

(Syllabus by the Court.)

#### 1. PLEADING (§ 129\*)—ANSWER—DENIAL ON INFORMATION.

The answer of the defendant made to certain allegations concerning his relation to the corporation and participation in the sale of its property and application of the proceeds of

sale was not so evasive as to amount to an admission of such allegations.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.\*]

#### 2. TRIAL (§ 169\*)—TAKING QUESTION FROM JURY—DIRECTION OF VERDICT.

The plaintiff and the defendant having introduced evidence, and the evidence being insufficient to authorize a finding in favor of the plaintiff, there was no error in directing a verdict in favor of the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 381, 389; Dec. Dig. § 169.\*]

#### 3. NEW TRIAL (§ 102\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

The alleged newly discovered evidence was of such character as, under the circumstances disclosed by the record, its existence, by the exercise of ordinary diligence, could have been discovered before the trial, and there was no abuse of discretion in refusing to grant a new trial on the ground of newly discovered evidence.

[Ed. Note.—For other cases, see New Trial, Dec. Dig. § 102.\*]

Error from Superior Court, Glynn County; L. A. Parker, Judge.

Action by Mrs. Leigh against the Aiken Canning Company and others. On the death of plaintiff, John O. Cadwalader, Jr., and others, as her executors, were substituted as plaintiffs. Judgment for defendant A. Fendig on his separate answer, and plaintiffs bring error. Affirmed.

Geo. W. Owens and R. D. Meader, for plaintiffs in error. Harry F. Dunwody, for defendant in error.

ATKINSON, J. Mrs. Leigh instituted suit against the Aiken Canning Company, a corporation, and J. W. Tatum, Albert Fendig, and J. B. Abrams. The individuals named were alleged to be stockholders and directors in the corporation. It was sought to hold them liable for a judgment obtained against the corporation, on the ground that, the corporation being insolvent, they, being officers in charge of the corporate affairs, and having notice of the plaintiff's debt, diverted its only assets from payment of the corporate debts to general creditors, including that to plaintiff, and applied them to the payment of alleged debts due to Tatum individually, and to others due to the National Bank of Brunswick, for which the bank held the individual notes of Tatum and Abrams. Out of this suit arose the questions decided in Tatum v. Leigh, 136 Ga. 791, 72 S. E. 236; Tatum having assigned error upon the judgment overruling his demurrer and striking certain portions of his plea. Fendig filed a separate answer, which was afterwards amended. He sought to avoid liability on the ground that he was not an officer of the corporation, and had not in any manner participated in the management of the corporate affairs or misapplied its assets. Upon the conclusion of the evidence on the trial of his plea the judge directed a verdict in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

his favor. The plaintiff made a motion for a new trial, and excepted to the judgment refusing it. While the case was pending in this court the plaintiff died, and her executors were made parties.

[1] 1. As an essential part of the plaintiff's case it was alleged that Fendig, and the other individual defendants, were officers of the corporation, and that all of them, knowing of the existence of plaintiff's debt, participated in the sale of the corporate assets and application of the proceeds of sale to individual debts due to Tatum, and also debts due to the bank, for which Tatum and Abrams were primarily liable. Such allegations were contained in two separate paragraphs of the petition. The answer by the defendant Fendig was that "for want of sufficient information and recollection" he was unable either to admit or deny the allegations of those paragraphs. It was urged that such allegations related to matters peculiarly within the knowledge of defendant, and his answer was so evasive as that under the rulings in the cases of *Horne v. Peacock*, 122 Ga. 45, 49 S. E. 722, and *Raleigh Railroad Co. v. Pullman*, 122 Ga. 707, 50 S. E. 1008, the allegations of the petition should be taken as true. While the cases cited related to pleadings somewhat similar to those under consideration, they are not identical and controlling. Civ. Code, § 5539, provides: "All such petitions shall set forth the cause of action in orderly and distinct paragraphs, numbered consecutively; and any averment distinctly and plainly made therein, which is not denied by the defendant's answer, shall be taken as prima facie true, unless the defendant states in his answer that he can neither admit nor deny such averment because of the want of sufficient information." This law does not force a defendant to either admit or deny an allegation unless he can do so truthfully; but, where for any cause he has not sufficient information to authorize him truthfully to admit or deny, it permits him to so state in his answer, and in that event the allegation made against him will not be taken as true. The fact that his want of information may be due to a want of recollection would be no reason for requiring him to admit or deny positively when he could not do so truthfully. The answer does not disclose any intent to evade, and is not of such character as that it should be treated as an admission.

[2] 2. On the trial the only evidence offered by plaintiff for the purpose of connecting Fendig with the corporation and the sale of its assets and the disposition of the proceeds was the answer to which reference has been made, which was relied upon by the plaintiff as an admission by the defendant. By an amendment to his answer Fendig denied more positively the allegation tending to connect him with the corporation and the transactions to which allusion has

been made, and also testified in his own behalf. His testimony did not contain any admission that he was an officer of the corporation, or that he participated in the management of the corporate affairs, or the sale of its assets, or the application of the proceeds of the sale; but, on the contrary, it tended to support his answer, as amended. It was admitted that the directors' meeting at which the sale of the corporate assets was determined upon was had in his office, and at that time he was notified by Abrams and Tatum that one share of stock had been transferred to him; but in this connection Fendig testified that he never saw the certificate of stock, did not pay for it, was never informed that it had been given to him, and that he took no interest or part in the meeting, or any other meeting, nor did he in any wise participate in the sale of the property or applications of its proceeds. In order to hold Fendig liable, the burden was upon plaintiff to prove his connection with the corporation and participation in the management of the corporate action whereby it sold all of its assets and applied the proceeds of sale to the payment of the debt to Tatum, and the other corporate debts for which Tatum and Abrams were primarily liable, to the exclusion of the plaintiff, an outside general creditor. The evidence was not sufficient for this purpose; and accordingly, evidence having been introduced by both parties, there was no error in directing a verdict in favor of defendant.

[3] 3. One of the grounds of the motion for new trial was because of certain alleged newly discovered evidence, being the testimony of Tatum, who, it was alleged, would testify in contradiction to the testimony of Fendig, and whose testimony would tend to sustain the allegations of the plaintiff on the point that Fendig was a director, attended the directors' meetings of the corporation, and participated in the sale and disposition of the corporate assets. It was alleged in this connection that the answer of Fendig, to which reference was made in the second division of the opinion, amounted to admissions, and that the plaintiff had no ground for anticipating that Fendig would amend his answer, and that at the time of the trial Tatum was in Alabama, 300 miles or more away. It was also alleged in general terms that plaintiff or her counsel, by the exercise of diligence, could not have discovered this evidence before the trial. The character of this alleged newly discovered evidence is such that it ought, for the most part, appear from the records of the corporation, and certainly ought to have been within the knowledge of the secretary and treasurer, Abrams, as well as within the knowledge of the president, Tatum. It does not appear that the plaintiff prior to the trial sought information from either of these sources; nor does it appear upon what in-

formation upon this point the allegations were made when the petition was filed. The answer of the defendant was not such as to put the plaintiff off his guard, and, under the circumstances enumerated, the mere general allegation that the plaintiff's counsel exercised ordinary diligence, being itself a mere conclusion, was not sufficient to show an abuse of discretion in refusing to grant a new trial on the ground of newly discovered evidence. Civ. Code, § 6086.

Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 126)

**EARLY COUNTY v. BAKER COUNTY.**  
(Supreme Court of Georgia. Nov. 15, 1911.)

*(Syllabus by the Court.)*

**CONSTITUTIONAL LAW (§ 80\*)—DISTRIBUTION OF GOVERNMENTAL POWERS—DELEGATION OF JUDICIAL POWERS.**

The statute, making provision for the delineation of the disputed county line (Civil Code 1910, §§ 473, 474, 475), is not violative of the Constitution of Georgia, article 1, § 1, par. 23, because it is an attempt to confer judicial power upon the Secretary of State. The statute was not intended to provide a special court, in which the counties were invited to litigate over their territorial boundaries, but devised a process by which the state would be enabled to ascertain the true boundary between its political subdivisions. The function of the Secretary of State in this process was of a political, and not of a judicial, nature.

[Ed. Note.—For other cases, see Constitutional Law, Cent.Dig. §§ 143-147; Dec.Dig. § 80.\*]

**Certified question from Court of Appeals.**

Controversy between Early County and Baker County as to location of boundary. Heard on certified questions from the Court of Appeals as to constitutionality of Civ. Code 1910, §§ 473-475. Statute held constitutional.

Pope & Bennet and R. H. Sheffield, for plaintiff in error. A. S. Johnson and Benton Odom, for defendant in error.

EVANS, P. J. The Court of Appeals certifies the following question of constitutional law: "Is the act of 1899 (Acts 1899, p. 24), contained in the Civil Code 1910, §§ 473, 474, 475, unconstitutional and void, for the reason that the statute in question is an attempt to confer upon the Secretary of State, who is a person discharging executive powers, the right to exercise a judicial function, in violation of article 1, § 1, par. 23, of the Constitution of the state of Georgia, which provides that 'The legislative, judicial, and executive powers shall remain forever separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of either of the others?'"

Counties are political subdivisions of the state, established as auxiliaries in the important business of local government. Public

duties are required of them as part of the machinery of the state; and, in order that they may better perform such duties, they are vested with certain corporate powers. Their functions are wholly of a public nature, and at all-times they are subject to the will of the Legislature, unless there is some constitutional restraint. *Laramie County v. Albany County*, 92 U. S. 307, 23 L. Ed. 553. It is essential to the existence of a county that its boundaries be defined. It rests with the Legislature of the state not only to originally define the boundaries, but also to provide means whereby the true localities of such boundaries on the ground may be finally determined. 11 Cyc. 346.

As the delineation of the boundaries in the establishment of a county is a political function of government, likewise the discovery of an original boundary line and its re-establishment as such is a political function. The Legislature may provide various means to find the location of a boundary which, from the lapse of time or other cause, may have become obscure or uncertain. It may provide for a survey, and may stipulate that such survey shall be final and conclusive as to the true location. Or a commission may be appointed to discover the boundary as originally located. If the Legislature adopts the course of locating the indistinct or uncertain boundary by a survey, it may provide for its verification by a second survey, or by a revision of it by civil engineers, or by a ministerial official. Should the Legislature enact that a disputed boundary line between counties should be ascertained by a survey made by the county surveyor of an adjoining county, and that such survey would be conclusive when approved by a civil engineer appointed by the Governor, could it be contended that it was intended to constitute the civil engineer a special court, and that his function in approving the survey was of a judicial nature, subject to review by the courts? Clearly not. Yet in the performance of the duty of verifying the accuracy of the survey, the engineer necessarily would have before him the notes of the surveyor and other data, to enable him to approve or disapprove the correctness of the survey. Carry the illustration a step further. Would it make any essential difference in the nature and character of the engineer's function if he was authorized to acquire information from any available source in arriving at his conclusion? We do not think so, because, it being competent for the Legislature to provide for the re-establishment of the uncertain line by survey, in the first instance, as a ministerial act, its revision is none the less a ministerial act, because the revisory engineer may search out information in determining the correctness of the survey submitted to him.

The statute respecting the settlement of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

disputed county lines provides that, when the grand jury of either county shall present that the disputed line requires to be marked out and defined, the clerk of the superior court shall certify the presentment to the Governor, who shall appoint a suitable and competent surveyor, who does not reside in either county, to survey, mark out, and define the boundary line in dispute, and return a plat of his survey to the Secretary of State's office. Within 30 days of the filing of the plat, the authorities of either county, dissatisfied therewith, may file a written protest or exception to the same. Upon the filing of a protest, the Secretary of State shall notify the ordinary or county commissioners of the respective counties of the time when he will hear the contest, and upon the hearing "he shall determine from the law and evidence the true boundary line in dispute between the respective counties." "Upon such decision being made by the Secretary of State, or in case no protest or exceptions are filed within the thirty days aforesaid, he shall cause the survey and plat to be recorded in a book to be kept for that purpose; whereupon the same shall be final and conclusive as to the boundary line in dispute." Civil Code 1910, §§ 472-476. The statute did not contemplate a lawsuit between the counties; it devised a process by which the line, as originally fixed by the Legislature in the formation of the counties, shall be ascertained and made certain. Counties have no territorial rights as against the state, and the statutory plan was not to settle a private dispute between the counties, but to afford means to the state in the delineation of the boundaries between its political subdivisions. If the decision of the Secretary of State is to have the ordinary force and effect of a judgment rendered in a judicial proceeding, then territorial rights would become vested, and the Legislature could not make a change, so as to disturb or alter the divisional line as adjudged by the Secretary of State. Whereas all the authorities concur that, unless the Constitution of a state otherwise prescribes, the Legislature has the power to diminish or enlarge the area of a county, or change its boundary lines, whenever the public convenience or necessity requires. *Laramie County v. Albany County*, supra. "While the departments of government must be kept separate and distinct, it is impossible to draw a mathematical line by which every action can be exactly classified; and there are some matters which do not inherently and essentially appertain to one department of government, rather than to another. As a part of this ground has been considered the impossibility of conducting a government at all, without permitting executive officers to exercise some discretion, or Legislatures or courts to do some things incidental to their general purpose, but which in a literal

sense are not strictly the enacting of laws or the rendering of judgments." *Southern Ry. Co. v. Melton*, 133 Ga. 282, 65 S. E. 665. The scope of the legislation is to ascertain the location of a line which the Legislature had previously established, and the means provided to accomplish this end did not contemplate an invitation to counties to engage in a lawsuit over the state's territory. The Legislature in its wisdom might have enacted that a survey of the disputed line should be had, and a report thereof made to its next session, when, upon the basis of that report, as well as other accessible data, it would by enactment finally locate the uncertain or disputed line. In such a case, it could hardly be said that the Legislature was usurping judicial functions, merely because it reserved the right, through committee or otherwise, to hear evidence as to the true location of the line. If the Legislature may by direct enactment, where not restrained by the Constitution, locate the disputed line, then it may provide machinery whereby the administrative branch of the government may carry out the legislative act, by ascertaining the facts upon which the enactment is to operate. And this is practically what was done by the act under review.

The act of 1897 (Civil Code 1910, § 501) provided for the filing, hearing, and determining of contests in elections held for the removal of county sites, and conferred upon the Secretary of State the power and made it his duty to hear and determine such contest on evidence previously taken under the terms of the act; and it was held that the duty of hearing and passing upon the questions raised in such a contest by the Secretary of State pertained largely to matters of a political nature, and properly exercisable by an executive officer of the government, and was not opposed to paragraph 23, § 1, art. 1, of the Constitution. *Bowen v. Clifton*, 105 Ga. 459, 31 S. E. 147. The principle involved in this decision is applicable to the question in hand. For the reasons given, we do not think the act offends the cited paragraph of the Constitution. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(127 Ga. 111)

DANNENBERG CO. v. ADLER-MAY CO.  
(Supreme Court of Georgia. Nov. 15, 1911.)

(Syllabus by the Court.)

GARNISHMENT (§ 187\*)—DEFAULT JUDGMENT AGAINST GARNISHEE—SETTING ASIDE—GROUNDS.

On November 13, 1909, a summons of garnishment, based on a pending suit, was served, commanding the garnishee to answer to the term of the superior court which would meet on January 3, 1910. On the latter date, a second summons in the same case was served on the garnishee, returnable to the March term of the court. This was accompanied by a written no-

tice from the plaintiff, relieving the garnishee from answering the first summons, and directing it to make answer to the second. On January 17th, the garnishee filed an answer, reciting that a summons of garnishment had been served on it, and denying indebtedness. To this a traverse was filed, but no exception taken on the ground of the time when it was made. At a later term, a verdict and judgment by default were taken against the garnishee, based upon the second summons. At the same term when this was done, a motion was made to set aside the verdict and judgment, alleging that the answer which it filed was made to the second summons. *Held*, that there was no error in granting the motion and setting aside the verdict and judgment.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 359-364; Dec. Dig. § 187.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Garnishment proceedings by the Dannenberg Company against the Adler-May Company. To an order setting aside a default judgment against the garnishee, the plaintiff excepts. Affirmed.

Frank L. Neufville and Hardeman, Jones, Callaway & Johnston, for plaintiff in error. David Eichberg, for defendant in error.

LUMPKIN, J. A judgment was entered in the superior court against a garnishee as being in default in not answering a summons of garnishment. At the same term of the court, a motion was made to set aside this judgment, on the ground that the garnishee had in fact filed an answer to the second summons. The court sustained the motion, and the plaintiff excepted.

A summons of garnishment had been served on the garnishee in November, 1909, returnable to the January term of the superior court. Another summons of garnishment in the same case was served on the same garnishee on January 3, 1910, returnable to the March term of court. Attached to the second summons was a notice from the plaintiff, relieving the garnishee from answering the first summons, and requesting it to answer the second. On January 17th, the garnishee filed an answer of not indebted. It recited that a summons of garnishment had been served upon it, but did not specify whether the recital referred to the first summons or the second. Inasmuch as the garnishee had been relieved from answering the first summons, and the only summons to which it was required to make answer was the second one, the court was authorized to hold that the answer was to the second summons. It is true that such answer was prematurely filed; but it was not void. If exception had been taken to it, on the ground that it was filed before the term of court to which the summons was returnable, it could have been amended. *Burrus v. Moore*, 63 Ga. 405; *Plant v. Mutual Life Insurance Co.*, 92 Ga. 636, 19 S. E.

719. Treating the answer as filed to the second summons, though inadvertently filed too early—which is more rational than to suppose that the garnishee insisted on answering the summons which they had been given notice need not be answered, and refused to answer one which they had been notified must be answered—the garnishee was not in default, and no judgment by default could properly be entered against it until some disposition had been made of the answer. Apparently the traverse is still pending. The court did not err in setting aside the verdict and judgment which was rendered against the garnishee for failure to answer the second summons.

Even where a garnishee is in default, and a judgment is rendered against it, upon motion during the same term, setting forth good and sufficient reasons for not answering in due time, and denying indebtedness to defendant, the court is not without discretionary power to set aside the judgment and relieve the garnishee from having an injustice done to it. *Brian v. Banks*, 38 Ga. 300; *Wiley v. Whiteley*, 38 Ga. 605; *Russell v. Freedman's Savings Bank*, 50 Ga. 675; *Atlanta Journal v. Brunswick Publishing Co.*, 111 Ga. 718, 36 S. E. 929. It has been said, however, that this is not an arbitrary power, and that after the second term the court can only allow an answer to be filed by the garnishee upon showing some reason legally sufficient to excuse a previous failure to do so. *Jones v. Bibb Brick Co.*, 120 Ga. 321, 48 S. E. 25.

Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 104)

JOHN SILVEY & CO. et al. v. BROWN.  
(Supreme Court of Georgia. Nov. 15, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 713\*)—RECORD—SCOPE AND CONTENTS—STATEMENT OF FACTS.

An alleged statement of facts not being set forth in the bill of exceptions, nor made a part of the same as an exhibit thereto and properly authenticated, what purports to be an agreed statement of facts, sent up as a part of the record, but not approved by the judge and ordered filed as such, cannot be considered by this court. *Robinson v. Woodward*, 134 Ga. 777, 68 S. E. 553; *Blackman v. Garrett*, 135 Ga. 226, 69 S. E. 110.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 713.\*]

2. APPEAL AND ERROR (§ 671\*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

The errors assigned in the bill of exceptions being such as cannot be determined from the record without a consideration of such alleged agreed statement of facts so sent up, the judgment of the court below must be affirmed. *Id.*

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 671.\*]

### 3. APPEAL AND ERROR (§ 296\*)—RECORD—STATUTORY PROVISION.

Acts 1911, p. 150, § 3, is applicable, according to its terms, exclusively to motions for a new trial, and is not applicable to this case, wherein there was no motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 296.\*]

Error from Superior Court, Lowndes County; J. H. Merrill, Judge.

Action between John Silvey & Co. and others and Jack Brown. From the judgment, Silvey & Co. and others bring error. Affirmed.

W. C. Lane, Jno. R. L. Smith, and Harde-man, Jones, Callaway & Johnston, for plaintiffs in error. Woodward & Smith, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 85)

#### WOODS v. STATE.

(Supreme Court of Georgia. Nov. 14, 1911.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 829\*)—TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Where, in the trial of one accused of murder, the presiding judge charged fully the law of reasonable doubt, as applicable to the case, it furnished no ground for reversal that the court refused to charge further, on request, that if the jury had a reasonable doubt as to whether the killing was voluntary or accidental they should accept the theory of accident and acquit the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2001; Dec. Dig. § 829.\*]

#### 2. INSTRUCTIONS—INVOLUNTARY MANSLAUGHTER.

Under the evidence, there was no error in not charging on the subject of involuntary manslaughter.

#### 3. CRIMINAL LAW (§§ 1111, 1170\*)—WRIT OF ERROR—RECORD—CONFLICT—NEW TRIAL—EFFECT—HARMLESS ERROR.

Where complaint is made in a motion for a new trial that a named witness for the defendant was not permitted to testify to certain facts, and in the brief of evidence it appears that the witness did testify to such facts, and both the motion for a new trial and the brief of evidence are duly approved by the presiding judge, this court cannot hold that the brief of evidence is incorrect, but must reconcile the two statements, on the theory that, while at one time the court made the ruling stated in the motion for a new trial, at some stage of the examination the testimony was admitted. Under such facts the ruling will not require a new trial, even if the evidence was admissible. *Roberts v. Tift*, 136 Ga. 901, 906, 72 S. E. 234.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2895, 3147; Dec. Dig. §§ 1111, 1170.\*]

#### 4. CRIMINAL LAW (§ 413\*)—EVIDENCE—DECLARATIONS BY ACCUSED.

Statements made by a slayer in his own favor, a considerable length of time after the homicide occurred and at a different place, and

forming no part of the *res gestae*, were properly excluded from evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 923-935; Dec. Dig. § 413.\*]

#### 5. CRIMINAL LAW (§ 1169\*)—WRIT OF ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where a witness for the state had testified that after the homicide the accused, his father, and the witness were together, and the accused was telling the witness how the homicide occurred, it will not require a new trial that the court permitted the witness to further state that the father of the accused, in the presence of the latter, laughed and said that the accused had shot the whole top of the decedent's head off.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

#### 6. ABANDONMENT OF ERROR—BIAS OF JURORS.

The ground of the motion for a new trial complaining that one of the jurors was biased was abandoned.

#### 7. SUFFICIENCY OF EVIDENCE—NO ERROR—REFUSAL OF NEW TRIAL.

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Bulloch County; B. L. Rawlings, Judge.

Joe Woods was convicted of murder, and brings error. Affirmed.

Hines & Jordan, Jno. R. Cooper, A. M. Deal, J. J. E. Anderson, and R. Lee Moore, for plaintiff in error. Alfred Herrington, Sol. Gen., T. S. Felder, Atty. Gen., H. B. Strange, and F. T. Lanier, for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 71)

#### PRICE v. STATE.

(Supreme Court of Georgia. Nov. 14, 1911.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 918\*)—NEW TRIAL—GROUNDS—TIME FOR ARGUMENT BY COUNSEL.

Under rule 5 of the superior courts (Civ. Code 1910, § 6264), counsel may only demand a reasonable and proper extension of time for argument. Where, in addition to the two hours allowed by the rule for argument, counsel demanded another hour, and the court announced that he would allow only half of the additional time requested, with the remark that the case could be properly argued within that time, and that in the circuit over which he presided there were good lawyers who rarely spoke over 40 minutes, and where after the opening argument of defendant's counsel the court notified counsel that he would allow the full time requested, and the full time was actually consumed in the argument, it is no ground for new trial that the extension of time requested was refused in the first instance, and afterwards granted under the circumstances narrated.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 918.\*]

#### 2. CRIMINAL LAW (§ 919\*)—NEW TRIAL—GROUNDS—ARGUMENT OF COUNSEL.

Where the Solicitor General assigned as a reason for speaking briefly in opening the case



to the jury that he was indisposed, and counsel for the defendant in his argument made during the solicitor's absence from the courtroom asserted that in his opinion the real reason was that the solicitor did not believe the defendant to be guilty, a new trial will not be granted because the court allowed counsel for the state in the concluding argument to argue that the solicitor was sick, and that the deduction of counsel for the defendant was unwarranted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2197-2201; Dec. Dig. § 919.\*]

### 8. CRIMINAL LAW (§ 386\*)—EVIDENCE—RES GESTÆ.

In determining who was the aggressor in a conflict terminating in the death of one of the parties, the conduct of the parties, including their declarations immediately preceding the homicide, are parts of the *res gestæ*. Where a homicide occurred at a railroad junction point, it is competent to prove by the station agent that the decedent alighted from one train and inquired about a connection of the other train just prior to the fatal encounter, as tending to explain the presence and purpose of the decedent at the place of the homicide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806-820; Dec. Dig. § 386.\*]

### 4. IMPEACHMENT OF WITNESSES—INSTRUCTIONS.

The charge on the subject of impeachment of witnesses was substantially like that approved in *Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277.

### 5. HOMICIDE (§ 112\*)—JUSTIFICATION—SELF-DEFENSE.

One cannot create an emergency which renders it necessary for another to defend himself, and then take advantage of the effort of such other person to do so. The facts authorized an instruction to this effect, and the legal principle was not incorrectly stated in the charge complained of.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. § 112.\*]

### 6. HOMICIDE (§ 308\*)—INSTRUCTIONS—SUFFICIENCY.

The summary of the court concretely applying the law to the case, though containing a slight verbal inaccuracy, was not calculated to mislead the jury, to the prejudice of the accused.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 308.\*]

### 7. HOMICIDE (§ 309\*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.

The statute defining voluntary manslaughter contains the declaration that "provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder." The reading by the court of the entire code section definitive of voluntary manslaughter (Penal Code § 65), containing the quoted language, while charging on the subject of voluntary manslaughter, is not subject to the criticism that by so doing the court entrenched upon the law of justifiable homicide, in that the reading of the section tended to convey to the jury the implication that they could not consider threats, accompanied by menaces, as defined in *Cumming v. State*, 99 Ga. 662, 27 S. E. 177, as sufficient cause to arouse the fears of a reasonable man that his life is in danger, or that a felony is about to be perpetrated upon him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

### 8. CHARGE—SUFFICIENCY OF EVIDENCE.

The charge was not subject to the criticisms made on it, and the verdict is supported by the evidence.

Error from Superior Court, Worth County; W. C. Worrell, Judge.

Buster Price was convicted of murder, and brings error. Affirmed.

Perry, Foy & Monk, J. H. Cooke, J. W. Walters & Son, and Jno. R. Cooper, for plaintiff in error. W. E. Wooten, Sol. Gen., F. A. Hooper, and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. Buster Price was convicted of the murder of A. E. Massey, and recommended to mercy. He excepts to the overruling of his motion for a new trial.

[1, 2] 1, 2. Complaint is made that the court refused to allow counsel for the accused additional time to that prescribed by the rule of court for the argument of the case, and that the court allowed counsel who concluded the argument for the state to make an improper reply to the argument of defendant's counsel. The nature of the complaints and the ruling thereon are sufficiently stated in the first and second headnotes.

[3] 3. The homicide occurred at a junction of two railroads. The decedent arrived on one train, and immediately inquired of the station agent concerning a connection on the other road, and was referred to the engineer of the latter road. This occurred shortly before the homicide. Objection was made to this testimony on the ground that it was hearsay and irrelevant. As bearing on the conflicting contentions as to who was the aggressor in the transaction wherein the deceased lost his life, his conduct just prior to the homicide was relevant. His inquiry of the station agent as to the schedule of the connecting train just before the homicide was a circumstance tending to elucidate his conduct and was a part of the *res gestæ*. *Mayer v. Power*, 79 Ga. 631, 4 S. E. 631.

[4] 4. Impeachment of a witness by proof of previous contradictory statements involves two propositions, viz., whether the witness made the alleged contradictory statement, and, if he made the contradictory statement, its effect on his present testimony. The charge complained of was substantially the same as that criticised in *Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277, and was not subject to the criticism that the jury was limited to the determination of the factum of the making of the alleged contradictory statement, nor that it was equivalent to a peremptory instruction that, if the testimony of the attacking witness is believed, the witness attacked is successfully impeached.

[5] 5. The court charged: "In addition to that, gentlemen, I charge you this: That

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the party who sets up self-defense to justify himself in taking human life, under the law of justifiable homicide, must be without fault at the particular time and in the particular act. One cannot by his own act or conduct create a necessity in another to defend himself, and then justify himself in killing the party who attempts to defend himself against the necessity of the defendant's own creation. But, of course, that does not mean that he must be without any fault whatever during the entire transaction, but without fault at the time of the killing." The evidence authorized an inference that the accused provoked the difficulty and brought about the emergency which he contends for as affording a justification for the homicide. One cannot create an emergency which rendered it necessary for another to defend himself, and then take advantage of the effort of such other person to do so. *Pryer v. State*, 128 Ga. 28, 57 S. E. 93. This excerpt from the charge is in harmony with this principle of law.

[6] 6. Exception is taken to this portion of the court's charge: "Applying the general principles that the court has given you, the court now charges you this: That if you believe from the evidence in this case beyond a reasonable doubt, that the defendant, Buster Price, in Worth county, at or about the date alleged in this bill of indictment, or at any time previous to the finding and returning of this bill of indictment into this court, when actuated by malice, either express or implied, on account of any approbrious words used to him by the deceased, or on account of other cause, with a pistol, shot and killed the deceased, in the manner and under the circumstances alleged in this bill of indictment, then the offense of murder would be made out, and you would be authorized in convicting him." Its vice is said to consist in stating an erroneous deduction from the stated hypothesis; that the use of the words "on account of other cause" deprived the accused of any defense. The criticism is clearly without merit. The instruction was to the effect that if the defendant killed the deceased in the manner and under the circumstances alleged in the bill of indictment, actuated by malice, which had just been defined as that deliberate intention unlawfully to take away the life of a fellow creature, the jury would be authorized to convict him. The use of the words "on account of other cause" at most could amount only to a verbal inaccuracy, and in connection with their context could not have misled the jury as to the meaning and intent of the court's instruction.

[7] 7. In his instruction on the law of voluntary manslaughter, the court defined that grade of homicide in the language of Pen. Code 1910, § 65. Exception is taken to that

part of the code section which declares that "provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder," as containing an implication that words and menaces are insufficient to excite the fears of a reasonable man that a felony is intended to be committed on his person, so as to justify a killing. We think this exception is entirely without merit. Surely it cannot be said that it is error to define manslaughter in the words of the statute. It is claimed that the statutory declaration, that provocation by words, threats, menaces, etc., shall not free the slayer from the guilt and crime of murder, militates against the code sections which justify a homicide by one who slays his antagonist under the influence of a reasonable fear that a felony is about to be perpetrated upon his person. The two principles of law are quite distinct. One who slays a person for no other reason than he is provoked by words, threats, menaces, or contemptuous gestures of the person slain is guilty of murder. Verbal threats or grimaces do not excuse a killing. On the other hand, the law justifies the taking of human life by a person under the influence of a reasonable fear that a felony is about to be inflicted upon his person, to prevent which he kills his adversary. A "menace" as defined in *Cumming v. State*, 99 Ga. 662, 27 S. E. 177, may be sufficient to arouse such fear. As there defined, a "menace" is "any overt act of a threatening character, short of an actual assault." Provocation caused by a menace neither mitigates nor excuses a homicide. But the fear of a reasonable man, engendered by the overt menacing act, that a felony is about to be committed on him, may be sufficient to acquit the slayer of blame for the homicide. The language excepted to in no way qualifies the law of justifiable homicide, and is not calculated to mislead the jury into such erroneous impression. The doctrine of the *Cumming Case* is that the court should not instruct the jury that a menace, as there defined, will in no case be sufficient to arouse the fears of a reasonable man that his life or person is in peril of a felonious assault. It is a misapplication of its principle to apply it to an exception like the one under consideration.

[8] 8. The issues made by the evidence were clearly submitted, and the charge was not open to the criticisms made on it. The evidence authorized the verdict, which has the approval of the trial judge, and no sufficient reason is made to appear for the granting of a new trial.

Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(127 Ga. 75)

**FUTCH et al. v. STATE.**

(Supreme Court of Georgia. Nov. 14, 1911.)

*(Syllabus by the Court.)***1. HOMICIDE (§ 309\*)—INSTRUCTIONS—VOLUNTARY MANSLAUGHTER.**

Where, on the trial of one indicted for murder, the evidence authorized instructions on the subject of voluntary manslaughter, it was not error for the court to charge in the language of section 85 of the Penal Code of 1910.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

**2. HOMICIDE (§ 300\*)—CRIMINAL LAW (§ 825\*)—INSTRUCTIONS—JUSTIFICATION—REQUESTS FOR INSTRUCTIONS.**

Where the court in dealing with the subject of justifiable homicide correctly charged the law touching the right to defend one's person against another who manifestly intends or endeavors, by violence or surprise, to commit a felony upon him, and also the law applicable where the circumstances are sufficient to justify the fears of a reasonable man that such a felony is about to be committed, it does not furnish a ground for reversal that the court did not particularize certain circumstances which the jury might consider in that connection, such as threats and menaces.

(a) If the defendants desired a charge to the effect that evidence of threats and menaces might be considered in connection with other evidence bearing on the subject of reasonable fears, they should then have made a proper request therefor, if the facts warranted the giving of it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300; Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.\*]

**3. HOMICIDE (§ 234\*)—MURDER—PARTIES.**

Where two persons are jointly indicted for murder, each may be convicted upon evidence showing that he was either the actual perpetrator of the crime, or was present, aiding and abetting the other in its commission.

(a) Mere presence and participation in the general transaction in which a homicide is committed is not conclusive evidence of consent and concurrence in the perpetration of the crime by a defendant sought to be held responsible for the homicide as aiding and abetting the actual perpetrator, unless such defendant participated in the felonious design of the person killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482, 493; Dec. Dig. § 234.\*]

**4. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—PARTIES TO OFFENSE.**

When the charge is considered all together, it is not so in conflict with these principles as to require a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990-1995; Dec. Dig. § 822.\*]

**5. HOMICIDE (§ 188\*)—EVIDENCE—CHARACTER OF DECEDENT.**

On the trial of one indicted for murder, the testimony of a witness that the deceased was in the habit of carrying concealed weapons was properly excluded; there being no evidence that the accused had any knowledge of that fact. *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 391-397; Dec. Dig. § 188.\*]

**6. CRIMINAL LAW (§ 729\*)—TRIAL—REMARKS OF COUNSEL.**

While a female witness for the state in a murder case was on the stand, she testified that she was engaged to be married to the person who was killed. For the purpose of impeaching her, she was asked certain questions. She stated that she did not know that she had said that she would like to cut the rope to break the neck of the defendant who shot the deceased, though she might have done so, but that she had said she could pull the rope to break the necks of the defendants (two being indicted). Counsel for the accused announced that the counsel for the state could examine the witness. He remarked in the presence of the jury, "I agree with you." Counsel for defendants moved for a mistrial. Counsel for the state at once withdrew the remark, and stated that he had no unkind feeling toward the defendants, and did not desire to prejudice the case, and earnestly trusted that the jury would not feel that he meant to influence or prejudice them in the slightest degree. The court overruled the motion for a mistrial. *Held*, that this was not error, although the court did not reprimand counsel or give special instructions to the jury on the subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1692; Dec. Dig. § 729.\*]

**7. REFUSAL OF NEW TRIAL—NO ERROR.**

None of the other grounds of the motion for a new trial are such as to require special discussion or a reversal.

**8. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.**

The verdict was supported by the evidence, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

P. C. Futch and another were convicted of murder, and bring error. Affirmed.

Way & Burkhalter, Hines & Jordan, and Jno. R. Cooper, for plaintiffs in error. N. J. Norman, Sol. Gen., H. H. Elders, and T. S. Felder, Atty. Gen., for the State.

**LUMPKIN, J.** P. C. Futch and Wallace Futch were jointly indicted for the murder of John B. Deal. They were convicted, and recommended to be imprisoned for life. After the refusal of a new trial they excepted.

[1] The headnotes state the rulings, and most of them require no elaboration. Pen. Code 1910, § 65, contains a statement as to the law of voluntary manslaughter, which has been the codified law since the original Code of 1863, and has been adopted and readopted by the Legislature. We cannot hold that it is either erroneous or misleading. In dealing with the subject of provocation which will reduce a homicide from murder to voluntary manslaughter, it states, among other things, that "provocation by words, threats, menaces or contemptuous gestures, shall in no case be sufficient to free the person killing from the guilt and crime of murder." In other sections of the Code are contained statements as to the law of justifiable homicide in killing one who manifestly intends by violence or surprise to com-

mit a felony upon the person of another, and of justification where the circumstances are such as to excite the fears of a reasonable man that such a felony is about to be committed. Pen. Code 1910, §§ 70, 71. The court gave all of these principles in charge, reading section 65 in its entirety when he came to charge on the subject, not of justification, but of reduction of a homicide from murder to voluntary manslaughter. This was not confusing or calculated to mislead the jury. *Price v. State*, 72 S. E. 908, this day decided.

[2] The court, in the proper connection, having charged the law touching acting under circumstances sufficient to excite the fears of a reasonable man, a reversal will not be granted because he did not specifically refer to threats and menaces in that connection. If the defendants desired a charge to the effect that the jury might consider evidence of threats and menaces, in connection with the other evidence bearing on the subject of acting under the fears of a reasonable man, they should have made a proper request therefor. *Cumming v. State*, 99 Ga. 662, 27 S. E. 177.

P. C. Futch fired the gun which killed Deal. Wallace Futch, his brother, was with him at the time, taking part in the fight. The evidence for the state tended to show that each of them entertained revengeful feelings toward Deal; that he and Wallace Futch had had a difficulty very shortly before the homicide; that the two brothers went to a church where they expected to find Deal, carrying a gun with them; and that they attacked and killed him without justification. There was also evidence that they afterward denied having been present, or having done the killing. They contended that Deal was the aggressor; that P. C. Futch knocked him down with a gun; that Deal grabbed it, and P. C. Futch called to his brother to "take him loose, he is cutting me"; and that Wallace Futch grabbed Deal by the back of the neck, and gave him "a sling," and, when he got Deal loose from the gun, P. C. Futch shot. In his statement Wallace Futch denied that he knew that his brother carried the gun in the buggy in which they drove to the church.

[3, 4] It was contended that the court erred in charging that if the jury believed from the evidence that P. C. Futch, without just cause, fired the shot that caused the homicide, and that Wallace Futch "was present, aiding and abetting in the act, then the act of the defendant, P. C. Futch, would be the act of the other defendant, Wallace Futch, and the latter would be guilty of whatever offense P. C. Futch may have committed, if any." Considering the excerpts from the charge on this subject to which exceptions were taken in connection with their context and with other portions of the charge, we think that the jury could not have been misled as to the meaning of the court, and that, in effect, they were informed that if P. C. Futch committed a crime in killing Deal by shooting him, and

Wallace Futch was present, aiding and abetting in the commission of such crime, he would also be guilty. In the same context with one of the charges to which exception was taken, the court said: "Where two or more persons are jointly indicted for a crime, and one perpetrates the act, and the other is present, aiding and abetting in the commission of the act charged in the indictment, the act of one is the act of the other." The act charged in the indictment was the unlawful killing of Deal by shooting him with a gun. So that the charge amounted to saying that, if one unlawfully fired the shot and killed the deceased, and the other was present, aiding and abetting him in doing so, the latter would also be guilty. It was not the mere presence of Wallace Futch or his aiding or abetting his brother in the quarrel or even in the fight to which the presiding judge referred, but presence and aiding and abetting in a felonious homicide by shooting the deceased. The court charged in regard to the defense of one brother by another, and also that, if the defendants attacked the deceased with no intention to kill him, but only to assault and beat him, and in the struggle between them and the deceased P. C. Futch suddenly formed the intention to kill the deceased, and Wallace did not share in this intention to kill, and did not fire the fatal shot, that would acquit Wallace Futch, unless they found that he was guilty of some lower grade of offense covered by the indictment.

Counsel for the plaintiffs in error relied on *Brown v. State*, 28 Ga. 199. In that case the defendant was indicted for murder as principal in the second degree, and was tried separately and convicted of manslaughter. From the opinion it would appear that this court thought that there was evidence from which it might be inferred that the defendant on trial intended to engage only in an assault and battery, but the other accused assaulted and killed the deceased with a deadly weapon, though his intention to do so was unknown to the defendant on trial. 28 Ga. 214. The court charged that presence and participation in the act committed was evidence from which the jury might infer "consent and concurrence." This language was criticised, but was not held to be cause for a new trial; and, the defendant having been convicted of voluntary manslaughter, the judgment was affirmed (pages 213, 214). If the contention on behalf of the defendants in the present case were accepted and carried to its logical conclusion, it would seem that the defendant in that case should not have been convicted of voluntary manslaughter on the hypothesis stated, and there should have been a reversal.

The *Brown* Case was cited in *Brooks v. State*, 128 Ga. 261, 57 S. E. 483, 12 L. R. A. (N. S.) 889. There the defendant was indicted for murder as principal in the second degree, and was tried separately and con-

victed. There was no controversy that the deceased was killed by a blow inflicted by the son of the defendant. There was evidence that a drunken debauch was in progress at a house near the residence of the defendant; that the deceased and a companion were knocking at the door for admittance; that the defendant ordered them to leave, and, when the deceased cursed her, threw a chip or rock at him, and later fired a pistol in the air, in order to frighten him; and that her son ran from the house, and, without a word, struck the deceased a mortal blow with a stick. The presiding judge charged that presence alone was insufficient to establish the defendant's guilt as a principal in the second degree, but the evidence must go further, and show that she aided and abetted her son in doing the act. He was requested to give in charge certain instructions defining the meaning of abetting and stating what would constitute it, but declined to do so. It was said that the case was a close one, and that the failure to give the requests was cause for a new trial.

The case of *Kimball v. State*, 112 Ga. 541, 37 S. E. 886, was also cited. In that case a person was indicted as a principal in the second degree for assault with intent to murder. If one kills by the use of a deadly weapon in the way in which it is ordinarily employed, the intent to kill may be inferred from the actual killing. Where there is an assault but no homicide, the intent to murder is an essential ingredient of the crime of assault with intent to murder which must appear from the evidence; and the murderous design is necessary to the conviction of one charged as a principal in the second degree. Section 42 of the Penal Code of 1910 defines a principal in the second degree to be "he who is present, aiding and abetting the act to be done." Conspirators may each be responsible for the act of the other in carrying out the common design, though the actual thing done was not agreed upon. On the other hand, there may be presence or even participation to some extent in the general transaction, without amounting to "aiding and abetting the act to be done." But if the act to be done is a felonious homicide by shooting with a gun, and there is presence and an aiding and abetting of that felony, the Code in terms applies. In this state, except where otherwise provided, a principal in the second degree receives the same punishment as a principal in the first degree; and it has been held that one may be indicted as a principal in the first degree and convicted as such, if the evidence shows that he was either the absolute perpetrator of the crime, or that he was present, aiding and abetting the other in its commission. *McLeod v. State*, 128 Ga. 17, 57 S. E. 83; *Bradley v. State*, 128 Ga. 20, 57 S. E. 237.

From what has been said we think it

sufficiently appears that there was no such error as requires a reversal, if there was any inaccuracy in language at all.

[8] The remark of counsel for the state, made without due consideration, was withdrawn, and a full disclaimer of any desire to prejudice the case was made. The remark was only an expression of opinion, not a statement of facts outside of the evidence; and the refusal to grant a mistrial furnished no reason for a reversal, although the judge did not instruct the jury as to such remark, or reprimand counsel.

Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 90)

MILLER et al. v. BUTLER et al.

(Supreme Court of Georgia. Nov. 14, 1911.)

(Syllabus by the Court.)

JUDICIAL SALES (§ 45\*)—SUIT TO SET ASIDE—PARTIES DEFENDANT.

Where a consent decree was rendered, and under it the title to certain lands was determined, and a sale made in accordance therewith, in order for persons claiming as beneficiaries of a trust, and whose trustee was a party to said decree, to set aside the decree and recover the lands, it is necessary to make all parties to said decree who would be affected by setting it aside parties defendant to the proceeding instituted for that purpose. The mere allegation that one of them died before the decree was rendered, that his administrator was made a party and joined in the consent, and that such administrator had since died, is not alone sufficient to excuse the failure to have a representative of the estate present as a party defendant.

The court properly sustained the demurrer, on the ground that a representative of the estate of Willis Miller was a necessary party to the suit.

[Ed. Note.—For other cases, see *Judicial Sales*, Dec. Dig. § 45.\*]

Error from Superior Court, Troup County; L. S. Roan, Judge.

Action by F. M. Miller and others against H. C. Butler and H. W. Miller. Judgment for defendants, and plaintiffs bring error. Affirmed.

F. M. Miller and others filed an equitable petition in Troup superior court against H. C. Butler and H. W. Miller, trustee, in which they made substantially the following allegations: The plaintiffs, except two, who are minors, are the grandchildren of Willis Miller, deceased, and are the children of H. W. Miller and his wife, Mary Jane Miller, and the two minor plaintiffs are children of a deceased child of H. W. Miller and his said wife. Said Willis Miller died some time between December 1, 1887, and May, 1895, and E. T. Winn qualified as administrator upon his estate. Said Winn is now dead, and there is no administration upon the estate of Willis Miller. On December 1, 1887, Willis Miller executed and delivered a deed to H. W. Mil-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ler, trustee, and his wife, Mary Jane Miller, and all the children of H. W. Miller, covering, among other property, "land lot No. 187 in the 6th district of Troup county, also land lot No. 186 in said 6th district of Troup county, which was and is also known as the Hopson place, also fifty acres known as the Curtwright place. \* \* \* All of said tracts containing 439 acres." Upon delivery of the deed to Miller, as trustee, Willis Miller put "the said H. W. Miller, as trustee, and his wife and children aforesaid in possession of said lands, and they accordingly went into possession thereof, and the said H. W. Miller, as trustee, remained in possession of said property until some time in 1895." The defendant Butler having begun to trespass on the Curtwright place under a pretended claim of title, and having an action pending against Willis Miller to recover an alleged indebtedness, Willis Miller and H. W. Miller, as trustee, brought an action against him to enjoin the trespass, recover damages therefor, cancel his pretended claim of title, and to enjoin further prosecution of his action against Willis Miller. A temporary restraining order was granted on the petition, and remained in force until the May term, 1895, of Troup superior court; no trial of the case being had; and H. W. Miller, as trustee, all this time remaining in possession of the property. Prior to said May term, 1895, Willis Miller died, and E. T. Winn was appointed administrator of his estate, and made a party to said case in place of Willis Miller.

On April 23, 1895, said action was settled by an agreement, then entered into, which was kept secret between the parties thereto, to wit, "the said Butler and H. W. Miller, as trustee, and his wife, Mary Miller. The said agreement provided that the said Butler should have a decree at the May term, 1895, settling in himself the title to the Hopson and Curtwright places, and also a decree against the estate of Willis Miller for between \$2,000 and \$3,000, which should be binding on the lands of Willis Miller," and that certain lands should be levied upon and sold under execution issued on the decree, and that Butler should buy them in at the sheriff's sale, and make an absolute deed to one of the places named to H. W. Miller and his wife. At the May term, 1895, a decree was taken in accordance with the agreement, upon which execution was issued, and "said old home place was levied on and sold by the sheriff under said execution, and deed to the same made by the sheriff of Troup county, and in accordance with said decree and said deed said Butler, in the year 1895, went into possession of all of said lands aforesaid, and has so remained ever since." The agreement referred to was kept secret, and plaintiffs knew nothing about its terms or purport until a short time ago, whereupon they employed counsel, and instructed them to bring this suit.

"Petitioners say that this decree and the contract upon which it was taken was and is a fraud upon them, and that said decree was obtained by fraud, and they ask the court to so decree, and that the same be not binding upon them." Owing to the fact that their trustee was their father, and having confidence in him, they made no inquiry until recently into his acts concerning the trust property. Some of plaintiffs are now minors, and others were until 1904 and 1906. They are informed Butler claims to have sold part or all of said lands to innocent purchasers. They prayed: That they recover the lands and mesne profits; that said decree be declared to be fraudulent; that whatever titles Butler may have to the land be canceled, and the record thereof canceled; that if any of the lands be decreed to be in the hands of innocent purchasers that they recover their value and mesne profits thereof; and for general relief. By amendment, it was alleged: "The administrator aforesaid was a friend of the parties to said suit aforesaid, took no interest in the same, and cared nothing about it, knowing that the estate of Willis Miller had no interest in the final result, whatever its termination; therefore he permitted the other parties to said suit to enter whatever decree they pleased, without inquiry as to their motives or agreements."

The defendant Butler filed general and special demurrers to the petition, upon the hearing of which the court passed the following order: "It appearing to the court by the petition of plaintiff that Willis Miller has no representative of his estate in this case, and the defendant having demurred to said petition, on the ground that there is no party representing the estate of Willis Miller in this case, that part of the demurrer raising this question is sustained, and it is ordered that said case be dismissed, unless petitioners amend their petition by making proper parties to said petition, in so far as the estate of Willis Miller is concerned, and serve the defendants with notice of said amendment 80 days before next term of this court. The other demurrers are not passed on." To this judgment the plaintiffs excepted, "in so far as the same sustains the demurrer of the defendant Butler, therein specified, and dismisses said case." They also excepted to the refusal of the judge to pass upon the other grounds of demurrer, but this contention was abandoned on the oral argument of the case in this court.

W. H. Terrell, for plaintiffs in error. F. M. Longley, for defendants in error.

HILL, J. (after stating the facts as above). Did the court below commit error in sustaining the demurrer and dismissing the case? We think not. The controlling question in this case is whether a representative of the estate of Willis Miller, deceased, should have

been made a party to the suit in the court below. The trial judge, in sustaining the demurrer, thought that it was necessary to make a representative of this estate a party to the suit brought by the plaintiffs to recover the land in controversy, and so do we. E. T. Winn, the former administrator of the estate, was a party of record to the former suit, and was a party of record to the decree under which the land in controversy was sold. This decree, rendered in 1895, was the basis of the execution levied upon the land, and which was bought by the defendant Butler.

One of the prayers of the petition is that the decree rendered in 1895 be declared fraudulent and void. To do so would be to leave the case, pending in Troup superior court, as it stood prior to the decree. Under the allegations of the petition, the estate of Miller certainly had an interest in that suit. Whatever interest the estate of Miller had in the suit prior to the decree, it would still have, if the decree was set aside. It is not alleged in the petition that the estate is insolvent, or that there are no creditors or heirs, other than plaintiff. The burden is on the plaintiff to allege facts showing that the estate of Willis Miller has no such interest in the result of the suit as to make it necessary that his estate be represented therein. The decree of May, 1895, was rendered in a case to which H. W. Miller, as trustee of the plaintiffs, was a party, and by his consent. It is therefore binding on the plaintiffs until reversed or set aside, and until this be done the plaintiffs cannot obtain any of the relief they are seeking.

In order to set the decree aside, it is necessary that the parties thereto, or their representatives, be parties to the proceeding in which it is sought to have this done; and a representative of the estate of Willis Miller being a party to the decree, a representative of that estate must be a party to the present suit, which necessarily involves the setting aside of that decree as a condition precedent to any right on the part of the plaintiffs to obtain the relief sought by them. Bullard v. Wynn, 134 Ga. 636 (2), 68 S. E. 439. In the case of Henderson v. Napier, 107 Ga. 342, 33 S. E. 433, this court held: "Where equitable proceedings are instituted, which pray for relief touching rights and interests of the petitioners in certain specific property, and the petition discloses the fact that others are directly interested in the property, who are not made parties to the proceedings, and whose interests would be affected by the grant of the relief sought, such other persons are proper and necessary parties to the action." See, also, Bond v. Hunt, 135 Ga. 733, 70 S. E. 572. The decision in the case of Bledsoe v. Bledsoe, 29 Ga. 385, is not in conflict with the decision we now make. In

that case the question was whether the plaintiffs could sue in their own name, or whether the property could only be recovered by an administrator de bonis non upon the estate of Morton Bledsoe.

But the question in this case is, not whether the plaintiffs can sue, but whether, if they do sue, the effect of the suit would be to injure others, who should be made parties to the suit. Undoubtedly the plaintiffs can bring suit to assert their legal or equitable rights, whatever they may be, but they cannot maintain a suit without the proper parties being made. To allow suitors to do so, would be to injure and damage those who have rights, as well as they. The estate of Willis Miller had rights in the suit, pending in the Troup superior court, which culminated in the decree of May, 1895, and to allow a subsequent suit, the effect of which, if successful, would be to set aside that decree, without making a representative of Willis Miller a party as such, would be to try a case without proper and necessary parties. We therefore think the judgment of the court below should be affirmed. All the Justices concur, except BECK, J., absent.

(137 Ga. 150)

#### JOHNSON v. NISBET.

(Supreme Court of Georgia. Nov. 16, 1911.)

(Syllabus by the Court.)

BILLS AND NOTES (§ 474\*)—EVIDENCE (§ 397\*)  
—ACTION ON NOTE—PLEADING—PAROL EVIDENCE.

In a suit upon a note for a certain sum of money payable at a definite time, a plea is demurrable which alleges that the note was given in pursuance of an oral agreement that the payee employed the maker to work for him the subsequent year, and advanced to him the money for which the note was given, with the understanding that he was to pay it in certain installments out of his wages, and that the payee refused to carry out his contract of employment, to the damage of the maker in a sum exceeding the amount of the note. Where a contract is entire, part of which is in writing and part in parol, the written part cannot be varied by parol evidence, in the absence of fraud, accident, or mistake.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 474; \* Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.\*]

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by J. L. Nisbet against H. G. Johnson and another. Judgment for plaintiff, and defendant named brings error. Affirmed.

Roberts & Hutcheson, for plaintiff in error. W. A. James and Shepard Bryan, for defendant in error.

EVANS, P. J. J. L. Nisbet sued H. G. Johnson and Mrs. Jennie R. Johnson on a note, to the March term, 1910, of Douglas superior court, alleging that notice was given, on February 16, 1910, by the plaintiff to

the defendants of the intention of the former to bring such suit. The note was for \$150 principal. It was dated November 1, 1907, due July 1, 1908, payable to Adams, Wright & Co., provided for interest at the rate of 8 per cent. per annum, and 10 per cent. attorney's fees if collected by law, and contained a waiver of homestead and exemption rights. On the back of the note was a transfer thereof to J. L. Nisbet, signed by Adams, Wright & Co., without date. The defendants filed a plea, which denied all the allegations of the petition, except the one stating that the note was due and that the defendants refused to pay the same, and denied that the plaintiff was a bona fide owner and holder of the note, and averred that, if he ever owned it, he procured it from the payees thereof after maturity, with full knowledge of "every defense hereafter set up by these defendants." The allegations of the fourth, fifth, sixth, and seventh paragraphs of the answer are substantially as follows: On November 1, 1907, Adams, Wright & Co., the payees of the note sued on, employed the defendant to work for them as a traveling salesman for 1908, and "at said date said Adams, Wright & Co. advanced H. G. Johnson \$150 in cash, to be paid back out of his salary for the year 1908," in monthly sums of \$25 until the note was paid, such payments to begin January 30, 1908." As evidence of said contract of cash loan the note sued on was given, and the consideration of said note was the cash loan aforesaid and the contract of employment aforesaid for the year 1908. On the 28th day of December, 1907, said Adams, Wright & Co. notified the said H. G. Johnson that they would not employ him for the year 1908, and fully abandoned their contract aforesaid without any cause on the part of the said H. G. Johnson. The said H. G. Johnson was ready and willing to carry out the terms of said contract, and offered to do so. On account of said breach of contract and abandonment of same as aforesaid, this defendant "sustained damages as set forth in the answer. Said damages grew out of the said contract, the consideration of said note sued on." The eighth paragraph prayed that the damages referred to in the plea be set off against the note by way of recoupment, and that the defendant H. G. Johnson have judgment against the payees of the note for \$1,020. The ninth paragraph of the plea alleged that Jennie R. Johnson was the wife of H. G. Johnson, and signed the note as surety for her husband. The tenth paragraph alleged that, if the plaintiff procured the note at all, he did so after it became due and with full notice of the defenses set up in the plea. The court, at the trial term of the case, on oral motion of the plaintiff, struck paragraphs 4, 5, and 6 of the plea, and, upon proof of the notice of intention to sue being given 20 days be-

fore the last return day of the term to which suit was brought, directed a verdict in favor of the defendant Jennie R. Johnson, and a verdict in favor of the plaintiff against the defendant H. G. Johnson for the full amount, principal, interest, and attorney's fees, called for by the note. To the striking of the last three paragraphs of the plea, and to the direction of the verdict, H. G. Johnson excepted.

If the contract be treated as an entire and not a severable one, the agreement to pay in installments from the salary to be received was set out as being a vital integral part of it. Such a contract could not be proved by parol, in the face of the note which fixed the amount to be paid at the time of payment. If the contract was entire, it could not be dismembered, so that a recovery could be had for breach of such contract of employment, when the terms of the contract could not be proved by parol. In other words, it is not competent to recover damages for a breach of an entire contract by simply showing a part of it, when another part, which is alleged as being of the essence of the contract of employment, and not a mere incident or conditional term, could not be proved. There may be cases in which a contract is severable, so that if one term fails it does not destroy the contract; but if the allegations of the plea are to be treated as making an entire contract, the agreement as to the amount to be deducted from the salary each month and applied to the payment of the note is just as inherently a part of the contract as is the total amount to be paid each month. We do not think it such a case as can be treated as one of entire contract, and yet one in which such integral part of the agreement can be rejected and leave the rest to stand. When the plea is read together, we think there are such indications that the alleged contract of employment was in parol, and only the note was in writing, and the case should now be dealt with on the substantial question involved, rather than be sent back to have the same principle applied when it appears more plainly that the contract of employment was not in writing. Counsel for both parties put this construction on the pleadings, and argued the case on the basis that the contract of employment was in parol.

The rule is well recognized that if a part of the contract is reduced to writing (such as a note given in pursuance of a contract), and it is manifest that the writing was not intended to speak the whole contract, then parol evidence is admissible. Civil Code 1910, § 4268. But to bring a case within the rule admitting parol evidence to complete an entire agreement, of which the written contract is only a part, it is essential that the parol evidence be consistent with and not contradictory of the written instrument.



*Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 87 S. E. 485, 81 Am. St. Rep. 28. The whole tenor of the plea is to change by parol an absolute unconditional promissory note into a conditional note, and this cannot be done in the absence of fraud, accident, or mistake. *Haley v. Evans*, 60 Ga. 157; *Sims v. Crawford*, 56 Ga. 31. The payees of the note were not parties to the suit, and under no circumstances could the defendant recover against them in this action damages by way of recoupment. The allegation that the plaintiff is not a bona fide holder of the note only served to let in any defense which the maker might have against the note. And it is not permissible to change the terms of a note for a certain sum, payable at a definite time, by parol proof. There was no error in striking the plea and directing a verdict for the plaintiff.

Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 109)

GULF LINE RY. CO. v. WAY.

(Supreme Court of Georgia. Nov. 15, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 394\*)—INJURIES TO PERSON ON TRACK.

The court erred in not sustaining the general demurrer to the petition.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1331-1338; Dec. Dig. § 394.\*]

2. APPEAL AND ERROR (§ 400\*)—WRIT OF ERROR—REQUISITES—DISMISSAL.

It clearly appears from the bill of exceptions who the parties to the case were, and therefore there is no merit in the motion to dismiss the writ of error on the ground that "no one is named therein as plaintiff in error and no one is named therein as defendant in error."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2103-2112; Dec. Dig. § 400.\*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action by Emma Way against the Gulf Line Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Marion Turner, H. E. Coates, and J. H. Tipton, for plaintiff in error. M. S. Means and W. L. & Warren Grice, for defendant in error.

FISH, C. J. [1] 1. Emma Way sued the Gulf Line Railway Company for damages for the homicide of her husband, Norman Way. The substance of the petition now material is: The deceased was killed by being run over by a passenger train of the defendant, a few hundred yards south of Powell's Still station, at about 3 o'clock in the afternoon. Prior to, and at the time of the homicide, it "was the general custom of pedestrians

to walk along and near the track of defendant from Powell's Still to a point on the far side of Big creek." Decedent was walking from Powell's Still towards Big creek, "along the right of way of said company, and suddenly became ill and unable to go further, and sat down on the end of a cross-tie in a foot or so of the track, where he soon became very ill and was unconscious, and that, in this condition, the train of defendant came upon him and killed him. Under the circumstances, the killing of said Norman Way was gross negligence; for, before the engine reached him, there was a straight track for a distance of 30 rails of iron, and upgrade, which afforded ample opportunity to see him and bring the train to a full stop before reaching him. The train was not stopped until after it had struck and dragged the decedent the distance of 2½ rails. The whistle of the engine was not blown, nor the bell rung, and the failure of the engineer and fireman to do this was gross negligence. Deceased was not negligent, and in his condition could not, by the exercise of ordinary care, have avoided the consequences of the negligence of the defendant as aforesaid." A general demurrer to the petition was overruled, and the defendant excepted.

It is clear that the decedent was a trespasser upon defendant's railway track. The mere fact that "it was the general custom for pedestrians to walk along and near the track of defendant," where the homicide occurred, was not sufficient to show that the employes of the company in charge of the train were bound to anticipate that he or other persons might be upon the track at that place, so as to impose upon the employes a duty to take such precautions to prevent injury to persons who might be upon the track as would meet the requirements of ordinary care and diligence. Under the facts alleged, the general rule as to trespassers upon a railway track applies; that is, the duty of observing ordinary care and diligence for his protection does not devolve upon the agents of the company in charge of the train, until his presence upon the track becomes known to them. It was not alleged that such agents of the company knew of the presence of the decedent upon its track before he was run over, nor does it appear from the petition whether a few or many pedestrians were accustomed to walk along or near the defendant's track at the place of the homicide. Moreover, it appears from the petition that the defendant was "walking along the right of way of said company, and suddenly became ill and unable to go further, and sat down on the end of a cross-tie in a foot or so of the track, where he soon became very ill and was unconscious, and that, in this condition, the train of defendant came upon him and killed

him." This is not a case, therefore, where the deceased suddenly became unconscious from illness, and was thereby caused to involuntarily fall upon the track, or where, while walking on the track, he suddenly became ill and unconscious, and while unconscious sat down on the track; but it is a case where the decedent, while walking along the right of way of the railway company, not necessarily on the track, suddenly became ill, and, being unable to go further, thereupon voluntarily went upon the track, and sat down on the end of a cross-tie, and subsequently became unconscious, thus showing that he was grossly negligent in voluntarily, and without even apparent necessity, placing himself in such a perilous position. It is therefore, for the reasons above stated, very clear to us that the court erred in not sustaining the general demurrer to the petition.

[2] 2. The second headnote needs no elaboration.

Judgment reversed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 119)

MILLER et al. v. BUTLER.

(Supreme Court of Georgia. Nov. 15, 1911.)

(Syllabus by the Court.)

EXCEPTIONS, BILL OF (§ 43\*)—DISMISSAL—TIME FOR PRESENTING BILL OF EXCEPTIONS.

It appearing that the judgment complained of was rendered in vacation on July 19, 1911, and that the bill of exceptions was tendered to the presiding judge on August 19, 1911, 31 days thereafter, the writ of error must be dismissed because of the failure to present the bill of exceptions within the time required by law. *Mertins v. Pritchard*, 135 Ga. 643, 70 S. E. 328; Civil Code 1910, § 6152.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 72½; Dec. Dig. § 43.\*]

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action between F. M. Miller and others and H. C. Butler. From the judgment, Miller and others bring error. Dismissed.

Wm. H. Terrell, for plaintiffs in error. F. M. Longley, for defendant in error.

HILL, J. Writ of error dismissed. All the Justices concur, except BECK, J., absent.

(137 Ga. 96)

REMINGTON, Ordinary, v. HOPSON et al.

ROUNTREE v. REMINGTON, Ordinary.

WILSON v. SAME.

(Supreme Court of Georgia. Nov. 15, 1911.)

(Syllabus by the Court.)

1. GUARDIAN AND WARD (§§ 175, 182\*)—LIABILITIES OF SURETIES—ACTIONS—PARTIES.

Where a guardian's bond was executed for a specified amount, and subsequently, after one

of the sureties had died leaving an insolvent estate, and other property had come into the hands of the guardian, the mother of the wards, being one of the sureties on the bond instituted a proceeding under Civil Code 1910, §§ 3049, 3050, to require the guardian to give other and additional security, and on his failure to do so to have the letters of guardianship revoked and another person appointed, and in this proceeding an order was granted requiring the guardian to give other and sufficient security, etc., and the guardian subsequently executed a new bond for a less amount, with new sureties, such second bond was cumulative, and the sureties thereon were co-sureties with those on the first bond for any past or future waste.

(a) In a suit by the obligee against the sureties on the second bond for a devastavit, those on the first bond were not necessary parties, and in the absence of equitable grounds the sureties on the second bond were not entitled to have those on the first bond made parties to the suit for the purpose of adjusting the rights between the several sureties.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. §§ 175, 182.\*]

2. PLEADING (§ 362\*)—STRIKING OUT MATTER.

In a suit of the character mentioned in the preceding headnote, it was error for the judge to refuse to strike so much of the pleas of the sureties on the second bond as sought to set up the invalidity of the bond, on the ground that it misrecited the date of the appointment of the guardian.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. § 362.\*]

3. PLEADING (§ 362\*)—STRIKING OUT MATTER.

Where, in a suit on a guardian's bond against the principal and sureties, the sureties denied the amount of the liability alleged, the fact that upon the trial the amount of the devastavit committed by the guardian was agreed upon by the parties did not make it erroneous to refuse to strike from the answer the denial of such amount.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. § 362.\*]

4. PLEADING (§ 362\*)—STRIKING OUT MATTER.

Where a plaintiff brought suit on a guardian's bond, and in one paragraph of his petition alleged that the defendants were indebted to him in a certain amount, without more, and one of the defendants denied it, there was no merit in a motion to strike such responsive part of a paragraph of the answer, on the ground that "a simple denial of the indebtedness is not a legal defense to a suit on a bond."

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 362.\*]

5. APPEAL AND ERROR (§ 1078\*)—REVIEW—ABANDONMENT OF ASSIGNMENTS.

Where a plaintiff causes to be certified exceptions pendente lite, assigning error upon numerous rulings of the court, and in the main bill of exceptions assigns error on the pendente lite exceptions and the overruling of a motion for new trial, and in his brief states that he "insists upon each and every assignment of error, but because of the fact that many of these are practically identical, and some overlap others, the errors complained of will be classified and insisted upon in the following questions," and following this statement are grouped the various legal propositions insisted upon, an assignment of error, not embraced in such legal propositions as stated, nor otherwise alluded to in the brief, will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4281; Dec. Dig. § 1078.\*]

#### 6. GUARDIAN AND WARD (§ 173\*)—LIABILITIES ON BONDS—EXTENT OF LIABILITY.

Under the pleadings and evidence, if the plaintiff were entitled to recover at all, he was entitled to recover from each of the sureties on the second bond the full amount of the devastavit; and it was erroneous as to him to divide the devastavit and find in his favor only a part against the sureties on such bond, and a part against the sureties on the first bond.

[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. § 173.\*]

#### 7. GUARDIAN AND WARD (§§ 175, 182\*)—LIABILITIES OF SURETIES—ACTIONS—PARTIES.

The second bond was given under an order granted by the ordinary in a proceeding for additional security, under Civil Code 1910, §§ 3049, 3050, and was merely cumulative to the first, and did not operate to discharge one of the sureties on the first bond under an order previously granted by the ordinary in a proceeding for a discharge under Civil Code 1910, § 3052. The sureties on both bonds were co-sureties in proportion to the amounts of the respective bonds; but the suit being at law, and the plaintiff not having elected to sue the sureties on the first bond, and no equitable reasons being alleged which would authorize the sureties on the second bond to require those on the first bond to be made parties, it was erroneous for the judge, over objection of one of the latter, to order that the one so objecting be made a party.

[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. §§ 175, 182.\*]

#### 8. APPEAL AND ERROR (§ 973\*)—REVIEW—DISCRETION OF TRIAL COURT—DIRECTION OF VERDICT.

While a trial judge may, within the restrictions prescribed by Civil Code 1910, § 5926, direct a verdict, this court will in no case reverse a judgment refusing to do so.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3846; Dec. Dig. § 973.\*]

Error from Superior Court, Brooks County; G. A. Whittaker, Judge pro hac.

Action by C. H. Remington, Ordinary, for use, etc., against J. W. Hopson and others. From the judgment, plaintiff and defendants S. H. Rountree, as executor, and Mrs. Jessie B. Wilson bring separate writs of error. Judgment reversed on main bill of exceptions and cross-bill of exceptions filed by defendant Mrs. Jessie B. Wilson, and affirmed on the cross-bill of exceptions filed by defendant Rountree.

Stanley S. Bennet and L. W. Branch, for plaintiff. W. H. Griffin, H. A. Mathews, Edmondson & Edmondson, and J. D. Wade, for defendants.

ATKINSON, J. On January 4, 1892, J. W. Hopson was appointed guardian of the person and property of Willie Lee Hopson and Ralph B. Hopson, minor children of I. B. Hopson, deceased. As such guardian he executed bond. Subsequently, to wit, July 6, 1896, on application of Mrs. Jessie B. Wilson, formerly Hopson, the mother of the wards, who had signed as one of the sureties on the bond above mentioned, the guardian, by order of the ordinary, executed a second bond, with a different set of sureties. Afterwards, upon an alleged devastavit, the

ordinary, disregarding the first bond, instituted suit against the principal and the sureties on the second bond only. No demurrer was filed, but the defendants Cicero N. Williams, Wesley W. Wade, A. J. Conoly, and Z. T. Knight, uniting in one answer, which was afterwards amended, and Mrs. Hannah Matthews, as executrix of S. M. Matthews, making a separate answer, which was afterwards amended, and S. H. Rountree, as executor of the will of Mitchell Brice, making a separate answer, which was afterwards amended, among other things, set up the existence of the first bond, and certain defenses which will be stated in this opinion, and prayed that the sureties on the first bond be made parties, etc. By order of the court the sureties on the first bond were made parties, and one of them, Mrs. Jessie B. Wilson, excepted pendente lite to the order making her a party. The plaintiff moved to strike certain portions of the several answers of the defendant sureties on the second bond, and excepted pendente lite to the order of refusal.

At the trial certain evidence was introduced, in addition to an agreed statement of facts. By the terms of the latter the amount of the devastavit was agreed upon. The verdict declared, among other things, for the plaintiff for that amount, but prorated it in such manner as to make it a finding against the sureties jointly on the first bond for a part thereof, and against the sureties on the second bond for the balance, thus failing to charge the sureties on either bond for the full amount of the devastavit. The plaintiff moved for a new trial, on the general grounds, which was refused, and he excepted. In the bill of exceptions, in addition to assigning error on the judgment refusing a new trial, error was also assigned by the plaintiff on his exceptions pendente lite to the judgment refusing to strike certain portions of the answers. The defendant Mrs. Jessie B. Wilson filed a cross-bill of exceptions, assigning error on her exceptions pendente lite to the order making her a party. S. H. Rountree, as executor of the estate of Mitchell Brice, filed a separate cross-bill of exceptions; but his only assignment of error was upon his exceptions pendente lite to the refusal of the judge to direct a verdict in his favor.

[1] 1. The main bill of exceptions assigned error on exceptions pendente lite filed by the plaintiff in the trial court, which complained of the refusal to strike certain parts of the answer of S. H. Rountree, as executor of the estate of Mitchell Brice, and also certain parts of the answers of Cicero M. Williams, Wesley W. Wade, A. J. Conoly, and Z. T. Knight, all of whom were sureties on the second bond, and also a part of the answer of Mrs. Hannah Matthews, as executrix of the will of S. M. Matthews, whose testator

was also a surety on the second bond. The parts of the several answers referred to set up the existence of the first bond, and alleged that, if the sureties on the second bond were liable at all, they were not liable for the waste committed prior to the date of their bond, but only liable jointly and ratably with the sureties on the first bond for waste committed since the date of the second bond, and prayed that the sureties on the first bond be made parties to the action, so that the liabilities of all the sureties might be determined in one action, thus avoiding circuity of action and a multiplicity of suits. The ground to strike the parts of the answers above referred to was that, as a matter of law, the sureties on the first bond were not jointly liable with the sureties on the second bond, and that the sureties on the second bond were liable for past as well as future waste.

The first bond was for \$40,000. The second, which was executed some three years later, was for \$30,000. The two bonds were of character as will be indicated, and were executed under the circumstances following, that is to say: In 1893 Mrs. Hopson, the mother of the wards, who had signed as one of the sureties on the first bond, filed with the ordinary a petition alleging that John S. Hopson, one of the sureties and the largest property owner who had signed the bond, had died; that she was the mother of the two minors, and desired that the estate of her husband be protected by giving a solvent bond; that she was alarmed about the result of her suretyship, and thought herself in great danger of suffering therefrom. She prayed that the court of ordinary would pass an order requiring the guardian to relieve her from the bond, and also give new and additional security, so that she might be saved harmless. A rule nisi was issued, and at the October term an order was passed that Mrs. Hopson, who had become Mrs. Wilson by a second marriage, "be relieved as a security on J. W. Hopson's bond," and that the guardian be required to give additional security at the next term of court. This was a proceeding under section 3052 of the Civil Code of 1910. By that section it is provided, however, that "such discharged surety shall be relieved only from the time the new security shall be given," and that, "if new security is not given, and the guardian's trust is revoked, the discharged surety shall be bound for a true accounting of such guardian with the new guardian, or his ward if no other guardian is appointed." It appears that no bond was given, and no new guardian appointed. Thus the matter stood until 1896, when Mrs. Wilson again filed a petition in the court of ordinary. In this she recited the appointment of the guardian, his qualification, and the giving of the bond, and the filing of the former petition by her, and that the ordinary had passed an order discharging her as a surety

from all further liability. She also alleged that J. S. Hopson, a surety on the bond, died leaving an insolvent estate, as she was informed, and that the guardian had received for his wards, otherwise than from the guardian estate, money amounting to \$10,000. She charged that the security on the bond was insufficient, and prayed an order requiring the guardian "to give other and additional security, and on his failure to do so to revoke his letters of guardianship and appoint some other person in his place." Upon hearing this petition the ordinary passed an order requiring the guardian "to give other and sufficient security as guardian for Ralph and Willie Lee Hopson," and declared that on his failure to do so his letters of guardianship should be revoked. It was under this order that the second bond was given. The petition did not allege a failure to obey the former order and ask the removal of the guardian. On the contrary, she sought, for various reasons, not to relieve herself, but to secure the wards. From a consideration of the petition and order, the second proceeding was under Civil Code 1910, §§ 3049, 3050. It was not a proceeding merely to have an additional bond given on account of new property which had accrued to the wards; but, in view of the decrease in the security of the original bond and of the increase of property in the hands of the guardian, it was a proceeding to require new and additional security, as provided in the sections last cited. The second bond had the form of a guardian's bond given upon an appointment then made.

Under these circumstances, was the second bond cumulative, and were the sureties on it cosureties with those on the first bond, relatively to past as well as future waste, and were the sureties on the second bond entitled to have the liabilities between themselves and the sureties on the first bond adjusted and declared in this suit? Section 3049 of the Civil Code states that, upon ascertainment that the original bond is insufficient, "it shall be the duty of the ordinary to give to the guardian notice to come forward at the next term of the court and give additional security to said ordinary, or give a new bond with good securities." If new securities had been added to the first bond, it is clear that they would have been cosureties with those already on it. The fact that the additional security was given in the form of a new bond for the proper conduct and accounting of the guardian did not prevent the two bonds from being cumulative. Neither this statute nor section 3050 provides for discharging one set of sureties and substituting another, but for adding security to that which has already been given. The original bond remains of force, and the new bond is cumulative or additional security for the benefit of the wards. As between the obligees of the bonds and the sureties on them, all are liable for a devastavit to the extent of

the bonds which they respectively signed for past as well as future waste. As among themselves, they occupy the position of co-sureties, and the liabilities of the sureties on the two bonds are in proportion to the size of such bonds. *Huson v. Green*, 88 Ga. 722, 16 S. E. 255; *Stewart v. Johnson*, 87 Ga. 97, 13 S. E. 258; *Schouler on Domestic Relations*, § 367; 4 *Field's Briefs*, § 54. Perhaps the plaintiff might have brought suit on both bonds, but he did not elect to do so, as did the plaintiff in the case of *Sutton v. Williams*, 77 Ga. 570, 1 S. E. 175, in which there was a discharge of a surety under section 3052. He sued only the last bond. While they were cumulative securities, he could not be compelled to sue on both at law, unless there were special equitable reasons which would require the bringing in of all the sureties, but he could proceed against the sureties on one bond. He has prayed no judgment against the sureties on the first bond. Can the defendants, who were sureties on the second bond, do so for him, and obtain a judgment, not for themselves alone, but for the plaintiff? If not, then the result of bringing in the sureties on the first bond would be, not the rendition of a judgment against them in favor of the plaintiff, but the entering of a judgment on the second bond, and a mere side adjudication that the defendants and the sureties on the first bond stood in a certain relationship. We do not think that the sureties on the first bond were necessary parties to the plaintiff's suit on the second bond, so that the sureties on it could compel the plaintiff to bring them in as codefendants and sue them at the same time. Indeed, the sureties on the second bond have not attempted to do so, but have simply prayed that the sureties on the first bond be brought into the action as parties, so as to save a multiplicity of suits. No sufficient reason for equitable relief is alleged by the sureties on the second bond, and they show no right to require them to be made parties. If there is any right of contribution between the sureties on the respective bonds, that can be determined in a proceeding at the proper time and in an appropriate way. This case is somewhat analogous to one where a plaintiff might bring suit upon a joint and several liability against some of the obligees, but might not care to proceed against all. Those sued could not compel him to bring in the others, nor could they themselves bring them into the plaintiff's suit, merely because there might be a right of contribution after a recovery by the plaintiff. *McDougald v. Maddox*, 17 Ga. 52; *McDougald v. Maddox*, 32 Ga. 63.

[2] 2. The main bill of exceptions also complained of the refusal of the judge to strike certain parts of the answers of the defendants named in the preceding division, which set up that the second bond was void because it contained a false recital as to

the date of the appointment of the guardian; it being recited that he was appointed on the date of the execution of the bond, which was the 6th day of July, 1896; whereas, in fact, the appointment had been made more than four years previously, to wit, in 1892. The ground of the motion to strike was that the defendants, having signed the bond, were estopped from denying its recitals. On this point the answer of Mrs. Matthews went further than that of the other defendants, and alleged that the second bond was executed with the express understanding that Hopson on the date of that bond was appointed guardian, when in fact he had not been so appointed, and had not since that date been appointed, and therefore that no liability could have arisen on the bond against her. The second bond having been given as a cumulative bond, in the manner already recited, the sureties thereon were liable for any devastavit of the principal from the time of his appointment, and not merely from the time the bond was given. The fact that the bond misrecited the date of his appointment, stating it as of the date of the bond, did not change this or make the bond invalid. It was given by virtue of proceedings in court, under an order of court requiring it. In response to such order the principal and his sureties gave the bond, and satisfied the requirements of the court. By doing so, they saved the guardian from being deposed from office, and allowed him to proceed with his administration. If in so doing they erroneously recited the time of his appointment, this would not relieve them from the burden the statute imposed upon them. The judge accordingly erred in refusing to strike the part of the answer which set up the erroneous recital in the bond of the date of the appointment as a defense. What has been said applies to the plea of Mrs. Matthews, as well as to those of the other defendants.

[3] 3. Error was also assigned upon the refusal of the judge to strike a part of the answer of certain of the defendants which set up that in the proceeding by the ordinary in which the judgment had been rendered declaring a devastavit the ordinary did not examine the return of the accounts of the guardian and examine witnesses, as alleged, but that, if any such judgment was signed at the time, it was done without a trial, and without the introduction of evidence, and therefore that the judgment was void; also that, if the guardian owed the wards any sum at the date of the judgment, it was greatly less than declared by the ordinary. The ground of the motion to strike such part of the answers was that "the amount had been agreed upon by all parties," and the defense was "eliminated by consent." There was no merit in this motion.

[4] 4. Error was also assigned upon the refusal of the judge to strike the first paragraph of the answer of Mrs. Matthews,

which merely denied that "she is indebted in any sum to the plaintiff in said case in manner and form as claimed." The ground of the motion to strike was because a simple denial of the indebtedness is not a legal defense to a suit on a bond. This answer was merely responsive to the allegations of a paragraph of the plaintiff's petition, which alleged that the defendants were indebted to him in a certain amount, without more. The motion to strike was without merit.

[5] 5. One of the exceptions pendente lite upon which error was assigned in the main bill of exceptions complained of the refusal of the judge to strike an amended plea filed by Wesley W. Wade and A. J. Conoly, setting up their discharge in bankruptcy. For reasons indicated in the fifth headnote, this assignment of error will be treated as abandoned.

[6] 6. The last assignment of error in the main bill of exceptions related to the order of the court overruling the motion for a new trial, which was based on the usual general grounds. The verdict which was rendered divided the liability to the plaintiff between the sureties on the two bonds, and also included matters which were not proper under the rulings heretofore made. Under the pleadings of the plaintiff, if he were entitled to recover at all, he was entitled to recover from each of the sureties on the second bond for the full amount of the devastavit, and it was erroneous as to the plaintiff to divide the devastavit, and find in his favor only a part against the sureties on that bond and a part against the sureties on the other bond.

[7] 7. When application was made by the defendant sureties on the second bond to have the sureties on the first bond made parties to the suit for the purposes mentioned in the first division of this opinion, Mrs. Jessie B. Wilson filed objections, setting up: (a) Nonliability to the plaintiffs; (b) that she was not a cosurety with the defendants on the second bond; and (c) that by the order of the ordinary dated July 6, 1896 (to which reference has been made in the first division of this opinion), the sureties on the second bond were given by the guardian as additional sureties, and therefore that she was released and discharged as a surety under authority of the order dated September 20, 1893 (which has also been referred to in the first division of the opinion). This objection was overruled, and Mrs. Wilson was made a party. Error was assigned upon this ruling in the cross-bill of exceptions. This assignment of error is controlled by the rulings announced in the first division. The second bond was not executed under the order of the ordinary passed in 1893, in a proceeding under section 3052 of the Civil Code, but under the subsequent order granted in

1896, in a different proceeding, under sections 3049 and 3050. Mrs. Wilson, therefore, was not discharged as a surety, but continued to be such; and, the second bond being merely cumulative to the first, her relation to the sureties on the second bond was that of a cosurety in proportion to the amount of the respective bonds. But as the plaintiff did not sue the sureties on the first bond, and no equitable reasons appeared which authorized the defendant sureties on the second bond to require the sureties on the first bond to be made parties to the suit, it was erroneous for the court to pass an order making them parties.

[8] 8. S. H. Rountree, as executor of the estate of Mitchell Brice, after all the evidence was submitted, moved the court to direct a verdict in his favor, and in a separate cross-bill of exceptions assigned error upon the refusal of the judge to direct such a verdict. While the trial judge may, within the restrictions prescribed by Civil Code 1910, § 5926, direct a verdict, this court will in no case reverse him for refusing to do so. *Green v. Scurry*, 134 Ga. 482, 68 S. E. 77, and cases cited in 13 *Michie's Digest*, 565, subsec. D.

Judgment reversed on the main bill of exceptions and the cross-bill of exceptions filed by Mrs. Wilson, and affirmed on the cross-bill of exceptions filed by Rountree, executor. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(127 Ga. 115)

#### STRICKLAND v. STATE.

(Supreme Court of Georgia. Nov. 15, 1911.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 48\*)—DEFENSES—INSANITY.

If one voluntarily becomes intoxicated by the use of a drug, this will not excuse him for the commission of a crime. But if mania or insanity, though caused by the use of a drug, be permanent and fixed in character, so as to destroy the knowledge of right and wrong as to the act, the person laboring under such infirmity will not be responsible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 53-58; Dec. Dig. § 48.\*]

#### 2. CRIMINAL LAW (§§ 486, 1169\*)—EVIDENCE—EXPERT TESTIMONY—HARMLESS ERROR.

It was not relevant for the state's counsel to ask an expert witness for the accused whether, in his opinion, a physician, who treated the accused for insanity at an asylum and cured him, could tell what produced it, unless the evidence of the physician affecting the cure was introduced.

(a) The admission of such statement in evidence could not have affected the verdict, and furnishes no cause for a reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1076, 3137-3143; Dec. Dig. §§ 486, 1169.\*]

#### 3. HOMICIDE (§ 158\*)—EVIDENCE—THREATS.

Conversations of the accused and another person, some days before the commission of the

homicide, in which the former expressed angry and threatening sentiments toward the decedent, were admissible to show the state of mind of the accused toward the person whom he killed. There was no error in admitting in evidence the parts of the conversations which rendered the sayings of the accused intelligible and showed the circumstances under which they were made.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 293-296; Dec. Dig. § 158.\*]

#### 4. CRIMINAL LAW (§ 452\*)—EVIDENCE—OPINION EVIDENCE—SANITY OF ACCUSED.

Where, on the trial of a person indicted for murder, the issue was one of sanity or insanity, and the sheriff of the county testified that, on the day the decedent died and the day after he was shot, the accused was placed in the charge of the witness and so remained in jail for two or three months, and that during such time the witness had conversations with the accused, and observed him constantly, with a view of ascertaining and determining his mental condition, and that from this the witness was in a position to give his opinion on the subject, the opinion of the witness, based on such facts, that the accused was insane during his incarceration, was admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1054; Dec. Dig. § 452.\*]

#### 5. CRIMINAL LAW (§§ 48, 1170\*)—CAPACITY TO COMMIT CRIME—WRIT OF ERROR—HARMLESS ERROR.

Omitting cases of delusional insanity, where the question is one of general insanity, the test of criminal responsibility is whether the accused had sufficient reason to distinguish between right and wrong as to the act about to be committed.

(a) A very thorough investigation as to the conduct and condition of the accused before, at the time of, and after the commission of the homicide having been had, and the witness mentioned in the fourth headnote having given no facts from which irresponsibility for crime could be inferred, the rejection of his mere general opinion that the accused was insane while in jail will not, under the evidence, require a reversal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 53-58, 3145-3153; Dec. Dig. §§ 48, 1170.\*]

#### 6. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.

The evidence sustained the verdict, and there was no error in overruling the motion for a new trial.

Error from Superior Court, Jeff Davis County; C. B. Conyers, Judge.

A. D. Strickland was convicted of murder, and brings error. Affirmed.

J. M. Wilcox and W. W. Bennett, for plaintiff in error. J. H. Thomas, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

LUMPKIN, J. Strickland was convicted of murder, and sentenced to imprisonment for life. He moved for a new trial. The motion was overruled, and he excepted.

[1] 1. Voluntary drunkenness furnishes no excuse for crime. Penal Code 1910, § 89. The mere dulling of the sensibilities, excitement, or temporary frenzy of the drunken man, brought about by his voluntary act, will not excuse him. But if mania or insanity, "though produced by drunkenness, be per-

manent and fixed, so as to destroy all knowledge of right and wrong, then the person thus laboring under these infirmities would not be responsible." *Beck v. State*, 76 Ga. 452, 470. Whether one voluntarily intoxicates himself with alcoholic liquor, or with a drug, would make no difference in principle. The charge of the judge was substantially to this effect, and there was sufficient evidence to authorize it.

[2, 3] 2, 3. The headnotes sufficiently state the rulings.

[4] 4. The defendant introduced the sheriff as a witness. As set out in the motion for a new trial, he testified that on Sunday after the homicide (the decedent having been shot on Saturday afternoon, and having died on Sunday morning) the defendant was placed in his charge as a prisoner, and so remained for two or three months, and was kept in jail by him; that during that time the witness had frequent conversations with and constantly observed the defendant, with a view of ascertaining and determining the mental condition of the latter; and that, from these observations and conversations, he was in a position to give his opinion on that subject. The court refused to let him give his opinion. Counsel for defendant stated that he expected to prove by the witness that in his opinion the defendant was insane, and that such was his condition on the day after the homicide. Sanity or insanity is a proper subject for opinion evidence. In such a case "any witness may swear to his opinion or belief, giving his reasons therefor." Code 1910, § 5874. An expert witness may base his opinion on a hypothetical statement of facts, and may state his opinion, without giving reasons. That the statement of facts or reasons given by the sheriff as a basis for his opinion as a nonexpert witness was sufficient to authorize the admission of such opinion is decided by former rulings of this court. *Withrow v. State*, 136 Ga. 387, 71 S. E. 139 (1911); *Potts v. House*, 6 Ga. 324 (4), 336 et seq., 50 Am. Dec. 329; *Choice v. State*, 31 Ga. 424, 465, 466; *Central R. & Banking Co. v. Kelly*, 58 Ga. 107, 111; *Taylor v. State*, 83 Ga. 647, 10 S. E. 442; *Herndon v. State*, 111 Ga. 178, 36 S. E. 634.

In *Bowden v. Achor*, 95 Ga. 245, 22 S. E. 254, the abstract rule was announced that it was not admissible for a witness who is not an expert in such matters to testify to his opinion with reference to the mental capacity of another, without stating the facts upon which that opinion is based. No application of it was made, nor was it declared what was a sufficient statement of reasons to furnish a basis for admitting the opinion of a nonexpert. In *Welch v. Stipe*, 95 Ga. 762, 22 S. E. 670, the rule was again announced, and its application carried quite far, under the facts of the case. It was held that a mother could not testify that her deceased daughter was of unsound mind, although it appeared

that the two had lived together during the entire lifetime of the daughter, about 40 years; "the mother herself not giving any reason whatever arising from their relationship or the long association between them, or stating any fact upon which her opinion as to the daughter's mental condition was based." In the opinion it was said that if the witness had detailed any of the peculiarities, mental or otherwise, and based the opinion which she did express upon such observation, it would have been admissible, and that if, without this, "she had stated the fact of such association, and distinctly referred her opinion to that for its basis, by saying that it was her opinion, derived from such association, that her daughter was of unsound mind, such opinion might have been competent."

In *Graham v. State*, 102 Ga. 650, 29 S. E. 582, an extraordinary motion for a new trial was made on the ground of newly discovered evidence, set forth in an affidavit stating that the accused "is of unsound mind"; that he was easily excited, and, when under such excitement, the witness "would not consider him responsible for his actions." The statement that the accused "is" of unsound mind was considered as referring to the time when the affidavit was made; the opinion of the witness that the accused was not "responsible for his acts" was held inadmissible; and the general opinion that the accused was of unsound mind was then considered on the assumption that it referred to the time of the homicide. It was said *arguendo* that this would not have been admissible in evidence without the reasons on which it was based, and finally it was held that, if such opinion would have been admissible in evidence, it was not of such weight as to require the grant of the extraordinary motion for a new trial.

These decisions, when considered in connection with the facts on which they were based and the exact points ruled, do not furnish any conflict with the decisions cited in support of the ruling now made. We hold that the sheriff's opinion was admissible in evidence. The opinion of a competent witness that the accused person is insane—of unsound mind—is admissible, along with the other evidence, in determining whether the insanity reaches the point of legal irresponsibility.

[5] Under the facts of this case, however, we do not think the exclusion of this evidence requires a new trial. Omitting cases of paranoia or delusional insanity, and dealing with general insanity, the test of criminal responsibility established in this state is whether the person had sufficient reason to distinguish between right and wrong, in relation to a particular act about to be committed. *Roberts v. State*, 3 Ga. 310; *Carr v. State*, 96 Ga. 285 (2), 22 S. E. 570; *Flanagan v. State*, 103 Ga. 619, 625, 30 S. E. 550; *Taylor v. State*, 105 Ga. 746, 775, 31 S. E.

764. Here a number of witnesses were examined as to the acts and conduct of the accused and his condition at the time of, before, and after the homicide. Physicians who examined him while in jail and the officer who arrested him were introduced on behalf of the accused. A very full examination of the question of insanity was had. While there was evidence tending to show unsoundness of mind, the jury did not believe it showed the accused to have been incapable of distinguishing right from wrong as to the act which he committed, at the time of its commission.

We think their finding was warranted. The sheriff detailed no facts showing an inability to distinguish between right and wrong. His mere general opinion that the accused was insane while in jail, not even going to the extent of giving an opinion that the accused could not distinguish right from wrong, could hardly have changed the verdict. In view of the entire evidence, this ruling does not require a reversal.

5. Nothing in the motion required a new trial.

Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(127 Ga. 143)

#### GABBETT v. HINMAN.

(Supreme Court of Georgia. Nov. 16, 1911.)

(Syllabus by the Court.)

REFORMATION OF INSTRUMENTS (§ 20\*) — GROUNDS—MISTAKE—FRAUD.

If an owner of land agrees to sell a part of it, and such part is measured by her agent and the purchaser between certain fixed boundaries, and the purchaser undertakes to prepare a deed, and fraudulently makes the description cover the entire property, instead of the part sold, and the owner signs the deed under a mistake of fact as to what it includes, which is known to the purchaser, equity may reform the deed, so as to make it describe the land actually sold, if the plaintiff is not prevented from obtaining relief on account of laches.

(a) There was enough in the petition to set forth a case of the character indicated in the preceding headnote, and the petition was not subject to general demurrer.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 79, 80; Dec. Dig. § 20.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Sarah E. Gabbett against George B. Hinman. Judgment for defendant, and plaintiff brings error. Reversed.

W. R. Hammond, for plaintiff in error. Tye, Peeples & Jordan, for defendant in error.

LUMPKIN, J. Sarah E. Gabbett filed her equitable petition against George B. Hinman, seeking to obtain reformation of a deed, or, if this were not granted, to recover a



money verdict. The court dismissed the petition on general demurrer, and the plaintiff excepted.

Equity will not generally reform a written contract on the ground of mistake, unless it is shown to be the mistake of both parties; but it may rescind and cancel upon the ground of mistake of fact material to the contract, though the mistake be that of one party only. Civil Code 1910, § 4579. In *Wyche v. Greene*, 28 Ga. 415 (decided in 1858), it was held that what is a mistake on one side, and a fraud on the other, is as much the subject of correction as if it were a mistake on both sides. This decision was rendered before the adoption of the first Code in this state. But it has been held that the Code did not alter this rule. *Shelton & Co. v. Ellis*, 70 Ga. 297; *Venable v. Burton*, 129 Ga. 537, 59 S. E. 253; *Central of Ga. Ry. Co. v. Gortatowsky*, 123 Ga. 366, 51 S. E. 469; *Bridwell v. Brown*, 43 Ga. 179; Civil Code 1910, § 4114, par. 2. The mistake of one party only to a contract, without mistake or fraud of the other party in reference to the same matter, will not authorize reformation of a written contract. To reform the contract under such circumstances, so as to correct the mere error of one party, would be, in effect, to make a contract which the parties did not make for themselves. If land is sold by the entire tract or lot, and the quantity is specified as "more or less," this qualification will cover any deficiency not so gross as to justify the suspicion of willful deception or mistake amounting to fraud. *Wylly v. Gazan*, 69 Ga. 506; *Kendall v. Wells*, 126 Ga. 343, 55 S. E. 41.

Applying these principles to the plaintiff's equitable petition, we think it was error to dismiss it on general demurrer. Some of the allegations are not appropriate to a case for reformation, but there is enough to withstand a general demurrer. It was alleged, among other things, as follows: The plaintiff owned certain land lying between the line of the Hinman lot and the projection of Lowndes street. She sent a carpenter to build a fence on the dividing line between her land and the Hinman lot, but by mistake he built it 27 feet eastward from such line. An agent representing her negotiated a sale to Hinman of land fronting 175 feet on Currier street, at the rate of \$10 per front foot, and her agent and Hinman together measured the frontage from the fence eastwardly to the boundary on that side, for the purpose of arriving at its length and the consequent amount of purchase money to be paid. The line so measured was 175 feet in length. "Your petitioner avers that this is the property shown to the said defendant by your petitioner's said agent, and measured off by him for said defendant, and which was paid for by the said defendant. \* \* \* Her said agent, when he pointed out said property to the defend-

ant, and when he and the defendant measured the same, told the defendant that the fence was the beginning point, and that the defendant understood distinctly from your petitioner's said agent at the time that the land he was buying from your petitioner began at the fence and extended eastward on the north side of Currier street, one hundred and seventy-five (175) feet, and the defendant acquiesced in said beginning point as being at the fence, and assisted your petitioner's said agent in measuring the same with the tape line, \* \* \* and that the defendant then and there acquiesced in said line as measured by him and said Graves [the plaintiff's agent] as the front of the property being sold to him by said Graves for your petitioner, and the defendant undertook the preparation of the deed for your petitioner to sign, and that he had said deed artfully prepared, so as to cover twenty-seven (27) feet more ground than he bought, although said line was described as one hundred and seventy-five (175) feet, and your petitioner signed said deed in the form prepared by the defendant under the mistaken belief that it only covered the land between the fence and the eastern terminus, as described in said deed."

The plaintiff was old and in feeble health, and took no part personally in the measurement of the property, and was not present, but relied upon her agent. The defendant knew that the fence was not on the dividing line between the plaintiff's property and the adjoining property, but was 27 feet eastward therefrom, and concealed the fact from the plaintiff and her agent, and suffered and permitted the latter to begin the measurement at the fence; he knowing her condition, and that her agent was laboring under a mistake as to the proper location of the dividing line, and hoping and intending to get the advantage of her in the trade, and get 27 feet more frontage on Currier street than he was paying for. It was charged that the defendant knew, when the plaintiff signed the deed at his request, that it extended 27 feet west from the fence, and included a strip having that frontage on Currier street between the fence and the Hinman line, and that the plaintiff did not know it, and the defendant artfully and fraudulently concealed the facts from her and her agent, and thereby obtained a deed covering the extra 27 feet, for which he did not pay. The deed described the lot conveyed as extending from the Hinman line to the extension of Lowndes street, and fronting on Currier street 175 feet, more or less. The words "more or less" were inserted to cover any slight inaccuracy in the measurement made, because it was made with a cloth tape line, but not with any view of covering an excess of 27 feet.

If these allegations are true, the case falls within the ruling in the decisions above cited. There were expressions in the peti-

tion to the effect that the plaintiff and her selling agent thought the fence was on the Hinman line, and indicating an intent to sell her entire lot, but a mistake as to its frontage, taken advantage of by the defendant. If a deed described the land conveyed as bounded on one side by the land of a third person, the true boundary line between the land conveyed and the land of such third person must be taken as the boundary line of the land so conveyed, and not a conventional line agreed upon in parol by the parties at the time the deed was executed, if there be a variance between such two lines. The deed will control, unless it can be reformed. *Hall v. Davis*, 122 Ga. 252, 50 S. E. 106. On the trial the plaintiff may or may not be able to sustain her allegations above set out, but they must be treated as true on general demurrer.

It does not sufficiently appear on the face of the pleadings that plaintiff was guilty of such laches as to prevent her from obtaining equitable relief. If such be the fact, it can be determined on the trial. Civil Code 1910, §§ 4571, 4581.

Judgment reversed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 82)

#### GLOVER v. STATE.

(Supreme Court of Georgia. Nov. 14, 1911.)

(*Syllabus by the Court.*)

#### 1. CRIMINAL LAW (§ 365\*)—EVIDENCE—RES GESTÆ.

It is permissible to prove as part of the res gestæ that the accused successively fired upon two persons, although he was on trial for the murder of the person whom he wounded when he fired the first time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 807; Dec. Dig. § 365.\*]

#### 2. HOMICIDE (§§ 203, 215, 218\*)—EVIDENCE—DYING DECLARATIONS—CONSCIOUSNESS OF DYING CONDITION.

To render a dying declaration admissible in evidence, the circumstances attending the making of the statement must be such as to show that the declarant was in articulo mortis and conscious of his condition. The court did not err in excluding the alleged dying declaration, because the necessary preliminary proof was not made, and the expected answer contained no assertion as to who killed him, but that "he laid the killing on some one else."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437, 451-457; Dec. Dig. §§ 203, 215, 218.\*]

#### 3. WITNESSES (§ 388\*)—IMPEACHMENT—CONTRADICTORY STATEMENTS.

It is not competent to prove a statement by one of the parties who was shot, and who was sworn as a witness for the state, to the effect that he did not wish the defendant hurt for his act. Even if evidence of this character be admissible for the purpose of impeachment, it was not admissible in this case, as the necessary foundation for impeachment by contradictory statements was not laid.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233-1246; Dec. Dig. § 388.\*]

#### 4. CRIMINAL LAW (§ 786\*)—TRIAL—INSTRUCTIONS—EFFECT OF DEFENDANT'S STATEMENT.

The practice of instructing the jury in the language of the Code section as to the effect to be given to the defendant's statement is to be commended.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895-1901; Dec. Dig. § 786.\*]

#### 5. HOMICIDE (§ 308\*)—INSTRUCTIONS—ELEMENTS OF OFFENSE.

The charge of the court to the effect that if a person shoots at another with malice, and by accident kills a third person, the crime is murder, was neither confusing nor inapplicable.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 308.\*]

#### 6. SUFFICIENCY OF EVIDENCE—NO ERROR.

Other assignments of error are without merit. The evidence supports the verdict.

Error from Superior Court, Crisp County; U. V. Whipple, Judge.

Kid Glover was convicted of murder, and brings error. Affirmed.

Kid Glover was convicted of the murder of Charlie West and sentenced to be hanged. The killing occurred shortly after midnight at the home of one Willie Royal. The evidence for the state made substantially the following case: There was a "supper" in progress in the home of Willie Royal. The defendant, in company with one Isom Crumley, and armed with a shotgun and a pistol, came to the house about midnight. Crumley had in his pocket several loaded gun shells. Some time thereafter the deceased, Charlie West, began to curse in the house, and Sammy Royal asked him not to curse in the house. Charlie West then went out on the porch and again began to curse. Sammy Royal, Garfield Royal, Charlie West, and others were at that time on the porch and out in the yard at a fire in front of the house. Willie Royal came out of the house and told the deceased not to curse at his house; that he did not want to have any fuss, and would break up the frolic before he would have any fuss. They engaged in heated conversation, and the deceased struck Willie Royal with his pistol. Garfield Royal then grabbed Charlie West, the deceased, and at this time Kid Glover, who was standing about 10 feet from them toward the other end of the porch, shot the deceased. In the scuffle between the deceased and the Royals, the deceased's pistol fired, immediately before the defendant shot. The defendant then turned and shot Garfield Royal, who had jumped off of the porch onto the ground. The defendant then got some shells from Isom Crumley, reloaded his gun, and threatened to shoot Willie Royal, declaring that he had come there, not to kill one, but to kill a "whole damn thousand," etc. The deceased was shot in the leg, and Garfield Royal in the arm; both wounds having been inflicted with a shotgun. The defendant contended that he did

not shoot the deceased at all, but that he was shot by Garfield Royal; and that the only shot fired by the defendant was when he shot Garfield Royal, after the latter had shot Charlie West and jumped from the porch. The defendant made a motion for a new trial, complaining of the admission of certain evidence and of the court's charge. The motion for new trial was overruled.

J. W. Dennard and Pearson Ellis, for plaintiff in error. W. F. George, Sol. Gen., Crum & Jones, and T. S. Felder, Atty. Gen., for the State.

EVANS, P. J. (after stating the facts as above). [1] 1. Complaint is made that the court should have restricted the evidence to the shooting of the decedent, and should have repelled testimony that immediately after the accused shot the deceased he also shot and wounded another person. The shooting of the deceased and the other person were part of the same transaction, and admissible under the rule of *res gestæ*. Indeed, the evidence authorized an inference that the accused really intended to shoot Garfield Royal in the first instance when he fatally wounded the decedent, and when Royal jumped from the veranda the accused fired upon him, inflicting a serious wound.

[2] 2. The deceased was shot in the leg with a shotgun. Soon after receiving his wound he was placed in a buggy for the purpose of being carried to a doctor. While en route he said, "I am in bad condition," and shortly thereafter he died from loss of blood before reaching the physician. A witness was asked, "What was the conversation that took place between him and Kid at that time?" referring to a conversation alleged to have taken place while the parties were in the buggy. Upon objection being made that the proper foundation had not been laid for the admissibility of any statement by the decedent as a dying declaration, counsel for the accused stated to the court that, while he could not prove the decedent said he was in a dying condition, he expected to show that the decedent "laid the killing on some one else," and that the jury could infer from that whether or not it was a dying statement. The evidence was excluded. While it is not essential to show that the declarant affirmatively said he was in a dying condition, to render a dying declaration admissible in evidence, yet it must appear from the attendant circumstances that the declarant was in articulo mortis, and conscious of his condition, at the time of making the declaration. Pen. Code 1910, § 1028. We think the testimony falls short of this requirement. The decedent was shot in the leg, and death was caused by loss of blood, and the evidence discloses no utterance or act, by him or the other persons with him, indicating any appreciation of the

probable fatality of the wound. There is no fact brought out in the evidence which would serve to show that the decedent believed that death was imminent at the time of making the alleged statement. Besides, the answer which the court was apprised the declarant would make was that he "laid the killing on some one else," and was too indefinite. It was not the statement of a fact as to who killed him.

[3] 3. The court refused to allow testimony that Garfield Royal, who was shot by the accused, and who testified in behalf of the state, said that he did not want the accused hurt. The testimony was not offered for the purpose of impeachment, as no foundation was attempted to be laid. The desire of a witness that the defendant be acquitted is totally irrelevant.

[4-6] 4-6. Other rulings on points made in the record appear in the headnotes. The evidence supports the verdict, which has the approval of the trial judge, none of the assignments of error are meritorious, and the judgment refusing a new trial is affirmed.

Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(10 Ga. App. 128)

#### GLENN v. STATE. (No. 8,758.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

#### 1. WEAPONS (§ 11\*)—RIGHT TO CARRY—MINORS.

The act approved August 12, 1910 (Acts 1910, p. 134), prohibits any applicant under the age of 18 years from obtaining a license to have a pistol or revolver about his person; and, as the terms of the act make it unlawful for any person to have a pistol or revolver about the person, except as stated, it follows by necessary implication that a minor under 18 years of age cannot legally have a pistol or revolver about the person, either with or without license.

[Ed. Note.—For other cases, see Weapons, Dec. Dig. § 11.\*]

#### 2. INFANTS (§ 13\*)—PROTECTION—STATUTORY PROVISIONS—POLICE POWER.

This state, in the exercise of its police power, has adopted the policy (as indicated by many statutes) of protecting minors from the formation of vicious habits or evil conduct; and this policy is not only within its police power, but is a wise exercise thereof. Minors are the wards of the police power of the state.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 14; Dec. Dig. § 13.\*]

#### 3. SUFFICIENCY OF EVIDENCE—NO ERROR.

The verdict is supported by evidence, and no error of law appears.

Error from City Court of Jackson; H. M. Fletcher, Judge.

John Glenn was convicted of having about his person a pistol or revolver without having obtained a license, and brings error. Affirmed.

W. E. Watkins, for plaintiff in error. C. L. Redman, Sol., for the State.

HILL, C. J. John Glenn was convicted of a violation of the act approved August 12, 1910 (Acts 1910, p. 134), which prohibits any person from having about his person a pistol or revolver without first having obtained a license from the ordinary of the county of his residence. His motion for a new trial was overruled, and he brings error. [1] He contends that his conviction was illegal for two reasons: First, because he was under the age of 18 years, and the act in question did not apply to minors of such tender years, as by the terms of the act the ordinary was authorized to grant license only to applicants 18 years of age or over, and that, as minors under that age were not allowed to procure a license, it was illogical and unjust to punish them for failing to do something that under the terms of the act they were not allowed to do; and it is insisted, apparently with seriousness, that minors in this state under the age of 18 years are legally allowed to carry pistols or revolvers on their persons without any license, if they do not carry them concealed. We think the conclusion is a non sequitur. Indeed, we frankly confess that it would take an express declaration of the Legislature of the legislative intent, before we would be willing to place the lawmaking body of the state in the attitude of requiring adults to obtain licenses before they could have or carry pistols or revolvers about their persons, and of permitting, in the same statute, minors under the age of 18 to have this right without any restriction. On the contrary, we are convinced that it was the intention of the Legislature that minors under 18 should not have this right at all, either with or without a license.

[2] This purpose is not only manifest, but wise. It is also in harmony with the legislative policy of the state as to rights of minors. The police power of the state makes a special charge of minors. It gathers them under its ample and protective wing "even as a hen gathereth her brood." Minors, as to their property rights, are the wards of chancery. Minors, as to their protection from vicious conduct or habits, are the wards of the police power of the state. The truth of the latter part of this statement is proved by the numerous statutes in the Code restricting the exercise by adults of rights in so far as the exercise of these rights relate to minors. No person controlling a billiard table, pool table, or tenpin alley is allowed to permit a minor to play or roll on the same. Pen. Code 1910, § 406. No person can furnish to a minor spirituous, intoxicating, or malt liquors without first obtaining written authority from parent or guardian. Pen. Code 1910, § 444. No one is allowed, through himself or agent, or in any other way, to furnish a minor with cigarettes, cigarette

tobacco, cigarette paper, or any substitute therefor. Pen. Code 1910, § 491.

Illustrating the purpose of the Legislature in the act now under discussion, no person can knowingly sell, or furnish, any minor with "any pistol, dirk, bowie knife, or sword cane, except under circumstances justifying their use in defending life, limb, or property." Is not this section inconsistent with that part of the act of 1910 which permits a license to be granted to a minor, even above the age of 18 years, to carry about his person a pistol or revolver, if he cannot be furnished or sold a pistol by any one? He should not be permitted to have a license to carry that which he can neither legally buy nor receive as a gift. Neither can any one furnish to minors any malt liquors, whether such liquors are intoxicating or not. *Stoner v. State*, 5 Ga. App. 720, 63 S. E. 602. An adult is not permitted to gamble with a minor at any game played with cards, dice or balls. Of course, adults cannot lawfully gamble with each other; but the penal statute above noted makes it a distinct offense for an adult to gamble with a minor. Pen. Code 1910, § 393. These and other statutes of similar character all prove the truth of the statement that the protection of minors is a favorite exercise by the state of its police power. We conclude, therefore, that the act of 1910 not only prohibits minors under the age of 18 years from obtaining license to have a pistol or revolver on their persons, but that the clear intentment of said act is to prevent minors from having about their persons at all this character of weapons, and this construction is in harmony with the general legislation of the state on the subject of minors.

2. The next ground upon which it is insisted that the conviction in this case was illegal is that, if the act in question is construed to prohibit minors from having about the person a pistol or revolver, this construction would be in violation of article 1, § 1, par. 22, of the Constitution of Georgia. This provision of the Constitution declares that "the right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne." The Supreme Court in the case of *Strickland v. State*, 137 Ga. 1, 72 S. E. 260, has held that the act is not violative of this provision of the state Constitution. While the exact question made in this record and now under consideration was not directly involved in that case, yet we think it fairly and reasonably deducible, from some of the language which is used by Mr. Justice Lumpkin in the opinion of the majority of the court, that the construction which we place upon the act in reference to minors under the age of 18 years is the view entertained by that court. It is entirely within the province of the Legislature, in the exercise of the police power of the state, to prohibit, on the part of mi-

nors, the exercise of any right, constitutional or otherwise, although it might only have the right in the case of adults to regulate and restrict such rights. For there are some rights which may be exercised by adults without harm to the state, but the same rights exercised by minors might injuriously affect in some way the public health, public safety, or public morality. Unquestionably the possession of a pistol or revolver by a minor constitutes a menace to the peace of the public, and to the safety of the individuals constituting the public.

So far as the writer of this opinion is concerned, he is decidedly of the opinion that the possession of a pistol or revolver about the person, either by a minor or an adult, concealed or open, is a menace to individual safety and to law and order, and he concurs strongly in the view of those able jurists who construe the constitutional provision above quoted as not applicable to the modern pistol or revolver. The framers of the federal Constitution and of the state Constitution did not have this weapon in contemplation as one of the constitutional rights of the citizen. This constitutional provision, rationally construed, applies only to such "arms" as could be used by the army or the militia in the preservation of public order. It is incredible that any lawmaking body, cognizant of the evils of having about the person a pistol or revolver, would have intended to preserve such evil by a constitutional provision. The ordinary pistol or revolver, usually carried in the hip pocket, is not a weapon of defense. It is a weapon of offense. The pistol is, in the opinion of the writer, the most offensive weapon ever devised by the ingenuity of man for the destruction of life and the peace of society. The people in their sovereign capacity have the right to prohibit absolutely this evil, and the individual member of society cannot claim it as one of the inalienable constitutional privileges of personal liberty. In a free country, no man has any personal right that is not subservient to the public weal. "Salus populi suprema lex" is a rule of unlimited application, and qualifies every personal right of the citizen.

One of the ablest and wisest judges who ever presided in the Supreme Court of this state, in discussing this provision of the Constitution, in the case of *Hill v. State*, 53 Ga. 472, uses the following wise and cogent language in alluding to this right claimed to exist under the Constitution: "It is to secure the existence of a well-regulated militia, \* \* \* and I have always been at a loss to follow the line of thought that extends the guaranty to the right to carry pistols, dirks, bowie knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day. It is in my judgment a perversion of the meaning of the word 'arms,' as used in the phrase 'the right to keep and bear arms,' to treat it as including weapons of this character. \* \* \* The

Constitution is to be construed as a whole. One part of it is not to be understood in such a sense as will militate against another. It is as well the duty of the General Assembly to pass laws for the protection of the person and property of the citizen as it is to abstain from any infringement of the right to bear arms. The preservation of the public peace, and the protection of the people against violence, are constitutional duties of the Legislature, and the guaranty of the right to keep and bear arms is to be understood and construed in connection and in harmony with these constitutional duties."

This construction of the constitutional provision was referred to by Mr. Justice Lumpkin, apparently with approval, in his able and learned opinion in the *Strickland Case*, supra. But, irrespective of the views entertained by Judge McCay as to the proper construction of this constitutional provision, it must be conceded by every one that, so far as minors are concerned, the Legislature of this state, in the exercise of its police power, has, by the statute in question, absolutely prohibited minors from having about their persons a pistol or revolver. If there was any doubt on this question, or any possibility of a difference as to the constitutionality of that portion of the act of 1910 restricting the right of a minor under 18 years of age to have about his person a pistol or revolver, we would certify this question to the Supreme Court for instruction. But we think the construction which we have given it is so clearly covered by the decision recently made in the *Strickland Case*, supra, that it would be wholly superfluous to do so.

We are asked by counsel for the plaintiff in error to certify to the Supreme Court the decision in the *Strickland Case* for review, in order that the same may be overruled. We decline to do so. The *Strickland Case* is too recent, and so fully meets our own views as to the proper construction of the statute that we do not feel warranted in complying with the request.

Judgment affirmed.

(10 Ga. App. 115)

KILLENS v. STATE. (No. 3,639.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No material error of law is complained of, and the evidence is sufficient to support the verdict.

Error from City Court of Miller County; C. C. Bush, Judge.

Jake Killens was convicted of crime, and brings error. Affirmed.

Bush & Stapleton, for plaintiff in error. P. D. Rich, Sol., for the State.

RUSSELL, J. Judgment affirmed.

**GRUSIN v. STATE** (No. 3,682.)†  
(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

**1. CONTINUANCE.**

There was no abuse of discretion in overruling the motion for a continuance.

**2. REVIEW OF EVIDENCE.**

The evidence amply authorizes the verdict of guilty, and no error of law appears.

Error from City Court of Richmond County; W. F. Eve, Judge.

J. Grusin was convicted of crime, and brings error. Affirmed.

Isaac S. Peebles, Jr., for plaintiff in error.  
J. C. C. Black, Sol., and John M. Graham, for the State.

**RUSSELL, J.** Judgment affirmed.

(10 Ga. App. 118)

**HERNDON v. STATE** (No. 3,743.)  
(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

**INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTIONS—SUFFICIENCY OF EVIDENCE.**

No error of law appears, and the evidence supports the verdict.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 236.\*]

Error from City Court of Macon; Robt. Hodges, Judge.

Lewis Herndon was convicted of selling intoxicating liquors and keeping them on hand at his place of business, and brings error. Affirmed.

The accusation charged Lewis Herndon with selling alcoholic, spirituous, malt, and intoxicating liquors, and with keeping such liquors on hand at his place of business. There was a general verdict of guilty. His motion for a new trial contains, besides the general grounds, the following assignments of error: (1) The verdict is contrary to law and the evidence, in that the uncontradicted testimony of an unimpeached witness, to wit, W. P. Dumas, affirmatively showed that the alleged liquor which formed the basis for the prosecution was not found at the defendant's place of business; that the place where it was found was not a part of the defendant's place of business; that the defendant had no control over the said place; that the room or passage where the whisky was discovered was in a portion of the building rented to and in the control of third parties, not connected in any way with defendant or his business. (2) Because the officer who made the arrest was allowed to testify as follows: "After I had placed the defendant under arrest, and had reached the door leading into the room where I found the whisky, I told the defendant to get the key to this door, and had him unlock and open the door of the room. When he opened

the door, I saw the whisky at the foot of the staircase. It was at my direction that defendant got the key, and at my direction that he unlocked and opened the door to the apartment where I found the whisky." The introduction of this testimony was objected to, because the officer compelled the accused to furnish the incriminating evidence against himself, in violation of the Constitution and laws of this state, which provide that no person shall be compelled to give testimony tending in any manner to incriminate himself, and that it was acquired while defendant was under arrest, and without his consent, and against his will. The court overruled the motion for a new trial, and this judgment constitutes the assignment of error.

The evidence, substantially stated, is as follows: The deputy sheriff of Bibb county testified, that the accused ran a "soft drink" place and pool room on Cotton avenue, near New street, in the city of Macon, Bibb county; that in company with another officer he went to this place on the 26th day of March, 1911, where he arrested the defendant. The front door of the "soft drink" establishment and pool room opened on Cotton avenue. The front room was used by the defendant as his "soft drink" place, where he kept soda water, cigars, etc. Just behind this room was the defendant's pool room, separated by a wall, with a door between. In the rear of the pool room, at the left-hand corner, "is a little room or passage, cut off by a wall running from ceiling to floor. It is very small, and there is a door leading into it from the pool room. This door was open on the night of the arrest. Passing into this door, and going directly forward about three or four feet across this little room or passage, you come to another wall leading from ceiling to floor, which has a door, and this door opens from the little room just mentioned into a room or passage from which a stairway leads to the second story of the building. This door was locked, and the defendant, at my instance, got the key and unlocked it. The door which I found open leading out of the pool room was only three or four feet from the door of the room or passage in which the whisky was found, and which was locked, and to which defendant furnished the key, and all was under one and the same roof with the 'soft drink' place of the defendant and his pool room. In this last-named room or passage, just at the foot of the stairway, I found an ordinary five-cent basket containing several flasks of whisky. There were six half pints of rye and one half pint of corn whisky in the basket. I asked the defendant for the key to the door at the top of the staircase, which was also locked, and he said that he did not have it; that some member of the bricklayers' union had it. When I found the whisky, I said to the defendant, 'I have found your liquor.'

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

†For complete opinion, see 75 S. E. 350.

and he said, 'Yes, sir; you've got me.' That is all I remember that was said. The stairway which leads to the upstairs of this building had the appearance of not being in use, as there was considerable trash on it, and the door opening on the rear porch and in front of the stairway just mentioned was closed at the time the whisky was found. There is another stairway which leads to the upstairs of this building from the front and on the outside of this building. I went to the defendant's place of business with a warrant for him and for the purpose of searching for whisky. This was the only whisky or intoxicants found on this occasion on the place. We made a thorough search of defendant's entire place. The building occupied by him is a two-story brick building, and his place of business is in the lower story. After passing from the pool room, I had to go through two doors before I reached the room containing the basket with the whisky in it." The state also introduced in evidence a diagram of the part of the building occupied by the defendant, showing the exact location of the room and place in which the whisky was found, and also introduced a five-cent basket containing six half pints of rye whisky, most of which was dreggy, and a half pint of corn whisky, which had been opened and had in it an ordinary house fly.

The following evidence was introduced in behalf of the defendant: W. B. Dumas testified that he was the owner of the building in which the defendant's place of business was located, and had rented the lower floor to him, and that the defendant ran a "soft drink" place in front and a pool room in the rear; that he rented the upstairs of the building to a colored bricklayers' union; that there were two stairways leading to the quarters above, the front stairway being on the outside of the building, and the rear stairway on the inside, and the bricklayers' union rented and controlled both stairways, as well as the passage down into which the stairway lands, and that this passage was not a part of the building which was rented to the defendant, and that he had no control over it and no right to use it; that the place where the whisky in question was found was not in any room, but in the little passageway or hall leading to the staircase in the rear of the building, and was separated from that part rented to the defendant by a wall reaching from the ceiling to the floor; that the members of the bricklayers' union often left the key to their quarters in the store of the defendant for their own convenience, and they often left it in the store of the witness, just a few doors below.

The defendant, in his statement to the jury, said that he ran this "soft drink" place and pool room on Cotton avenue; that he had never sold any whisky, beer, or in-

toxicants of any kind at this place of business, and had never kept any on hand; that on the night of his arrest the officers came into his place of business and told him that they wanted to search the place, and proceeded to do so; that they exhibited no warrant of any kind, and did not tell him that they had one; that they searched his "soft drink" place, in the front room, but found no whisky; that they went through the door leading back into the pool room, searched it, and found none. They then came to the door in the wall which runs from the ceiling to the floor and separates his place of business from that part of the building rented to the colored bricklayers' union. This door was locked, and, at the command of the officer, he went and got the key and opened the door. The union rented the entire upstairs of the building, including this stairway in the rear, and the little passage or apartment where the stairway lands, the place where the officer found the whisky. He stated that he had no control over the upstairs of the building, the stairway leading thereto, or the little passageway or apartment at the foot of the staircase where the whisky was found; that these places had no connection with his place of business, which was separated from them by a wall reaching from the ceiling to the floor; that, his store being just under the union men's quarters, the key to the door leading upstairs was often left in his store for the convenience of the men of the union, who were frequently going to their quarters. He further stated that on the night of the arrest he had gotten the whisky for his own use and was going to carry it home and strain it, as it was full of trash and dregs, and one bottle had a fly in it; that in the condition in which it was found it was not fit for use; that, knowing that it was a violation of law to keep or put whisky in one's place of business, he got the key, unlocked the door leading into this passage where the stairway comes down, placed the basket with the whisky in it there, and relocked the door, intending, when he started home later, to unlock the stairs, get the basket, and carry it home with him; that it had been setting there only a short time before the officers came in, it being only a few minutes before closing time; that he set the basket in the passageway because it had no connection with his place of business, as he knew that by setting it there he would not violate the law; that it was not his custom to use this passage or stairway for any purpose; and that he only set the basket there on the night of his arrest to avoid putting it in his store.

W. D. Nottingham and W. A. McClellan, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 187)

**ABRAM v. MAPLES, Warden.** (No. 3,764.)  
(Court of Appeals of Georgia. Nov. 20, 1911.)*(Syllabus by the Court.)***1. FINES (§ 13\*)—IMPRISONMENT—RIGHT TO DISCHARGE.**

Where the court sentences a misdemeanor convict in the alternative, directing that he labor upon the public works as the proper authorities of the county may direct, for the space of 12 months, with the privilege of paying a designated fine and costs at any time after entering upon said public works, and thereupon be discharged from custody, and it appears that shortly after the imposition of the sentence, and while the defendant was in the custody of the public authorities of the county, he made a tender of the fine and costs to the sheriff of the county, it was the duty of the sheriff to accept the fine and costs as thus tendered, and to notify the proper authorities, who held the custody of the defendant under said sentence, that the sentence had been fully complied with in the payment of the fine and costs to him; and, upon receiving this notice from the sheriff, it was the duty of the officer holding the custody of the defendant under this sentence to discharge him from further custody.

[Ed. Note.—For other cases, see *Fines*, Cent. Dig. § 14; Dec. Dig. § 13.\*]

**2. FINES (§ 13\*)—IMPRISONMENT—RIGHT TO DISCHARGE.**

Where a sentence has been imposed in a misdemeanor case in the alternative, the misdemeanor convict has the right, as a matter of law, to pay, within a reasonable time, that part of the money sentence imposed upon him by the court; and, upon payment or tender thereof to the sheriff of the county within a reasonable time, he is entitled to be discharged from any further custody under the sentence.

[Ed. Note.—For other cases, see *Fines*, Cent. Dig. § 14; Dec. Dig. § 13.\*]

Error from City Court of Camilla; H. C. Dasher, Jr., Judge.

Application by Janie Abram for writ of habeas corpus to A. A. Maples, Warden of Convicts for the County of Mitchell. From a judgment refusing the writ, the petitioner brings error. Reversed, with directions.

This is a writ of habeas corpus against the warden of convicts for the county of Mitchell for the purpose of testing the legality of the warden's custody of Charlie Abram, the husband of the petitioner. The facts are as follows: Charlie Abram entered a plea of guilty to the offense of gaming, in the city court of Camilla, on the 19th day of July, 1911, and thereupon the judge of the court imposed upon him the following sentence: "Whereupon it is considered by the court that the defendant, Charlie Abram, be put to work and labor on the public roads, or such other public works as the proper authorities of said county may direct, for the space of 12 months, with the privilege to pay a fine of \$60, including all costs of this prosecution, and be discharged at any time after entering upon such public work." The day after this sentence was imposed Charlie Abram was delivered by the sheriff of the county into the custody of the

respondent as warden of convicts for Mitchell county, and he was put to work upon the public roads of the county. Seven days after the imposition of the sentence B. H. Jones, a citizen of said county, representing the petitioner and Charlie Abram, went to O. D. Crowe, the sheriff of Mitchell county, and made a tender to him of the full amount of the fine imposed, and requested the sheriff to accept it, and demanded the discharge of Charlie Abram from custody. The sheriff refused to accept the money, assigning as a reason for the refusal that the authorities of the county would not discharge him from custody. On August 19th thereafter Jones made a like tender of the fine to the sheriff, which was again refused by him, and for the same reason, and on the following day Jones again made a tender to the sheriff of the fine imposed upon Charlie Abram, and requested him to accept the money, "and have the said Charlie Abram discharged, which said tender the said sheriff refused to accept, and refused to order the said Charlie Abram discharged."

The respondent admitted the allegations of the petition for the writ, in so far as the custody of Charlie Abram was concerned and his official position as therein stated. He sets up the following reasons why Charlie Abram should not be discharged from his custody: (1) That he holds custody of Charlie Abram as the warden of convicts of Mitchell county, under regular appointment of the prison commission of Georgia, under the sentence imposed by the court, and that the said Abram is under the absolute and exclusive control of the prison commission of Georgia; that the term of his sentence has not expired, and that as warden he has no authority to release the convict, unless authorized to do so by the prison commission of the state of Georgia. (2) That that part of the sentence which reads, "and be discharged at any time after entering upon such public work" is an old printed form and is mere surplusage; that it was not the intention of the judge, in imposing the fine and sentence, to incorporate in his sentence the language quoted, but that it was only his intention to give Charlie Abram, the defendant, a reasonable time in which to pay the fine after the imposition of the sentence, and that more than a reasonable time had elapsed for this purpose before the fine was tendered to the sheriff. (3) That the sheriff was not the proper officer to whom to make the tender of the payment of the fine, or to receive the fine. (4) That no notice or demand of any kind was ever served upon the respondent warden for the release of Charlie Abram; his first notice thereof being the application for his discharge under habeas corpus. (5) That no application was made to the prison commis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



sion for the release of Charlie Abram, and no notice was ever served on that body or tender made to it, and said commission had the exclusive control of the convicts.

The judge who imposed the sentence testified that after the imposition of the sentence he had some conversation with the defendant as to the time that would be allowed in which to pay the fine, and that he stated to the defendant that he would have until Mr. Maples, the warden, came after him, which would probably be the next day, and that it was his intention to give the defendant until the next day, or until Mr. Maples came after him, to pay the fine; that the form of the sentence which he used was the general form that had been in use for a number of years, and that he did not consider the language thereof in making out the sentence, simply signing the printed form. This testimony was objected to by the attorney for the petitioner, on the ground that it was irrelevant and immaterial, and was an effort on the part of the judge to change, modify, amend, revoke, and nullify a written sentence and judgment, after the term of the court at which it had been rendered. The admission of this testimony is assigned as error. The sheriff in his testimony admitted that the tender of the fine had been made to him, and that he refused it, and that, while he did not know whether he was the proper officer to receive fines imposed on prisoners in the city court of Camilla, he did collect most of them.

After hearing the evidence, the court refused to discharge Charlie Abram from custody, and this refusal is assigned as error.

E. E. Cox, for plaintiff in error. E. M. Davis, for defendant in error.

HILL, C. J. (after stating the facts as above). [1] We think the court erred in not discharging the convict. We are not disposed to be severely technical, or to require strict compliance with mere formal procedure, when the personal liberty of a citizen is concerned. The question, and the only one, to be determined, is: Is the custody of Charlie Abram, under the admitted facts of this case, legal? It is immaterial that the warden held his position under the prison commission of Georgia, and that neither he nor the prison commission had been given any notice that the fine imposed by the judge had been tendered to the sheriff. The validity of this custody is to be tested by the terms of the sentence imposed upon Charlie Abram, and whether he had complied with its terms, and to test this question it was not necessary for the prison commission or the warden to receive any notice of an effort made by the convict to comply with the terms of the sentence; nor does it matter whether or not the sheriff was, strictly speaking, the officer to whom the tender should have been made and who should have

received the fine. We think, however, he was such officer. It is a general practice of sheriffs of this state to collect fines imposed in criminal cases. They are bonded officers of the state, and while it may not be expressly within their duties, in practice it is generally performed by them, and in this case the sheriff states that he had collected the fines imposed in the city court.

[2] It is admitted that the tender of this fine was made by the agent of the petitioner and Charlie Abram, the convict, seven days after the fine had been imposed, and this tender was twice repeated a few days thereafter, and the fine was every time refused by the sheriff. Penal Code 1910, § 1111, provides that "every fine imposed by the court under the authority of the Code shall be paid immediately, or within such reasonable time as the court may grant." In the present case the court imposed a fine in the alternative, and gave to the defendant the privilege of paying this fine, including all costs, at any time after entering upon his labor on the public works of the county. Where the courts have a right to impose a fine as a part of a sentence, we think they also have a right to grant to the defendant the privilege of paying it at any time during his period of confinement under the sentence, and the payment thereof should operate as a discharge from further custody. This is a privilege in favor of liberty, and should be left to the discretion of the trial court. Now, in this case the judge who imposed the sentence testified to the effect that it was not his intention to give such an extended privilege to the defendant in reference to the payment of the fine, but meant to give him only a reasonable time in which to pay it.

We do not think that the testimony of the judge on this point was relevant or material. It certainly could not operate to change the sentence, which was unambiguous. It was the duty of the court, in the exercise of his discretion, to prescribe at least a reasonable time within which to pay the fine; and even if we disregard the time which the judge did actually prescribe for that purpose, the law itself would give to the defendant a reasonable time in which to pay the fine, and would declare what would be a reasonable time in each particular case, under the evidence. *Dunaway v. Hodge*, 127 Ga. 690, 55 S. E. 483. In that case the Supreme Court held that 15 days after a fine had been imposed was a reasonable time in which to make a legal tender in payment of the fine and costs, and that it should have been accepted and the prisoner discharged. In the case of *Broomhead v. Chisolm*, 47 Ga. 393, the court decided that the better practice, in imposing a sentence with the alternative of a fine, would be for the judge to fix some reasonable time in which the prisoner might pay the fine, and that, if this

was not done, the prisoner would nevertheless be entitled, under the law, to a reasonable time in which to pay it. In the case above mentioned the sentence was imposed on March 12th, and on April 2d thereafter the tender of payment of the fine was made, and the court held that that was a reasonable time. Here the undisputed evidence is that the tender of the fine was made to the sheriff the first time within seven days after the imposition of the sentence. Certainly this was a reasonable time.

The material facts in this case, in our opinion, are fully controlled by the decisions of the Supreme Court in the cases of *Dunaway v. Hodge* and *Broomhead v. Chisolm*, supra; and, under the law as there decided, this court reverses the judgment of the lower court, with direction that Charlie Abram be permitted, by himself or any one acting for him, to pay the fine to the sheriff of the county of Mitchell, or other officer authorized to receive it, and that upon such payment, and notice thereof given to respondent, the warden who has him in custody shall discharge him from custody; otherwise, that he continue to hold in his custody the said Abram.

Judgment reversed, with direction.

(10 Ga. App. 142)

**GROWDER et al. v. MAPLES, Warden.**  
(No. 3,765.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(*Syllabus by the Court.*)

**FORMER DECISION CONTROLLING.**

This case is controlled by the decision of this court in the case of *Abram v. Maples, Warden*, 72 S. E. 932, this day decided.

Error from City Court of Camilla; H. C. Dasher, Jr., Judge.

Petition by Sarah Crowder and another for writ of habeas corpus to A. A. Maples, Warden of Convicts for the County of Mitchell. From a judgment refusing the writ, petitioners bring error. Reversed.

E. E. Cox, for plaintiffs in error. E. M. Davis, for defendant in error.

**HILL, C. J.** Judgment reversed.

(10 Ga. App. 136)

**WALL v. STATE.** (No. 3,763.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(*Syllabus by the Court.*)

**CRIMINAL LAW (§ 1064\*)—APPEAL—REVIEW—MOTION FOR NEW TRIAL.**

This case arose after the passage of the act approved August 21, 1911 (Acts 1911, p. 149), under which no judgment of a trial court in a criminal case is to be reversed "for lack of proof of venue or of the time of the commission of the offense, save where the particular point has been specifically raised by a ground of the original or amended motion for a new

trial." The only point insisted on in this court is that the state did not sufficiently show the time when the offense was committed, so as to affirmatively prove that it was within the statute of limitations; but the motion for a new trial contains no such specific ground. Hence the act cited applies, and the judgment is affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.\*]

Error from Superior Court, Rabun County; J. B. Jones, Judge.

C. C. Wall was convicted of crime, and brings error. Affirmed.

T. L. Bynum, R. E. A. Hamby, and W. S. Paris, for plaintiff in error. Robt. McMullan, Sol. Gen., and J. C. Edwards, Sol. pro tem., for the State.

**POWELL, J.** Affirmed.

(10 Ga. App. 106)

**TAYLOR v. KEEN.** (No. 3,555.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(*Syllabus by the Court.*)

**1. TROVER AND CONVERSION (§ 16\*)—RIGHT OF ACTION—TITLE OF PLAINTIFF.**

A plaintiff cannot successfully maintain an action for trover for timber cut and carried away from land, where he has not had any possession or title to the timber, except in so far as title to the land or possession thereof may have carried with it title to the timber, and the only semblance of title he shows to the land is a deed not connected with any source of title, under which he shows only transitory acts of possession, which had ended prior to the time the timber was cut.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 119-147; Dec. Dig. § 16.\*]

**2. PROPERTY (§ 10\*)—POSSESSION—EFFECT.**

Bare possession of land, though not coupled with title, gives the possessor certain rights; but these rights end when the possession is abandoned.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 10.\*]

Error from City Court of Abbeville; E. F. Strozler, Judge.

Action by W. J. D. Taylor against Pete Keen. Judgment for defendant, and plaintiff brings error. Affirmed.

E. H. Williams, for plaintiff in error. Haygood & Cutts, for defendant in error.

**POWELL, J.** [1] Taylor brought trover against Keen for the recovery of 63 sticks of round timber, alleged to have been grown on lot of land 353 in the Fourteenth district of Dodge county, and to have been cut therefrom unlawfully. The plaintiff attempted to show ownership of the timber, by showing title to the land or possession thereof. There was testimony that in the year 1902 or 1903 the plaintiff bought the lot of land in question from one Thomas Walker, who executed to him a deed, which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

had never been recorded, and which had been lost. It may be said, however, that proper secondary proof of this deed was duly made. It was a quitclaim deed, but was adequate as color of title. No title was shown in Walker; hence it possessed no greater validity than color of title. During the next year after he got this deed, the plaintiff went into possession of the land by erecting thereon a small house, which was occupied by certain employes of his, who cut timber from the lot and made staves therefrom. They remained in the house during that year from February until November. During the next year no one resided in the house and no timber was cut from the land. In the third year thereafter the laborers and stove makers again occupied the house for a period of four months. Again in the year 1907 timber was cut from the land for the purpose of making staves, and the plaintiff's laborers occupied the house for a period of about three months. During the year 1908 the house was washed away in a freshet. The land is wild land, and is subject to overflow from the river, and none of it can be cultivated, by reason of the fact that it is subject to overflow. Other than above indicated, there was no house, fence, inclosure, or cultivation of any kind upon the land. The suit was brought in the year 1910, and, while the record does not definitely disclose the exact date on which the defendant cut the timber from the land, it is reasonably inferable from the pleadings that it was cut during the year 1910. It is plain that if the plaintiff's possession from the year 1902 to the year 1908, when his last vestige of possession was destroyed by the freshet, could be considered as that open, notorious, continuous occupancy which is essential to the ripening of acquisitive prescription, no title by prescription was in fact acquired thereby, for it lasted for less than the statutory period of seven years. The plaintiff had no title by prescription. His only reliance therefore was upon prior possession.

[2] Whether we take the view that the right of a plaintiff to recover in ejectment, and in similar actions, on prior possession, rests on a presumption of title, or take what is, perhaps, the correct view, that the possession itself is property, which the law will protect, is of no consequence here. The possessor, who shows no higher right than his mere possession, loses that right whenever his possession ends, except in those cases where it constructively continues on by reason of an *animus revertendi*. Knight v. Isom, 118 Ga. 613, 39 S. E. 103; Delay v. Felton, 133 Ga. 15, 65 S. E. 122(3); Watkins v. Nugen, 118 Ga. 375 (1), 377, 45 S. E. 260; King v. Sears, 91 Ga. 577 (7), 589, 18 S. E. 830; Jones v. Nunn, 12 Ga. 469, 474. How-

ever, no *animus revertendi* can save the plaintiff's rights, where the physical evidences of the possession, such as houses, fences, etc., are totally destroyed, and no other control over the property is shown. The writer of this opinion has so lengthily discussed these questions in the twelfth chapter of his text-book on "Actions for Land" (see, especially, §§ 300, 312, where the Georgia cases are collected and cited) that he takes the liberty of making reference to it, instead of further extending the discussion of the question here. The plaintiff, having shown no title to or possession of the land at the time the alleged cause of action arose, could not maintain trover for the timber cut therefrom, since he has not otherwise shown possession of or title to the timber itself.

Judgment affirmed.

(10 Ga. App. 132)

#### WILCOX v. STATE. (No. 3,743.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

#### 1. WEAPONS (§ 3\*)—CARRYING WEAPONS—CONSTITUTIONALITY OF ACT.

There was no error in overruling the motion to quash the accusation. *Strickland v. State*, 137 Ga. —, 72 S. E. 260.

[Ed. Note.—For other cases, see *Weapons*, Dec. Dig. § 3.\*]

#### 2. REVIEW ON APPEAL.

The other assignments of error are not properly presented for consideration by this court.

Error from City Court of Ocilla; H. B. Oxford, Judge.

Emanuel Wilcox was convicted of carrying a weapon, and brings error. Affirmed.

Philip Newbern and R. M. Bryson, for plaintiff in error. H. J. Quincey, Sol., for the State.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 116,

#### YOUNG v. STATE. (No. 3,663.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

#### HOMICIDE (§ 255\*)—VOLUNTARY MANSLAUGHTER—EVIDENCE.

Where a baseball player and an umpire become involved in a quarrel over a point in the game, and while the umpire is advancing toward the player with his hand in his pocket the player pulls his pistol and kills the umpire, a verdict finding the player guilty of voluntary manslaughter is not contrary to law, nor without evidence to support it.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 539-541; Dec. Dig. § 255.\*]

Error from Superior Court. Screven County; B. T. Rawlings, Judge.

Son Young was convicted of voluntary manslaughter, and brings error. Affirmed.

**E. K. Overstreet**, for plaintiff in error. **Alfred Herrington**, Sol. Gen., and **Hines & Jordan**, for the State.

**RUSSELL, J.** The defendant, **Son Young**, was a member of a baseball team who were playing a game down on Briar creek one Saturday afternoon. The deceased, **Son Williams**, was umpiring the game, and also doing the tallying. The defendant claimed that the opposing team had made only three runs, whereas the deceased had given them five runs, whereupon an argument began, and then cursing followed. Finally the deceased started toward the defendant with his hand in his pocket, and the defendant pulled his pistol and shot him. He was indicted for murder, convicted of voluntary manslaughter, and sentenced to five years' imprisonment.

The motion for a new trial contains only the general grounds. We are of the opinion that the evidence authorizes the verdict. *Spence v. State*, 7 Ga. App. 825, 68 S. E. 443; *Fallon v. State*, 5 Ga. App. 659, 63 S. E. 806; *Malone v. State*, 49 Ga. 217.

Judgment affirmed.

(10 Ga. App. 115)

**HARWELL v. STATE.** (No. 3,655.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(*Syllabus by the Court.*)

**DISTURBANCE OF PUBLIC ASSEMBLAGE (§ 1\*)—WHAT CONSTITUTES—"ASSEMBLAGE OR MEETING OF ANY SUCH SCHOOL."**

A person, who by loud talking and laughing disturbs a "sleight of hand performance," conducted by a traveling performer at a schoolhouse, under an arrangement with the trustees whereby the performer is to pay the trustees 10 per cent. of the door receipts for the use of the schoolhouse, is not guilty of violating section 424 of the Penal Code of 1910. Such a meeting is not a "public school, private school, or Sunday school, or any assemblage or meeting of any such school," within the meaning of the words of that statute.

[Ed. Note.—For other cases, see *Disturbance of Public Assemblage*, Cent. Dig. §§ 1-5; Dec. Dig. § 1.\*]

Error from City Court of Carrollton; **James Beall**, Judge.

**Jeff Harwell** was convicted of disturbing a public assemblage in schoolhouse, and brings error. Reversed.

**J. O. Newell**, for plaintiff in error. **C. E. Roop**, Sol., for the State.

**RUSSELL, J.** The language of the statute is: "Any person who shall willfully interrupt or disturb any public school, private school, or Sunday school, or any assemblage or meeting of any such school, lawfully and peacefully held for the purpose of scientific, literary, social, or religious improvement, either within or without the place where such school is usually held, shall be guilty of a

misdemeanor." The proof is that a sleight of hand performer, desiring to give a show in a community, obtained the use of the schoolhouse by agreeing to give the trustees 10 per cent. of the door receipts for the use of the room, and that, while he was giving his performance, the accused disturbed it. The statute is directed against the disturbance of schools and assemblages of persons at schoolhouses for some purpose connected with exercises pertaining to a school, and has no reference to meetings of any other nature, though held in the house where school is commonly conducted. The language of the statute is not very clear in all of its terms, but by no fair construction can it be made to include a case like this.

Judgment reversed.

(10 Ga. App. 104)

**MACON, D. & S. R. CO. v. BARFIELD.**

(No. 3,550.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(*Syllabus by the Court.*)

**1. SUFFICIENCY OF EVIDENCE.**

There is sufficient evidence in the record to prevent this court's interfering with the verdict.

(*Additional Syllabus by Editorial Staff.*)

**2. WITNESSES (§ 317\*)—IMPEACHMENT—FALSUS IN UNO, FALSUS IN OMNIBUS.**

In an action for the killing of a mule on a railroad track, where the testimony of the engineer was contradicted in various particulars, so that the jury might believe that his statements as to those particulars were not true, they could have considered him as impeached, and disregarded his uncontradicted statement that he was so close upon the mule before he discovered it that he could not have stopped his train in time to prevent striking it.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 317.\*]

**3. RAILROADS (§ 443\*)—EVIDENCE.**

In an action for the killing of a mule on a railroad track, evidence held sufficient to show that the injury occurred in the county where the action was brought.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 443.\*]

Error from City Court of Dublin; **K. J. Hawkins**, Judge.

Action by **J. J. Barfield** against the **Macon, Dublin & Savannah Railroad Company**. Judgment for plaintiff, and defendant brings error. Affirmed.

**Minter Wimberly**, **Adams & Flynt** and **Akerman & Akerman**, for plaintiff in error. **W. C. Davis**, for defendant in error.

**POWELL, J.** The railroad company killed the plaintiff's mule. The jury found for the plaintiff. Defendant's motion for a new trial was overruled, and it excepts.

[2] If the engineer's testimony is to be taken as the truth of the transaction, the company was not liable. It is argued that the jury had no right to disregard this tes-

timony. It is conceded that other witnesses disputed his testimony as to whether he slackened his speed at the time he said he slackened it, and as to whether he sounded the cattle alarm as he said he sounded it. It is said that there is no conflict in his testimony, so far as it states that he was so close upon the mule before he discovered it that he could not have stopped his train in time to prevent striking it, and that, in spite of the conflict as to other matters, his testimony must be believed as to this, wherein he is not contradicted, and that this alone is sufficient to rebut the presumption of negligence. One of the ways to impeach a witness is to disprove material facts testified to by him, relating to the transaction in question. The testimony of the engineer that he threw on the brakes and brought about a slackening of the speed of the train, and that he sounded the cattle alarm, were a part of the *res gestæ* of the transaction, and if the jury believed, as they could have believed, any of the testimony of the other witnesses, that his statements as to these things were not true, they could have considered the engineer as impeached, and disregarded his testimony.

[3] It is said, however, that the verdict was without evidence to support it, because it is not shown that the injury complained of occurred in Laurens county. The testimony of at least one of the witnesses locates the scene of the killing of the mule at a point less than a quarter of a mile from the defendant company's station at Rockledge, as he himself, according to his testimony, was about a quarter of a mile from the station, and the place where the mule was killed was between him and the station. By the act of August 17, 1908 (Acts 1908, p. 900), we are informed that the town of Rockledge is in the county of Laurens, and that its incorporated limits extend "eight hundred yards in all directions from the depot of the Macon, Dublin & Savannah Railroad Company at Rockledge." Hence every point on the company's track within a quarter of a mile of the station at Rockledge is in Laurens county. Therefore, even if the point as to the jurisdiction of the court must be made under the general grounds of the motion for a new trial, it is not well taken.

Judgment affirmed.

(10 Ga. App. 143)

HAMMOND v. STATE. (No. 8,813.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

**1. STATUTES (§ 162\*)—IMPLIED REPEAL—GENERAL AND SPECIAL LAWS.**

In the construction of general and special acts, the maxim "*generalia specialibus non derogant*" applies, and a general act will be held

to repeal or modify a special act embraced within the terms of the general act only when the provisions of the two acts are clearly repugnant and irreconcilable, or where the provisions of the general act manifest that it was the intention of the Legislature to enact a general law on the subject-matter which should be exhaustive and a substitute for every prior general, local and special law relating to the subject-matter covered by the general act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 235-237; Dec. Dig. § 162.\*]

**2. GAME (§ 4\*)—STATUTORY PROVISIONS—REPEAL OF SPECIAL ACT.**

The general law on the subject of the protection of game in this state, approved August 21, 1911 (Acts 1911, p. 137), was intended by the Legislature to be exhaustive of the subject, and was intended to repeal all existing general, special, or local laws on the same subject-matter.

[Ed. Note.—For other cases, see Game, Cent. Dig. § 3; Dec. Dig. § 4.\*]

Error from City Court of Blakely; L. M. Rambo, Judge.

Ernest Hammond was convicted of unlawful shooting of game, and brings error. Reversed.

Hawes, Pottle & Wright, for plaintiff in error. Walter Park, Sol., for the State.

HILL, C. J. An accusation in the city court of Blakely charged Ernest Hammond with a violation of the act approved August 17, 1911 (Acts 1911, p. 417). On arraignment the accused made a written motion to quash the accusation, on the ground that it charged no offense against the laws of this state: (1) Because the local law prohibiting the shooting of game in Early county, approved August 17, 1911, was in conflict with article 1, § 4, par. 1, of the Constitution of Georgia (Code of 1910, § 6391), which prohibits the enactment of a local or special law in any case for which provision has been made by an existing general law, and that the local game law for Early county, under which the accusation was framed was in violation of section 586 of the Penal Code of 1910; and (2) because the local law in question is invalid for the reason that it has been repealed by the general game law of the state, approved on August 21, 1911 (Acts 1911, p. 137). The court overruled the motion to quash the accusation, and this judgment is assigned as error.

The local law under which the accusation is framed is entitled "An act to prohibit the killing of doves, partridges, and quail in the county of Early for a period of five years, and for other purposes, and to provide a penalty for its violation." Section 1 provides that from and after the passage of the act it shall be unlawful for any person or persons to shoot, kill, trap, or ensnare, or destroy in any way, any dove, partridge, or quail, for a period of five years from the passage of this act. Section 2 makes a violation of this act a misdemeanor, and pre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

scribes the punishment provided for in section 1039, Penal Code of 1895. Section 3 repeals conflicting laws. When this local law was passed, the general law on the subject, as contained in section 586 of the Penal Code of 1910, made it a misdemeanor for a person "to shoot, trap, kill, ensnare, net, or destroy, in any manner, any wild turkey, pheasant, partridge or quail, between the fifteenth day of March and the first day of November in each year, or to kill, shoot, trap, ensnare, net, or in any manner destroy any dove, marsh hen, or snipe, between the fifteenth day of March and the fifteenth day of July in each year." The accusation in the present case charged that the accused, on the 27th day of October, 1911, in Early county, did unlawfully shoot and kill one dove, in violation of the act of the Legislature approved August 17, 1911, prohibiting the shooting of doves and other game birds in Early county from the date of the passage of said act. The general act of the General Assembly, approved August 21, 1911 (Acts 1911, p. 137), need not be set out in full.

It is manifest from the act, considered as a whole, that it was intended to embrace all the law on the subject of the protection of game in this state. The act establishes a department of game and fish for the state, provides a state game and fish commissioner, game wardens, and deputy game wardens, and was clearly intended to cover the whole subject of protection of game in this state, and to fix and prescribe the only rules in respect thereto, and it was also intended by the Legislature that it should act as a repeal of all former statutes, either general or local, relating to the same subject-matter, whether they were, in direct words, repugnant to this act or not; and we are clearly of the opinion that this general act, by terms, expressly covers the whole subject-matter of the protection of game in this state. If the first point made by the demurrer to the accusation is well taken, to wit, that this local act of Early county was in conflict with that provision of the statute which prohibits the enactment of a local law where the same subject-matter was covered by a general law, in our opinion the local law would be inoperative, null, and void, as being in conflict with this provision of the Constitution under the repeated rulings of the Supreme Court, beginning with the decision in the case of *Papworth v. State*, 103 Ga. 36, 31 S. E. 402, which has been followed in numerous decisions.

[1] Unquestionably the general act, as contained in section 586 of the Penal Code of 1910, applied to the shooting of the game specified in the special or local act for Early county. But inasmuch as this law, in our opinion, was itself repealed by the general law on the subject, approved August 21, 1911 (Acts 1911, p. 137), the only material question for this court to decide is whether or not the local special law for Early county has been

repealed by the general law subsequently approved. It is the established rule of construction that the law does not favor a repeal by implication, and that, where there are two or more provisions relating to the same subject-matter, they must, if possible, be construed so as to maintain the integrity of both. 1 *Lewis' Sutherland on Statutory Construction* (2d Ed.) § 27. And it follows that, as a rule, general laws will not impliedly repeal those which are special or local; in other words, that a general statute, without express repealing words, will not repeal by implication the provisions of a former special, local, or particular law which is limited in its application unless there is something in the general law upon the subject-matter that makes it manifest that the Legislature contemplated and intended a repeal, or, to express it otherwise, in the construction of general and special acts, the maxim "*generalia specialibus non derogant*" applies, and a general act will not be held to repeal or modify a special one embraced within the general terms of the general act, unless the two acts are so repugnant or irreconcilable as to indicate a legislative intent to modify or repeal the other.

[2] But it is manifest that the general act in this instance is a general revision of the whole subject-matter, and was intended by the Legislature to be exhaustive as to that subject-matter. *Florida v. Southern Land & Timber Co.*, 45 Fla. 374, 33 South. 999; *Village of Ridgway v. County of Gallatin*, 181 Ill. 521, 55 N. E. 146; *State v. Archibald*, 43 Minn. 328, 45 N. W. 606, and many cases there cited. This whole question of construction is summed up in a headnote in the case of *Davis v. Dougherty County*, 116 Ga. 491, 42 S. E. 764, in the following language: "A general law will not be so construed as to repeal an existing particular or special law, unless it is plainly manifest, from the terms of the general law, that such was the intention of the lawmaking body." These rules of construction apply both to the subject of the repeal of a general law by a subsequent general law and the repeal of a special or local law by a general law. They are axiomatic, and need no further discussion. It remains only to make an application of these rules to the particular statutes now under consideration.

The local act for Early county prohibits the killing of game birds, therein described, for a period of five years. The general act on the same subject (Acts 1911, p. 140, § 6) fixes the hunting season, and, among other things, provides that any resident of the state may procure a license to hunt in his residence county upon the payment of one dollar. "License to such resident shall be issued authorizing him to hunt throughout the state upon the payment of three dollars." And it further provides that "licenses shall be issued to nonresidents upon the payment of the sum of fifteen dollars, which shall

authorize them to hunt throughout the state." The act creates a game warden and deputy game wardens, and prescribes their terms of office and their duties, among which is to grant the licenses provided for by the act. Clearly these provisions of the general act are in irreconcilable conflict with that provision of the local act which prohibits any person, whether with or without license, from killing in Early county in five years, any of the game birds mentioned in both of the acts. As to this provision the two acts cannot stand together, and therefore the general act is paramount and necessarily repeals that provision of the local act. Further, the penalty presented by the acts is different. But, as before suggested, this general act, establishing the department of game and fish for the state of Georgia, was intended to be exhaustive of the subject-matter, and was manifestly intended by the Legislature to repeal all general or special or local laws on the same subject-matter, and, for this additional reason, even if the provisions of the two statutes were not directly repugnant, the local law of Early county was repealed by the general act subsequently passed. The accusation should therefore have been quashed.

Judgment reversed.

(10 Ga. App. 123)

CASSIDY v. STATE. (No. 3,754.)  
(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS (§ 236\*)—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

The evidence authorizes the conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 236.\*]

2. INTOXICATING LIQUORS (§ 140\*)—OFFENSES—KEEPING LIQUORS ON HAND.

It is a violation of the statute of this state for a person to keep intoxicating liquors on hand at his place of business, "whether the package, bottle, or barrel is open or unopen."

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 140.\*]

3. CRIMINAL LAW (§ 814\*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

The written request to charge on the subject of mere transient possession of liquors at one's place of business was properly refused, because there was no evidence on which to base it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979-1985; Dec. Dig. § 814.\*]

4. INTOXICATING LIQUORS (§ 233\*)—CRIMINAL PROSECUTION—ADMISSIBILITY OF EVIDENCE—PAYMENT OF GOVERNMENT TAX.

In a prosecution for keeping intoxicating liquor on hand at one's place of business, the state may show, and the jury may consider, the fact that the accused has registered as a retail liquor dealer and paid the United States government tax therefor, even though the act approved August 21, 1911 (Acts 1911, p. 180), is not applicable, and though a prima facie

case of guilt is not made out by the introduction of this evidence.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 298½; Dec. Dig. § 233.\*]

5. INTOXICATING LIQUORS (§ 101\*)—OFFENSES—EFFECT OF "NEAR BEER" LICENSE.

One who has paid the tax and obtained a license under what is known as the "near beer act" (Acts 1908, p. 1112) is not entitled thereby to keep on hand at his place of business any alcoholic, spirituous, malt, or intoxicating liquors. The only liquors he is authorized to keep on hand are such as, if drunk to excess, will not produce intoxication.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 105-107; Dec. Dig. § 101.\*]

Error from City Court of Macon; Robt. Hodges, Judge.

S. D. Cassidy was convicted of the sale of intoxicating liquor, and of keeping on hand intoxicating liquor at his place of business, and brings error. Affirmed.

John P. Ross, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

POWELL, J. The defendant was indicted on two counts. The first charged the sale of intoxicating liquor, and the second the keeping on hand of intoxicating liquor at his place of business. He was found guilty upon the second count only.

[1] The state showed that there had come by railway, addressed to the accused, a number of shipments marked "whisky," and so designated on the bills of lading; that these articles thus marked and consigned had been delivered to draymen, under written orders of the accused; and that the draymen had taken these packages and had delivered them within the place of business of the accused. The accused's place of business was raided some time later, but no liquor was found therein. It was shown by a certified copy from the records of the office of the collector of internal revenue for the district of Georgia that the accused had registered and paid the federal tax as a retail liquor dealer for the first half of the year 1911; the place where the business was being carried on being designated as 601 Fourth street, Macon, Ga. This was the address to which the liquor mentioned in the bills of lading was consigned. Apart from these writings, it does not affirmatively appear that the defendant's place of business was at 601 Fourth street, in Macon. The oral evidence speaks of his place of business as being located at the corner of Fourth and Plum streets, in Macon, and this latter address is given as the address at which the draymen delivered the barrels and packages said to contain liquor. The accused made no statement and introduced no evidence.

We think that the evidence is amply sufficient to support the conviction. It is said that it has not been proved that the pack-

ages which were delivered to the place of business of the accused from the railway station were in fact intoxicating liquors. This is sufficiently proved by the fact that these packages were marked "whisky," that they were entered upon the freight bills, bills of lading, and receipts to the railway company as whisky, and that the accused himself recognized the contents of the packages as such, by making memoranda upon the freight bills thus describing them, requesting the freight agent to deliver them to the draymen for him. To state it more plainly, the state introduced in evidence freight bills which on their faces purported to be for shipments of whisky, together with the defendant's written order thereon to the agent asking him to deliver the above to a named drayman, to whom the packages were in fact delivered, and by whom they were carried to the defendant's place of business. We are under the impression that there is an interstate commerce regulation (and these were interstate shipments) requiring the contents of packages containing alcoholic liquors to be truly marked. If so, the very fact that the packages were marked as containing whisky has even higher value as circumstantial evidence than it otherwise would have. This court has, however, fully recognized the principle that it is at least *prima facie* sufficient to prove that an article is whisky to show that it was treated by the accused himself as whisky, as where a purchaser calls for whisky and the accused as seller delivers it.

We shall presently discuss the evidentiary value of the fact that the accused had registered with the internal revenue collector of the United States government as a retail liquor dealer. We need not enter upon that now. As it was proved that these packages, thus presumptively containing intoxicating liquors, were delivered with the defendant's consent into his place of business, it was sufficiently shown that he kept them on hand at his place of business, in the absence of any proof to the effect that they were merely deposited there for the moment and immediately removed elsewhere. It may be that there is some difference between the meaning of the words "keep on hand," as used in this statute, and such an expression as "have in one's possession" (see dissenting opinion of Russell, J., in *Cohen v. State*, 7 Ga. App. 5, 65 S. E. 1096); but the majority of this court does not think that the keeping on hand must be continuous, in order to make it violative of the statute. Merely to allow liquors to be deposited in one's place of business, under peculiar circumstances, followed by an immediate removal of them, might not constitute a violation of the statute; but where it is shown that the liquors were delivered into the place of business with the proprietor's consent, and nothing further is shown as to the

disposition of them, it is to be presumed, until the contrary appears, that he is keeping them on hand, contrary to the statute.

[2] 2. By exception to the refusal of a written request to charge, the plaintiff in error makes the point that to keep unopened packages of liquor at one's place of business is not a violation of the law. The statute makes no exception of this kind, and we know of no good reason for making any such judicial exception. Indeed, deference to the spirit of the act would prevent the making of any such exception by construction or interpretation.

[3] 3. The plaintiff in error also has excepted to the failure of the court to give in charge a number of requests to the effect that, if the jury should find that there was a mere temporary deposit of intoxicating liquors at the defendant's place of business, the law would not be violated. These requests were properly refused for lack of evidence to support them. As we have already said above, the state, by showing delivery of the liquor into the accused's place of business, with his consent, made out the case against him; and he in no wise attempted to avoid the effect of the state's evidence by any refutation or explanation or by any attempt to show that his custody of the liquor at his place of business was merely transient.

[4] 4. The state introduced in evidence a certified abstract from the records of the collector of internal revenue of the district of Georgia, and showed that the receipt for the tax due to the government had been issued to the accused for the first six months of the year 1911, for the business of retail liquor dealer, to be carried on at 601 Fourth street, Macon, Ga. At the time this evidence was offered the defendant objected to it, on the ground that it was not a copy of a paper required by law to be kept in the office of any particular officer; also because it was immaterial, since the state had abandoned the prosecution on the count charging a sale. The first of these objections is answered by the decision of this court in *Huckabee v. State*, 7 Ga. App. 677, 67 S. E. 837. As to the second objection: We think that it is relevant, in a prosecution for keeping intoxicating liquors on hand at one's place of business, to show that the accused has paid the government tax as a retail dealer; for it is a matter of legal knowledge that this tax is paid upon an application reciting that the person paying it intends to engage in that business. One who makes preparation and pays out money for the purpose of engaging in the business of a retail liquor dealer is much more liable to have intoxicating liquors on hand at his place of business than one who has not. It is not necessary, in a prosecution for keeping intoxicating liquors on hand at one's place of business, to show that any of the liquor has been sold; but when liquor has in fact been



sold at one's place of business, this is conclusive evidence of the crime. The two acts of preparation, the getting of the liquor and the taking out of the government license, are natural concomitants, and the one has relevancy as supporting the probative value of the other.

We have not overlooked the act of August 21, 1911 (Acts 1911, p. 180), which makes it prima facie evidence of guilt in certain cases for any person to be in possession, to make application for, or to have issued to him the United States special tax receipt as a retail liquor dealer. This act, by its terms, is applicable to the trial of cases brought to abate or enjoin the operation of "blind tigers," and to prosecutions for the illegal sale of intoxicating liquor. In those cases proof of the defendant's having paid the government tax as a liquor dealer is made prima facie evidence of guilt. The act is without direct applicability where mere keeping on hand is charged; but, independently of this statute, the fact of the defendant's having applied for and having paid for the special tax receipt is relevant. The Case of *Huckabee*, supra, was decided prior to the passage of this act, and therefore shows that, irrespective of the statute, proof of this nature may be received.

The point is made that this tax receipt specifies the place at which the retail liquor dealer's business is to be carried on as "601 Fourth street, Macon, Ga.," while the proof shows that the place where the liquor was delivered was the corner of Plum and Fourth streets, and, therefore, that the connection between the two is not sufficiently shown. In the first place the jury probably inferred that the two addresses were identical, from the fact that the address given on the bills of lading on which the liquors were shipped and under which the defendant received them designated the place where they were to be delivered as 601 Fourth street, and that the draymen, under this direction, delivered them at the corner of Plum and Fourth streets. But, even if this is not so, the evidence as to the payment of the government tax would not be wholly without relevancy; for, say that the two addresses are different, but in the same general locality, the jury might believe that the accused, intending to open his place for illegal sale at the address stated in the tax receipt, had stored his general stock near by in his other place of business.

[§] 5. The defendant, by numerous requests to charge, attempted to get the benefit of some such theory as that if the accused had taken out, under the act of 1908, license as a "near beer" dealer—that is, a license to sell imitations and substitutes for beer, wine, whisky, or other spirituous or malt liquors—his liability to prosecution, and the effect of the evidence against him, would be

legally different from what it would be if he had not procured this license. One of the requests to charge along this line was as follows: "If at the time of the passage of the act of September 5, 1908, known as the 'near beer act,' there was not and is not now any beverage or drink or liquor known to science or practical use in this state, in imitation of or intended as a substitute for beer, whisky, or other alcoholic, spirituous, or malt liquors, that did not contain alcohol, then and in such event said act authorized the license and the sale of beverages or drinks or liquors containing alcohol, and proof that the beverage or liquor kept on hand or sold by the defendant contained alcohol would not, of itself and without more, authorize the conviction of the defendant." The act taxing "near beer" and other imitations of liquors (Acts 1908, p. 1112) expressly provides that "nothing in this act contained shall ever be held, taken, or construed to authorize the sale of any beverage, drink or liquor now prohibited by law." And the law then prohibited, and now prohibits, throughout the state, the sale of any and all kinds of liquors of such a nature as will, if drunk to excess, produce intoxication. "Near beer," the thing at which the act in question was particularly aimed, has been defined by this court as follows: "'Near beer' is a term of common currency, used to designate all that class of malt liquors which contain so little alcohol that they will not produce intoxication, though drunk to excess." *Campbell v. City of Thomasville*, 6 Ga. App. 212, 64 S. E. 815. The evidence in the present case related only to whisky as such, and there is not the slightest suggestion in the record of any other form of liquor or imitation of liquor, and whisky, of course, is judicially known to be intoxicating, so that in no event did the judge err in not giving the charges requested.

The whole record shows a clear case of guilt, followed by a legal trial and a conviction; hence the judgment is affirmed.

(10 Ga. App. 142)

JACKSON v. STATE. (No. 3,776.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236\*)—EVIDENCE.

This case is controlled by *Cassidy v. State*, 72 S. E. 939, this day decided.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 236.\*]

Error from City Court of Macon; Robt. Hodges, Judge.

G. W. Jackson was convicted of violation of the prohibitory law, and brings error. Affirmed.

Napier & Maynard and John R. Cooper, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

**POWELL, J.** The evidence in this case is of the same general nature as that dealt with in *Cassidy v. State*, 72 S. E. 939, this day decided. Shipments marked "whisky" came addressed to the accused. He gave to the railroad agent orders directing that the whisky shipped to him be delivered to certain draymen, who hauled it to his place of business. Sometimes the draymen left it inside the store, and sometimes in the back yard, near the back door of his store. The defendant had a government tax receipt as a retail liquor dealer. He did make a statement in which he denied that any whisky had ever been brought to his store by the draymen; but the jury, as they had the right to do, disregarded this statement in the light of the overwhelming evidence to the contrary. The jury had a right to find, even as to the liquor left in the back yard of his store, that it was left "at his place of business." *Bashinski v. State*, 5 Ga. App. 3, 62 S. E. 577; *Jenkins v. State*, 4 Ga. App. 859, 62 S. E. 574.

Judgment affirmed.

(10 Ga. App. 100)

**ROBERTS v. GEORGIA SOUTHERN & F. RY. CO.** (No. 3,243.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(*Syllabus by the Court.*)

**1. CARRIERS (§ 218\*)—TRANSPORTATION OF LIVE STOCK—LIMITATION OF LIABILITY.**

A stipulation in a contract for the shipment of live stock, requiring that, as a condition precedent to any right to recover any damages for loss or injury to said live stock, "written notice of a claim therefor shall be given before said live stock is removed or intermingled with other live stock," is reasonable and valid. *Southern Ry. Co. v. Tollerson*, 129 Ga. 647, 59 S. E. 799.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927-949; Dec. Dig. § 218.\*]

**2. CARRIERS (§ 218\*)—TRANSPORTATION OF LIVE STOCK—LIMITATION OF LIABILITY—WAIVER.**

This stipulation in the contract may be expressly or impliedly waived by the carrier. *Carter & Co. v. Southern Ry. Co.*, 3 Ga. App. 40, 59 S. E. 209; *Arnold v. Louisville Ry. Co.*, 4 Ga. App. 520, 61 S. E. 1050; *Hill v. Telegraph Co.*, 85 Ga. 430, 11 S. E. 874, 21 Am. St. Rep. 166. In this case there is no evidence of waiver; but, on the contrary, the stipulation is expressly set up and relied upon by the carrier in answer to the claim made in violation of its terms.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927-949; Dec. Dig. § 218.\*]

**3. CARRIERS (§ 218\*)—TRANSPORTATION OF LIVE STOCK—LIMITATION OF LIABILITY—CONSTRUCTION.**

Whether the stipulation above set out applies only to injuries that are patent is not nec-

essary to be ruled, for the injury in this case was not latent, but an indication of the injury was discernible to the eye by superficial examination, and was in fact discovered by plaintiff, or his agent, before the horse was removed from the point of delivery, and no complaint was then made, or damages claimed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927-949; Dec. Dig. § 218.\*]

**4. CARRIERS (§ 218\*)—TRANSPORTATION OF LIVE STOCK—LIMITATION OF LIABILITY.**

Where the evidence shows that the plaintiff did not comply with the above stipulation in the contract, and there is no evidence of any waiver by the carrier, a recovery could not be legally had, and a verdict for the defendant was properly directed.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927-949; Dec. Dig. § 218.\*]

**5. CERTIFYING CASE FOR REVIEW.**

This court declines to ask the Supreme Court to review the case of *Southern Ry. Co. v. Tollerson*, supra, and other cases decided by that court to the same effect.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action by B. H. Roberts against the Georgia Southern & Florida Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Patterson & Copeland, for plaintiff in error. J. E. Hall and E. K. Wilcox, for defendant in error.

**HILL, C. J.** Judgment affirmed.

(10 Ga. App. 96)

**REISMAN v. WESTER.** (No. 3,168.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(*Syllabus by the Court.*)

**SALES (§ 472\*)—CONDITIONAL SALES—EFFECT OF FAILURE TO RECORD.**

A contract for the sale of personalty, reserving title in the seller until the purchase money has been paid, to be valid and binding as to third persons, must be recorded as required by Civil Code 1910, §§ 3318, 3319. Otherwise, the sale is absolute as to third persons; and where the purchaser subsequently gives the property to another, the property generally becomes subject to the debts of the latter, reduced to judgment, especially where the creditor of the donee in possession had no actual notice of the existence of the conditional contract of sale, and that the property covered by that contract had not been paid for, and extended credit on the faith thereof.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1366-1376; Dec. Dig. § 472.\*]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Claim by J. D. Wester to property levied on under execution in favor of Joe Reisman. From a judgment for the complainant, the execution creditor brings error. Reversed.

Hewlett & Dennis, for plaintiff in error. Shepard Bryan and W. R. Tichenor, for defendant in error.

HILL, C. J. Wester sold a piano to Taylor under a conditional contract in writing reserving title until the piano was fully paid for. This contract was not recorded. He was to pay for the piano by installments. Before paying for it he gave it as a Christmas present to his wife. After the piano had been given to her, Reisman obtained a judgment against her, and the execution issued upon this judgment was levied on the piano as her property. Wester interposed a claim. The jury in the justice's court found the piano subject to the execution, and Wester, by certiorari, asked the superior court to review this finding. The superior court sustained the certiorari and entered up final judgment in favor of Wester, holding that the property was not subject to the execution; and Reisman brings error to this court.

On the trial of the claim case there was no controversy as to the facts, which are substantially set out above. Reisman testified that he had extended credit to Mrs. Taylor on the faith of her statement that the piano was her personal property. The claimant objected to this testimony, so far as it related to the statement of Mrs. Taylor that the piano belonged to her, on the ground that it was mere hearsay, and irrelevant and inadmissible; that Mrs. Taylor was not a party to the contract between Wester and her husband, and her statement was not binding upon Wester, as he was not present when it was made. The court overruled this objection, and this is assigned as error. We think the statement of Mrs. Taylor to Reisman was admissible, as showing the good faith of Reisman in extending credit to her. Under the view we take of the merits of the case, however, it makes very little difference why Reisman extended credit to Mrs. Taylor. His judgment was good against her and was binding on her property, and the undisputed evidence is that her husband had given her this piano.

It is insisted, however, that Mrs. Taylor knew that her husband had not paid for the piano, that he bought it from Wester on installments, and that he had no right to make a voluntary gift of it to her as against Wester's claim for the balance of the purchase money. And this is probably the view that the superior court took of the question. The Code requires that every conditional contract of sale, to be valid as against third persons, shall be in writing and recorded within 30 days from date. Civil Code 1910, §§ 3318, 3319. The contract in this case was not recorded. It was therefore binding upon nobody except the parties thereto. Relatively to third persons, the sale of the piano by Wester to Taylor was an absolute sale. *Steen v. Harris*, 81 Ga. 681, 8 S. E. 206. Cf. *Rhode Island Works v. Empire L. Co.*, 91 Ga. 642, 17 S. E. 1012. Now, suppose that

Reisman had obtained judgment against Taylor himself, and had had the execution levied on the piano, and Reisman, when extending credit to Taylor, had no knowledge of the conditional contract in writing made by Wester to Taylor; can it be doubted that Reisman's execution would be prior in dignity to Wester's claim? The creditor (with judgment lien) of the donee of the purchaser under the conditional sale is likewise a third person within the meaning of the Code sections cited.

Another reason why we think the property was subject to the execution in favor of Reisman: Wester failed to record his conditional contract. He put the piano into the possession of Taylor; and, according to the evidence, Taylor told him at the time of the sale that he wanted to buy the piano as a Christmas present for his wife. He thus put it into the power of Mrs. Taylor to perpetrate a fraud on Reisman, for she stated to him that the piano belonged to her, and it was on the faith of this statement that he extended the credit to her. Wester put it into the power of Taylor, the husband, through his wife, to commit a fraud upon an innocent person; and if Reisman, the innocent person, or Wester, who had put it in the power of Taylor and his wife to perpetrate the fraud, must suffer, clearly the one who made the fraud possible should suffer, and not the one who was innocent.

For these reasons, we think that the superior court erred in sustaining the certiorari and entering final judgment in favor of Wester. The certiorari should have been reversed.

Judgment reversed.

(10 Ga. App. 98)

WILSON v. BARNARD. (No. 3,208.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

1. PLEADING (§ 258\*)—AMENDMENT—ANSWER.

The amendment to the answer, although filed after the time for answering had expired, was properly verified as required by section 5640 of the Civil Code of 1910, and there was no error in allowing it. Besides, the amendment set up no defense that was not substantially made by the original answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 765-782; Dec. Dig. § 258.\*]

2. BILLS AND NOTES (§ 489\*)—ACTIONS—ISSUES AND PROOF.

Under the plea of non est factum to a suit on a note, the defendant may deny either the execution of the note by him altogether, or its execution by him in its present shape, and proof of either allegation, provided, in case of alteration, the change was material, would sustain the plea. Civil Code (1910) § 4295; Joyce on Defenses to Commercial Paper, § 135.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 489.\*]

### 3. EVIDENCE (§ 197\*)—DEMONSTRATIVE EVIDENCE—COMPARISON OF HANDWRITING.

Where the signature to a note sued on is attacked on the ground that it is a forgery, an admittedly genuine signature of the person purporting to have signed the note is admissible for the purpose of comparison, and to aid in the determination of the issue as to the genuineness of the signature in dispute, and the jury can make a physical inspection of both the genuine signature and the one in dispute. *Joyce on Defenses to Commercial Paper*, §§ 96, 97, and cases in notes.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.\*]

### 4. EVIDENCE (§ 197\*)—ADMISSIBILITY—WRITINGS FOR COMPARISON.

In support of his plea of non est factum, it was not error to permit the defendant to introduce in evidence a blank copy of a note, which he testified was an exact copy of the one he executed, for the purpose of showing dissimilarity between that and the note sued on and alleged to be a forgery.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 681, 681½; Dec. Dig. § 197.\*]

### 5. BILLS AND NOTES (§ 492\*)—TRIAL (§ 229\*)—BURDEN OF PROOF—INSTRUCTIONS—REPE- TITION.

When a plea of non est factum is filed under oath to a suit on a note, the burden is upon the plaintiff to prove the execution of the note sued on. *Paulk v. Creech*, 8 Ga. App. 738, 70 S. E. 145 (2). It was not error for the trial judge, during the course of his charge, to instruct the jury repeatedly to the foregoing effect. One time would have been sufficient, but needless repetition in a charge of a correct principle of law applicable to the pleadings and evidence could not be error.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1649-1651; Dec. Dig. § 492.\* Trial, Cent. Dig. § 513; Dec. Dig. § 229.\*]

### 6. BILLS AND NOTES (§ 497\*)—ACTIONS—PRE- SUMPTIONS—BONA FIDE HOLDERS.

Where a plea of non est factum is filed to a suit on a note, the plaintiff must prove the execution of the note sued on, before the presumption of law would arise that he was a bona fide holder for value; and, after charging sections 4286 and 4288 of the Civil Code of 1910, the court did not err in also charging the above qualification.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1675-1687; Dec. Dig. § 497.\*]

### 7. ALTERATION OF INSTRUMENTS (§ 3\*)—MATERIALITY—NAME OF PAYEE.

The alteration of the name of the payee in a note, without the knowledge of the maker, is a material alteration, and would constitute a good defense to an action against the maker of the note. *Joyce on Defenses to Commercial Paper*, § 158, and cases cited; 3 *Randolph on Commercial Paper*, §§ 1749 and 1777.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 5-15; Dec. Dig. § 3.\*]

### 8. APPEAL AND ERROR (§ 1003\*)—REVIEW—QUESTIONS OF FACT.

This court has repeatedly ruled that, in the absence of legal error, it has no jurisdiction to interfere with a verdict supported by some evidence, although the verdict was against the preponderance of the evidence. The decisions cited to the contrary, applicable to the Supreme Court, were rendered prior to the constitutional amendment restricting the jurisdiction of that court and this court to the decision of errors of law and equity, and are not now in point.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\*]

### 9. MOTION FOR NEW TRIAL—NO ERROR.

Other grounds of alleged error contained in the motion for a new trial, not specifically covered by the foregoing notes, are without substantial merit.

### 10. SUFFICIENCY OF EVIDENCE—REFUSAL OF NEW TRIAL.

There was evidence in support of the plea of non est factum, and the verdict for the defendant was authorized, and there was no error in refusing a new trial.

Error from City Court of Cartersville; A. M. Fonte, Judge.

Action by W. C. Wilson against John E. Barnard. Judgment for defendant, and plaintiff brings error. Affirmed.

Jno. F. Norris, for plaintiff in error. Neel & Neel, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 117)

GIBSON v. STATE. (No. 3,694.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

### RAPE (§ 16\*)—ASSAULT WITH INTENT TO RAPE—ELEMENTS OF OFFENSE—INSTRUCTIONS.

Under the evidence the defendant was guilty of assault with intent to rape, or not guilty at all, and therefore there was no error in not charging the law as to assault and battery. An assault with intent to induce consent to sexual intercourse on the part of a female child under the age of consent is not assault and battery, but assault with intent to rape, just as the completed intercourse with such a child would be rape.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. §§ 15-19; Dec. Dig. § 16.\*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Will Gibson was convicted of assault with intent to rape, and brings error. Affirmed.

Eubanks & Mebane, for plaintiff in error. Jno. W. Bale, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(112 Va. 878)

## MOSS v. TAZEWELL COUNTY.

(Supreme Court of Appeals of Virginia. Nov. 29, 1911.)

## 1. CONSTITUTIONAL LAW (§ 50\*)—LEGISLATIVE POWER.

The power of the Legislature is supreme, except as restricted by the state or federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.\*]

## 2. CONSTITUTIONAL LAW (§ 48\*)—CONSTRUCTION—CONSTITUTIONALITY.

All doubts as to the constitutionality of a statute should be resolved in favor of its existence, and the court should not declare a statute unconstitutional, unless it clearly and plainly appears to be so.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

## 3. TAXATION (§ 40\*)—STATUTES (§ 95\*)—UNIFORMITY—GENERAL LAW.

Acts 1908, c. 70 (Code Supp. 1910, p. 729), entitled "An act to provide for the issuing of county bonds for permanent road or bridge improvements in the magisterial districts of the counties of the state," does not violate Const. 1902, § 168 (Code 1904, p. cclxii), providing that all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied under general laws.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 68-89; Dec. Dig. § 40.\*; Statutes, Cent. Dig. §§ 105, 106; Dec. Dig. § 95.\*]

## 4. COUNTIES (§ 187\*)—FISCAL MANAGEMENT—BONDS—LIABILITY ON.

Acts 1908, c. 70, § 1 (Code Supp. 1910, p. 729), permits bonds to be issued by any county for road and bridge improvements in magisterial districts. Section 2 requires the polls to be opened at all the voting places in the county not in a particular magisterial district, and provides that all qualified voters of the counties shall vote upon the question. Section 3 requires the county election commissioners to canvass the returns. Section 4 provides that, if a majority of the voters of the county and also a majority of the voters of the district voting upon the question favor issuing the bonds, the county board of supervisors shall be directed to carry out their wishes. Section 6 requires the board to issue the bonds and have written therein a recital that they are issued for "\_\_\_\_\_ magisterial district," but that the full credit of the county is pledged for their payment, and that a tax will be levied upon the property of the district to pay interest and create a sinking fund. Section 7 requires a levy by the county on all property liable to state tax in the magisterial district in which the proceeds of the bonds are to be expended, and that, should the county have to assume any payment, the board of supervisors shall levy such tax in the magisterial district as may be necessary to pay the amount so assumed; "it being \* \* \* intended that bonds issued or to be issued under this act are county obligations, but payable primarily out of levies upon the property in the magisterial district, where the proceeds of the bonds may be expended hereunder." *Held*, that the bonds were direct county bonds, and not bonds of the magisterial district: the county's liability to the bondholder not being diminished because of the provision for levy upon the property of the district.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 293-295; Dec. Dig. § 187.\*]

Error to Circuit Court, Tazewell County.

Action by the County of Tazewell against C. J. Moss. Judgment for plaintiff, and defendant brings error. *Affirmed*.

Henry & Graham, for plaintiff in error  
George W. St. Clair and T. C. Bowen, for defendant in error.

WHITTLE, J. This writ of error is to a judgment rendered upon motion by the circuit court in behalf of the defendant in error, the plaintiff below, against the plaintiff in error, C. J. Moss, for the purchase price of three bonds (known as "road bonds"), each of the denomination of \$1,000.

These bonds constitute part of a bond issue made by Tazewell county by virtue of an act of the General Assembly of Virginia, entitled "An act to provide for the issuing of county bonds for permanent road or bridge improvement in the magisterial districts of the counties of the state," approved February 25, 1908. 3 Va. Code Supp. 1910 (Pollard) p. 729.

In pursuance of this act an election was held in Tazewell county to take the sense of the qualified voters of the several magisterial districts of the county and of the qualified voters of the county as to whether the board of supervisors should issue county bonds aggregating \$625,000 for the entire county, the proceeds of which were to be apportioned among the several magisterial districts in accordance with the provisions of the act. The election was duly held, and resulted favorably to the bond issue.

We have scrutinized the proceedings leading up to and including the authorization, execution, issuance, and sale of these bonds, and, without undertaking to set out in detail the various steps taken, it is sufficient to say that the county authorities have substantially complied with all the requirements of the act.

There are only two assignments of error which demand our attention. The first is "that the statute under which the election was held and the bonds issued is unconstitutional"; and, second, "that the bonds are not direct county bonds for which the county is primarily responsible, but are direct magisterial district bonds, these districts being primarily liable."

With respect to the first assignment, it is maintained that the act is in conflict with that portion of section 168 of the Constitution of Virginia (Code 1904, p. cclxii) which declares that " \* \* \* all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

Objection to the constitutionality of this act has recently received careful consideration at our hands. In May last a petition for appeal from a decree of the circuit court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of Lee county, in the case of *Holliday v. Board of Supervisors*,<sup>1</sup> involving the precise question now in judgment, was refused by four of the judges in vacation, and afterwards by the court, on the ground that the decree of the circuit court, maintaining the constitutionality of the act, was plainly right. In these circumstances, we would ordinarily have simply denied a writ of error in the present case; but, in view of the large number of bond issues under this act throughout the state, we have deemed it advisable to affirm its constitutionality by an authoritative decision.

[1-2] The principle is elementary that "the power of the Legislature of the state is supreme, except so far as it is restrained by the state or federal Constitution, and even in case of doubt as to the power, all doubts are to be resolved in favor of the existence of the power. The courts have no power to declare an act unconstitutional, unless it is so clearly and plainly so that there can be no doubt on the subject." *Henry's Case*, 110 Va. 879, 65 S. E. 570, 26 L. R. A. (N. S.) 883; *Button v. State Corporation Commission*, 105 Va. 634, 54 S. E. 769, and cases cited.

This canon of construction is essential to the very life of the state and has always been jealously guarded by the courts. In deference to this fundamental principle, the constitutionality of acts of the Legislature essentially similar to the present statute have repeatedly received the sanction of this court.

In *Gilkeson v. Frederick Justices*, 13 Grat. 577, it was held that section 22, art. 4, of the Constitution of 1851, providing that "taxation shall be equal and uniform throughout the commonwealth, and all property \* \* \* shall be taxed in proportion to its value," applied to state revenue, and not to taxes and levies by counties for local purposes.

The convention which adopted the Constitution of 1869, in section 1, art. 10, enlarged the scope of the equality and uniformity provision, so as to include taxes imposed for state revenue and also levies imposed by counties and corporate bodies for local revenue. Nevertheless, in *Norfolk City v. Ellis*, 26 Grat. 224 (a decision under the Constitution of 1869), the court held that the council of Norfolk had authority under the city charter and the Constitution of the state to assess the expense, in whole or in part, of paving a street upon the owners of the property on the street in proportion to the number of feet facing on the street. The court construed the constitutional prohibition as applying to revenue as contradistinguished from assessments for local improvements. Such assessments, it was said, proceeded upon the theory of benefits conferred upon the inhabitants of the particular locality, and not upon the idea of revenue. Judge

Staples, in delivering the opinion of the court in that case, observes: "It is regarded as a system of equivalents. It imposes the tax according to the maxim that he who receives the benefit ought to bear the burden; and it aims to exact from the party assessed no more than his just share of that burden according to an equitable rule of apportionment."

In *Richmond & A. R. Co. v. City of Lynchburg*, 81 Va. 473, the charter of Lynchburg, which empowered the city, where water mains were laid in the street, to levy an annual special assessment on the real estate on both sides of the street to meet the expense of the waterworks, was held to be valid.

In *Supervisors v. Saltville Land Company*, 99 Va. 640, 39 S. E. 704, the court held: "In the absence of constitutional restrictions, the Legislature may impose upon a taxing district, such as a town, the duty of keeping in repair the streets and roads within, and relieve it from taxation for roads without, its limits. The Legislature judges finally and conclusively upon this question."

In *Day v. Roberts*, 101 Va. 248, 251, 43 S. E. 362, 363, *Buchanan, J.*, speaking for the court, said: "Constitutional provisions similar to the one now under consideration (section 1, art. 10, Constitution of 1869) have frequently been before the courts. The settled construction placed upon them is that uniform taxation requires uniformity, not only in the rate of taxation and in the mode of assessment upon the taxable valuation, but the uniformity must be coextensive with the territory to which it applies. If a tax is imposed by the state, it must be uniform over the whole state; if by a county, city, town, or other subordinate district, the tax must be uniform throughout the territory to which it is applicable. *Knowlton v. Board of Sup.*, 9 Wis. 410, 420, 421; *Bright v. McCullough*, 27 Ind. 223, 230; *Exchange Bank v. Hines*, 3 Ohio St. 15; *Sleight v. People*, 74 Ill. 47; *Dyar v. Farmington*, 70 Me. 515; *Hutchinson v. Ozark Co.* [57 Ark. 554] 22 S. W. 173, 38 Am. St. Rep. 258; *Pine Grove, etc., v. Talcott*, 19 Wall. 676, 22 L. Ed. 227; *Cooley on Tax.* (2d Ed.) 141, 244; *Cooley's Const. Lim.* (6th Ed.) 610; 1 *Desty on Tax.* § 85, p. 173; *Burroughs on Taxation*, 61, 62."

[3] The uniformity clauses of the Constitution of 1869 and of 1902 are substantially the same, and the authorities to which attention has been called fully sustain the constitutionality of the act of February 25, 1908.

[4] We are furthermore of opinion that the assignment of error, that these bonds are not direct county bonds, for which the county is primarily responsible, but are direct magisterial district bonds, for which the districts are primarily liable, is not meritorious.

Counties are erected by the Legislature,

<sup>1</sup> No opinion filed.

and constitute subdivisions of the state. They are organized under the Constitution and laws, and, within their territorial limits, are clothed with many important governmental and other functions. Among others, they have authority to make levies for local purposes. They also have power to make contracts, with respect to which they may sue and be sued as provided by law, and possess adequate agencies and machinery to discharge the duties and obligations imposed upon them by law. But it is otherwise with respect to magisterial districts, which are subordinate divisions or precincts of a county, created for political and administrative purposes of exceedingly limited character. They are without that artificial personality possessed by corporate bodies. They have authority to elect certain officers, but possess no debt-making power under general statutes of the state, and plainly have no such power under the act of February 25, 1908. It is not possible, therefore, that these road bonds are direct magisterial district bonds.

On the other hand, that the bonds are direct county bonds, for payment of which the full faith and credit of the entire county is pledged, unmistakably appears from the terms of the act.

Section 1 declares "that bonds may be issued by any county" for the purpose, and upon the conditions, and in the manner therein provided.

Section 2 provides that the polls shall be opened at all the voting places in the county, not in a particular magisterial district, and that all the qualified voters of the county shall have the right to vote on the question of bond issue.

Section 3 provides that the commissioners of election of the county shall canvass the returns.

Section 4 provides that if the report of the commissioners of election shows that a majority of the qualified voters of the county voting upon the question, and also that a majority of the qualified voters of the district voting on the question, are in favor of issuing the bonds, the circuit court shall direct the board of supervisors of the county to carry out their wishes.

Section 5 provides for contesting such elections.

Section 6 provides that the board of supervisors shall issue the bonds, which shall be signed by the chairman and countersigned by the clerk of the board, "and shall have written or printed in said bonds the following sentence: 'These bonds are issued for ..... magisterial district, but the full faith and credit of the entire county is hereby pledged for their payment; and a tax to be levied upon the property of said district to pay the interest on them and to create a

sinking fund sufficient in amount to pay them upon maturity.'"

Section 7 provides that a levy shall be made by the county on all property liable to state tax in such magisterial district in which the proceeds of the bonds have been or are to be expended to pay interest and create a sinking fund to redeem the principal at maturity. It also provides that, "should for any reason the county in any way have to assume any payment on account of said bond issue, either interest or principal, it is hereby provided that the board of supervisors shall levy such tax in said magisterial district as may be necessary to defray the amount assumed by the county, it being and having heretofore been intended that bonds issued or to be issued under this act are county obligations, but payable primarily out of levies upon the property in the magisterial district where the proceeds of the bonds may be expended hereunder."

It thus appears that these bonds are direct county bonds, for the payment of which "the full faith and credit of the entire county is \* \* \* pledged," and the liability of the county, so far as the holder of the bonds is concerned, is in no way diminished by the circumstance that as between the county and the magisterial district a convenient and expeditious method is provided for payment of the interest and principal of the bond by levy of a sufficient tax upon the property in the district for that purpose.

In conclusion, we are of opinion that the act in question is constitutional; that the bonds are direct county bonds, for which Tazewell county is primarily liable to the holders; and that the proceedings by which this bond issue was authorized and the bonds executed were in all respects regular and lawful.

For these reasons, the judgment of the circuit court must be affirmed.

Affirmed.

(187 Ga. 113)

HARRIS v. BROCK et al.

(Supreme Court of Georgia. Nov. 15, 1911.)

(Syllabus by the Court.)

1. DOWER (§ 108\*)—COMMISSIONERS' PROCEEDINGS — CONFIRMATION — CONCLUSIVENESS — PERSONS CONCLUDED — CREDITORS OF ESTATE.

Where a person other than the widow of the decedent is the administrator upon the latter's estate, and is duly notified of an application for dower, and the creditors of the estate fail to enter a traverse to the return of the commissioners which assigned dower, and the return is without objection of any kind made the final judgment of the superior court, the creditors are (in the absence of actual fraud upon the part of or collusion between the widow and administrator) bound by such judgment, whether they had notice of its rendition or not. *Williamson v. McLeod*, 64 Ga. 762; *Fussell v. Short*, 96 Ga. 524, 23 S. E. 506.

(a) The fact that the administrator was the

son of the intestate and the widow, and that he knew, previously to the return of the commissioners being made the judgment of the superior court, that the intestate had executed a security deed to the land out of which the dower was assigned, and made no objection to the return being made the judgment of the superior court on that ground, did not amount to such actual fraud or collusion between the administrator and the widow as would authorize the creditors to attack such judgment after its rendition.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 319, 320, 357; Dec. Dig. § 108.\*]

**2. DOWER (§ 112\*)—ASSIGNMENT—CONCLUSIVE-NESS AS TO CREDITORS.**

Where the holder of such security deed, subsequent to the making of the return of the commissioners setting apart dower the judgment of the superior court, obtained a judgment against the administrator for the recovery of the land in which dower had been assigned, and the administrator, in pursuance of the decree of the court in such action against the administrator, obtained a quitclaim deed to such land from the holder of the security deed upon payment to him by the administrator of the debt secured by such deed, the administrator did not thereby become liable to the creditors of the intestate for the rental value of the lands assigned as dower.

[Ed. Note.—For other cases, see Dower, Dec. Dig. § 112.\*]

**3. APPEAL AND ERROR (§ 637\*)—RECORD—EFFECT OF DEFECTS.**

Error was assigned upon the overruling and dismissal of certain exceptions to an auditor's report, and, there being enough in the bill of exceptions to enable this court to ascertain the real questions in the case which the plaintiff in error seeks to have decided, the motion to dismiss the writ of error is overruled. Civil Code 1910, § 6183.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 637.\*]

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action between C. L. Harris, administrator, and C. O. Brock and others. From the judgment, the administrator brings error. Reversed.

W. W. Stark, for plaintiff in error. Ray & Ray and J. S. Ayers, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(137 Ga. 129)

McPHERSON et al. v. CHANDLER.  
(Supreme Court of Georgia. Oct. 28, 1911.)

(Syllabus by the Court.)

**1. DEMURRER OVERRULED—NO ERROR.**

There was no error in overruling the demurrer to the petition.

**2. MALICIOUS PROSECUTION (§ 53\*)—ACTIONS—PLEADING.**

The defendant in error (hereinafter called the plaintiff) brought an action against the plaintiffs in error (hereinafter called defendants) for illegal arrest and malicious prosecution, alleging that he had been wrongfully arrested for carrying on a "near beer" business without a municipal license, and that the defendants, who were the mayor, a member of the municipal council, and a deputy marshal,

sought to prevent his conducting such business by means of arrests, although he held a license from the municipal authorities for the conduct of such business. The defendants denied the allegations of the petition. They also alleged that in order to conduct a "near beer" business it was necessary to have a license from the state, one from the federal government, and one from the municipality where the business was located, and that the plaintiff had no license. They further alleged that every act for which the plaintiff was arrested was a crime, and was committed in the presence of the arresting officer. The plaintiff demurred to so much of the answer as sought to set up that it was necessary to obtain a license from the federal and state authorities for the reason, among others, that it was not alleged that the plaintiff's arrest was based on any violation of the state or federal law. The defendants made no effort to amend, but left their allegations on this subject in a vague and ambiguous condition. Held, that there was no error in sustaining the demurrer and striking such allegations from the answer.

(a) There was no error in sustaining the demurrer to certain other portions of the defendants' answer.

[Ed. Note.—For other cases, see Malicious Prosecution, Dec. Dig. § 53.\*]

**3. MALICIOUS PROSECUTION (§ 55\*)—PLEADING—ISSUES AND PROOF.**

Under the law of this state, where a petition alleges that a plaintiff was illegally arrested on the ground that he was conducting a certain business in a city without having a municipal license for that purpose, and that he in fact had such a license, and the answer denies the allegations of the petition, such denial puts in issue only the allegations of the petition. Under such issue, the defendant may disprove the plaintiff's cause of action, and for that purpose may show that the arrest was not made for an alleged violation of a municipal ordinance, but for an offense against the laws of the state committed in the presence of the arresting officer; but if it is sought to justify the arrest on the ground that it was made both for a violation of a municipal ordinance and of a state law, and that the arrest was legal on either or both of such grounds, a plea of justification should be filed. Civil Code 1910, §§ 4488, 5636; Rateree v. Chapman, 79 Ga. 574, 4 S. E. 684 (3); Kerwich v. Steelman, 44 Ga. 197.

[Ed. Note.—For other cases, see Malicious Prosecution, Dec. Dig. § 55.\*]

**4. APPEAL AND ERROR (§ 671\*)—RECORD—BRIEF OF EVIDENCE—SUFFICIENCY.**

The brief of evidence filed with the motion for a new trial set forth the parol evidence introduced, and also stated that certain documentary evidence was introduced by mere general reference to a minute book, copies of transcripts from minutes, by-laws, and the like, without setting forth such evidence in substance, or showing in any way what were the contents of such documents. There was no charter provision, nor does it appear from such brief that there was any municipal ordinance, making it an offense for the plaintiff to conduct his business without a license. The brief of evidence is so imperfect, and omits such essential parts of the evidence, that it cannot be treated as a compliance with the law as to the manner of bringing the evidence to this court, nor can this court determine any of the assignments of error requiring a consideration of the evidence. Such are a number of the grounds of the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]



# 5. MALICIOUS PROSECUTION (§ 72\*)—INSTRUCTIONS—"MALICE"—"PROBABLE CAUSE."

There are sufficient assignments of error in the motion for a new trial, which can be considered, to show that the presiding judge erred, and that a new trial should be granted. Without sifting the numerous grounds of the motion for a new trial, and discussing how far each of them may or may not be affected by the condition of the brief of evidence, the following will suffice to show error requiring a new trial.

(a) The court charged that, "to constitute malice, it would not be necessary to show ill will or hatred to the person injured, but malice may be inferred from any offensive act, or any act of an offensive nature, which would show disregard of him and violation of proper consideration of the person who is alleged to have been injured." This definition was too broad, and made the definition of "malice" turn rather upon whether an act was offensive to the person claiming to be injured than upon the intent, purpose, or state of mind of the actor, and it was also too general in referring to a disregard of "proper consideration" of the person claiming to be injured. Civil Code 1910, § 4451; *Patterson v. State*, 85 Ga. 131, 133, 11 S. E. 620, 21 Am. St. Rep. 152.

(b) It was not accurate to charge that, in order to constitute "probable cause," there must be reasonable grounds of suspicion, "supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person arrested is guilty of a crime." It is the "reasonable" man, rather than the "cautious" man, who is to be taken as the standard. Civil Code 1910, §§ 4440, 4452.

(c) A charge that "the court charges you, gentlemen of the jury, that the law as a rule does not look with favor upon arrests made without a warrant," should not have been given. Where the law permits an arrest without a warrant, such a rule does not apply; where it does not permit an arrest without a warrant, such an arrest is illegal.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Dec. Dig. § 72.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713; vol. 6, pp. 5618-5620; vol. 8, p. 7765.]

# 6. MALICIOUS PROSECUTION (§ 55\*)—APPEAL AND ERROR (§ 1031\*)—EVIDENCE—PREJUDICE FROM ERROR.

In an action for illegal arrest and malicious prosecution, where aggravating circumstances and bad faith are charged, the measure of damages in case of a recovery by the plaintiff is necessarily in issue, and under a general denial of the plaintiff's allegations, the defendant may introduce evidence tending to show that there was no bad faith, or aggravation, and that the plaintiff was not damaged in the amount claimed.

(a) In a suit of the character above indicated there is no exact measure of damages, and the recovery of no particular amount can be declared by a reviewing court to be demanded by the evidence; and errors calculated to prejudice the jury in respect of the amount of the recovery import injury.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Dec. Dig. § 55;\* *Appeal and Error*, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.\*]

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Action by P. E. Chandler against D. A. McPherson and others. Judgment for plaintiff, and defendants bring error. Reversed.

M. C. Edwards and R. L. Moye, for plaintiffs in error. Geo. Perry, R. Terry, and Glessner & Park, for defendant in error.

HOLDEN, J. Judgment reversed. All the Justices concur, except BECK, J., absent.

(137 Ga. 82.)

# HOLTON v. STATE.

(Supreme Court of Georgia. Nov. 14, 1911.)

## (Syllabus by the Court.)

### 1. JURY (§ 127\*)—DISQUALIFICATION—INVESTIGATION AFTER ACCEPTANCE.

Upon the trial of the accused, charged with murder, after the jury of 12 had qualified upon their voir dire, and had been accepted by the state and the accused, and sent to their room, and before being sworn in chief, the solicitor general stated to the court that he desired to put upon trial, as to his competency, one of such jurors, for the reason that the juror had expressed a decided bias as to the case, in that he had made the statement that "it ought to be narrated all over the county that the defendant ought to be turned loose, and if he got on the jury he would do it." The solicitor further stated to the court that the alleged disqualification of the juror had come to his knowledge since the juror was accepted, and that no one interested in behalf of the state had any knowledge of such alleged disqualification until after the juror had been accepted. After the introduction of evidence in behalf of the state, before the court as a trier on the question as to the juror's disqualification, and after the juror's statement to the court on the subject, the court found the juror to be qualified, and he served in the trial of the case, and a verdict of guilty was rendered. *Held*, that the court did not err in allowing such investigation as to the competency of the juror. Penal Code 1910, § 1004; *Eberhart v. State*, 47 Ga. 598 (3).

[Ed. Note.—For other cases, see *Jury*, Dec. Dig. § 127.\*]

### 2. CRIMINAL LAW (§ 954\*)—NEW TRIAL—SPECIFICATIONS IN MOTION.

One of the grounds of the motion for a new trial was: "Because on the trial of the case, while [a named person], a witness for the defendant, was on cross-examination by the solicitor general, said witness having testified that in his opinion the defendant on trial, at the time he killed the deceased, was insane, the court erred in ruling out, upon the objection of the solicitor general that the same was irrelevant and immaterial, the following answer of the witness: 'About this insult to his wife —.' This witness at the time being cross-examined as to his reasons for basing the opinion [opinion] that the defendant at the time of the homicide was insane." This ground does not sufficiently specify any point for determination.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2363-2367; Dec. Dig. § 954.\*]

### 3. CRIMINAL LAW (§ 954\*)—NEW TRIAL—GROUND OF MOTION.

A ground of a motion for new trial, based upon the refusal of the court to permit a given question to be asked by a party of his own witness, furnishes no reason for a new trial, where it does not appear what answer was expected to the question. *Southern Railway Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979; *Morris v. State*, 129 Ga. 434, 59 S. E. 223.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2363-2367; Dec. Dig. § 954.\*]

#### 4. HOMICIDE (§ 297\*)—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

Upon the trial of one accused of murder, who, in his statement to the jury, admitted committing the homicide, and nothing was set up by way of justification or mitigation, other than that the person killed, several years prior to the homicide, had grossly insulted the wife of the accused, and that the accused was insane at the time of the homicide, it was not error for the court to refuse, upon written request of counsel for the accused, to give in charge to the jury the provisions of Penal Code 1910, §§ 70, 72, 74, 75, relating, respectively, to justifiable homicide, killing in defense of property or habitation, mutual protection by parents and children, and all other instances standing upon the same footing of reason and justice.

(a) Nor did the court, under the evidence in this case and the statement of the accused, and in view of the defenses set up, err in refusing to give, upon the written request of counsel for the accused, the following instruction to the jury: "I charge you that the section of the Code which I have just read you, to wit, that which provides that 'all other instances which stand upon the same footing of reason and justice as those enumerated shall be justifiable homicide,' refers to those instances which I have given you under the head of 'justifiable homicide,' killing in defense, or defense of habitation or property, or killing another under the fears of a reasonable man, or killing in his own defense, and that the jury, who, as I have explained previously to you, being the judges of both the law and the evidence in this case, are clothed with large discretionary powers over that class of offenses, where the defense is set up by the slayer that he took the life of another under other instances or circumstances standing upon the same footing of reason and justice as those which I have enumerated, and that it is with the jury to say whether the defense set up in this case, if you should see fit and proper to give weight and credit to the statement of the accused, was such as contemplated by the law when it says that 'all other instances which stand upon the same footing of reason and justice as those enumerated, shall be justifiable homicide.'"

(b) There was no evidence authorizing an instruction that, "the homicide appearing to be justifiable, the persons indicted shall, upon the trial, be fully acquitted and discharged."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 611; Dec. Dig. § 297.\*]

#### 5. CRIMINAL LAW (§§ 773, 829\*)—REPETITION OF INSTRUCTIONS.

Where the judge, in his general charge to the jury, fully, clearly, and accurately instructed them as to the law of insanity and the degree thereof that will excuse a person from criminal liability, and as announced by previous decisions of this court, it was not error to refuse to give in charge, upon written request of counsel for the accused, correct legal principles relating to the same subject, which are fully covered and expressed substantially in the same language by the general charge.

(a) Nor, under such circumstances, was it error for the judge to refuse to give in charge the request embracing language used by way of argument by text-writers and judges of reviewing courts in other cases as to "the infinite variety of forms in which insanity and derangement may show itself" and the difficulty in defining "the invisible line that divides perfect and partial insanity."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821-1828, 2011; Dec. Dig. §§ 773, 829.\*]

#### 6. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REPETITION.

The request to charge upon the subject of impeachment of witnesses was fully covered in the general charge, and in practically the same language as the request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

#### 7. CRIMINAL LAW (§ 1172\*)—INSTRUCTIONS—HARMLESS ERROR.

Complaint was made in one ground of the motion for new trial that the court, in charging upon the subject of impeachment of witnesses, instructed the jury as follows: "It being entirely with the jury to determine whether or not a witness has been successfully impeached, whenever they find any evidence of an impeaching nature, and if they should determine that any witness had been successfully impeached, then it is entirely for the jury to determine whether or not they will believe the impeaching witness or the witness sought to be impeached; it being for the jury to pass upon the credibility of the testimony in the case—the evidence in the case." The criticism made upon this charge was "that it instructed the jury to the effect that, although they might find that a witness had been successfully impeached, still the jury had a right, after so finding that such witness had been successfully impeached, to believe such impeached witness in preference to the witness by whom such impeachment was made." While this exception to the instruction was well taken, it was not harmful to the accused, for the reason that the only witness sought to be impeached was one who testified in behalf of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3169; Dec. Dig. § 1172.\*]

#### 8. CRIMINAL LAW (§ 768\*)—INSTRUCTIONS—DUTIES OF JURY.

The court did not err in instructing the jury as follows: "If the court should err in giving you a principle of law, there is a way by which such error may be corrected. That responsibility does not rest upon your shoulders, and it is therefore your duty to accept the law as given you in charge by the court, and apply those principles of law to the facts as you find them, and make up your verdict, as stated to you."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1798-1802; Dec. Dig. § 768.\*]

#### 9. REVIEW OF INSTRUCTIONS.

There was no merit in any of the exceptions to the instructions given on the subject of insanity, as they were in almost the identical language of charges approved by this court in *Lee v. State*, 116 Ga. 583, 42 S. E. 759.

#### 10. CRIMINAL LAW (§§ 773, 922\*)—INSANITY AS A DEFENSE—INSTRUCTIONS.

In view of the full, clear, and accurate instructions given by the court to the jury on the subject of insanity, the mere failure to charge the jury "that the insanity of a person charged with crime might appear from the indicia of the act committed," and "failure to charge the jury the law of partial insanity," was not cause for a new trial. Nor was the failure to charge "the law of delusional insanity" cause for a new trial, for the reason that there was no evidence to authorize an instruction upon that subject, and, even if delusional insanity were presented in the statement made by the accused to the jury, the failure to charge upon that subject, in the absence of a proper and timely

written request, was not cause for the grant of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821-1828, 2210-2218; Dec. Dig. §§ 773, 922.\*]

#### 11. CRIMINAL LAW (§ 1129\*)—APPEAL—ASSIGNMENTS OF ERROR.

Assignments of error upon the admission of evidence, or the statement of a witness made before the jury while testifying, are not sufficiently made, where it does not appear from the grounds of the motion in respect thereto what objection was made and ruled upon by the court in reference to such evidence. *Cook v. State*, 134 Ga. 347, 67 S. E. 812; *Wadsworth v. Wadsworth*, 134 Ga. 816, 68 S. E. 649.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954-2964; Dec. Dig. § 1129.\*]

#### 12. GRANT OF NEW TRIAL.

The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Dooly County; U. V. Whipple, Judge.

Isaac Holton was convicted of homicide, and brings error. Affirmed.

W. H. Lasseter and Crum & Jones, for plaintiff in error. W. F. George, Sol. Gen., and T. S. Felder, Atty. Gen., for the State.

FISH, C. J. Judgment affirmed. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(10 Ga. App. 101)

#### GEORGIA & F. RY. v. JOHNSON.

(No. 3,302.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

#### 1. WITNESSES (§ 196\*)—APPEAL AND ERROR (§ 1051\*)—CONFIDENTIAL COMMUNICATIONS—DOCUMENTARY EVIDENCE—HARMLESS ERROR.

The plaintiff made a verbal contract with the defendant railway company to furnish it a specified number of cypress poles. It was admitted that the number of poles were furnished, but some were rejected, and payment for them was refused, because, as contended by the company, they did not come up to the specification of the contract as to size; the company contending that the contract specified that the poles were to be "10 inches in diameter at the small end." The plaintiff contended that the contract specified that they were to be "8 inches in diameter at the small end." The general manager of the defendant company, after inspecting the poles, wrote to the roadmaster, who was the agent representing the railway company in making the contract, to the effect that a majority of the poles exceeded 8 inches in diameter at the small end, and, if the specification of the contract was as claimed by the plaintiff, the company owed the account sued on. *Held*, the letter was not a confidential communication, and was competent evidence in behalf of the plaintiff. But, even if incompetent, its admission was harmless, there being no dispute that the poles were not less than 8 inches in diameter at the small end; and the letter contained no statement as to what in

fact was the specification of the contract on the sole question in issue.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 744-746; Dec. Dig. § 196;\* Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

#### 2. TRIAL (§ 234\*)—INSTRUCTIONS—RULES OF EVIDENCE.

There was no error for any reason in the following: "If you should find that the plaintiff has not carried the burden to your satisfaction, or that the defendant, by the preponderance of testimony, or by sufficient proof to satisfy your mind, has proven to you that they are not liable for any amount, your verdict will be: 'We, the jury, find for the defendant.'"

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.\*]

#### 3. APPEAL AND ERROR (§ 1002\*)—REVIEW—QUESTIONS OF FACT.

The exceptions as to alleged errors of law are manifestly without merit; the controlling question depending upon an issue of fact, on which there was conflict in the evidence, and this conflict was settled by the verdict in favor of the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Error from City Court of Nashville; W. G. Harrison, Judge.

Action by R. M. Johnson against the Georgia & Florida Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. H. Barrett, J. P. Knight, and Quincey & McDonald, for plaintiff in error. Rogers & Heath, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 109)

#### GARNETT v. STATE. (No. 3,586.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 278\*)—PLEA IN ABATEMENT—DISQUALIFICATION OF GRAND JUROR.

A plea in abatement, setting up that a member of the grand jury who returned the indictment was also a member of the firm whose store was alleged to have been burglarized, is insufficient in law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 278.\*]

#### 2. CRIMINAL LAW (§ 1178\*)—WRIT OF ERROR—REVIEW—ABANDONMENT OF ERROR.

A point, not insisted on in the brief of counsel for the plaintiff in error, will be treated as abandoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.\*]

#### 3. CRIMINAL LAW (§ 406\*)—EVIDENCE—ADMISSIONS—PROMISE OF IMMUNITY.

Where, in the chain of evidence fixing unmistakable guilt on the accused, there is one link consisting of his own incriminatory admission leading to the discovery of other independent circumstantial evidence, the incriminatory admission, together with the circumstances, should go before the jury, even though it appear

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that the incriminatory admission was induced by promise of immunity from prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 894-927; Dec. Dig. § 406.\*]

**4. CRIMINAL LAW (§ 563\*) — EVIDENCE — WEIGHT AND SUFFICIENCY — CORPUS DELICTI.**

The corpus delicti was sufficiently proved by the circumstantial evidence, coupled with the incriminatory admissions of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1269; Dec. Dig. § 563.\*]

**5. CRIMINAL LAW (§ 1169\*) — WRIT OF ERROR — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE.**

While, from some of the numerous grounds of the motion for a new trial, complaining of the admission of evidence, there appears some hearsay and some irrelevant testimony, it also appears that the defendant was not prejudiced thereby; and the trial being otherwise free from error and the evidence strongly indicative of guilt, this court would not be justified in reversing the judgment overruling the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.\*]

**6. PROOF OF VENUE — SUFFICIENCY.**

The venue was sufficiently proved.

**7. CHARGE — SUFFICIENCY.**

The charge was full and fair, and covered the written requests, in so far as they were appropriate to the issues in the case.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

J. W. Garnett was convicted of burglary, and brings error. Affirmed.

Isaac S. Peebles, Jr., for plaintiff in error. John M. Graham and J. S. Reynolds, Sol. Gen., for the State.

**RUSSELL, J.** The defendant, Garnett, who, at the time of the transaction set out below, was a policeman of the city of Augusta, was convicted of the offense of burglary and sentenced to seven years' imprisonment. Some time in 1907 it was reported to the prosecutor, J. J. O'Connor, a member of the firm of Rice & O'Connor Shoe Company, that there were a lot of his shoes in a certain cellar. The matter was investigated by the police department of the city, and, having cause to suspect the defendant, his locker at the police barracks was examined, and therein was found a pair of ladies' shoes, which were identified by the prosecutor as shoes from his stock. The defendant was then sent for, and, in an interview which followed between him and the prosecutor, at which several other witnesses were present, he admitted that he had taken the shoes from the prosecutor's store one night, by using a key with which he effected an entrance through the front door. He further admitted that he had taken about \$250 worth of shoes from the same store, and thereupon agreed to pay \$150 in settlement of the matter, to which the prosecutor assented. Whether the money was ever paid does not clearly appear, but it is fairly inferable from the testimony that it was not.

The evidence does show that about a dozen pair of shoes were returned by the defendant to the prosecutor, and that these shoes were clearly identified as shoes sold only by the prosecutor's firm at Augusta, and of their brand, size, and mark. After the conversation in which the defendant admitted that he had effected the entrance into the store with a key, the prosecutor met him in the street and asked him for the key, and was given by him a key with which the prosecutor afterwards unlocked the door of the store. The shoes returned by the defendant were kept by him at the house of a fortune teller, with whom he was intimate. Shortly afterward the defendant fled from the state, and he remained in hiding for three years.

It appears that, at the first interview between the prosecutor and the defendant, the prosecutor promised not to hurt a hair of the defendant's head if he would tell the truth about the matter, and further promised to help him hold his position on the police force. Relying on these promises of immunity from punishment, and hope of being rewarded by retention in his position, the defendant made the admissions, and undertook, by causing the return of goods, to make satisfactory restitution and settlement of the matter. In his statement at the trial he denied all guilt, and explained his admissions previously made by saying he was trying to shield the fortune teller, who feared trouble with the police, because she had not paid her license fee. He accounted for his flight by saying that, after the matter was given publicity, he noted that public opinion was so strong against him that, under the advice of his attorney, he fled from the state until sufficient time had elapsed to insure his having a fair trial, when he voluntarily returned and surrendered.

[1] 1. Before pleading to the merits, the defendant filed a plea in abatement, on two grounds, the first of which was that it appeared that J. J. O'Connor, a member of the firm whose store was alleged to have been burglarized, was a member of the grand jury by whom the presentment was found. There was a day when parties litigant were wholly incompetent as witnesses; the reason of the law at that time being that their interest in the result of the case was such as to make their testimony of no probative value. It is a far cry from that day to this, when usually the only, and certainly the most important, witnesses in every case are the parties litigant themselves, whose testimony is admitted to the jury, to have such weight as that tribunal may see fit to give it. No less interesting is the change as to the qualification of a juror as a witness. There was once a time in our law when, after retiring to the jury room, the jury could administer the oath to one another, hear their own evidence as to the transaction in issue, and

bring in a verdict on the evidence thus ad-  
duced, out of the hearing of judge, lawyers,  
and parties litigant. In this day and time  
the verdict must be based on the evidence as  
heard from the witness stand, and a juror is  
expressly forbidden to act on his own pri-  
vate knowledge of the transaction, unless he  
is sworn and examined as a witness in the  
case. Civil Code 1910, § 5932. Thus do our  
notions of things change. But we have not  
yet reached the point that we are willing  
for a juror to act as a judge in his own  
case, and still recognize that a party and  
his relatives are not qualified to sit in the  
petit jury box. The person from whom  
goods are alleged to have been burglarized  
sustains such a relation to the state's side  
of a criminal case that he would be incom-  
petent as a petit juror. But the grand jury  
is merely a court of inquiry, and the dis-  
qualification of a grand juror for such a  
cause cannot be taken advantage of by plea  
in abatement. The reasons for this rule are  
well stated in the recent case of *Hall v.*  
*State*, 7 Ga. App. 115, 68 S. E. 390 (1). We  
conclude, therefore, that the judge did not  
err in holding that the plea in abatement  
was insufficient in law in this particular.

[2] 2. The second point raised by the plea  
in abatement relates to whether or not the  
indictment was indorsed by the grand jury  
as the law requires. The brief of the  
plaintiff in error makes no reference to this  
point, and we assume, therefore, that it has  
been abandoned. *Groves v. State*, 8 Ga. App.  
690, 70 S. E. 93 (3).

[3] 3. The motion for a new trial, as  
amended, contains 39 grounds, all of them  
presenting, in a little different way for the  
most part, the same general questions. The  
first one we shall discuss is whether or not  
the court erred in admitting the alleged in-  
criminating admissions of the defendant. It  
is ably and earnestly argued before us that  
it appears from the state's own evidence that  
the admissions were not freely and volun-  
tarily made, but were induced by hope of  
reward, based on promises of the persons  
receiving the admissions. We are inclined  
to believe that able counsel falls clearly to  
delimit the difference between a confession  
and an incriminating admission. A confes-  
sion, not freely and voluntarily made, should  
be rejected. The reason for this rule has  
been stated so many times and is so well  
known that restatement here would be use-  
less redundancy. On the other hand, where  
the reason fails, the rule ceases. Where, in  
the chain of evidence fixing unmistakable  
guilt on the accused, there is one link, con-  
sisting of his own admission, which makes  
the chain complete, the law in its wisdom  
does not reject that link as useless, but per-  
mits it to go before the jury, not as a con-  
fession, but merely as a circumstance, which,  
together with the other evidence in the case,  
tends to prove the guilt of the accused.

*Daniels v. State*, 78 Ga. 99 (3), 103, 104, 6  
Am. St. Rep. 238.

Where, therefore, in making a confession  
which comes up to the full requirements of  
the law in all particulars, save that it was  
not full, free, and voluntary, the defendant  
discloses a clue which leads to other extrane-  
ous evidence tending to incriminate him, the  
evidence thus disclosed, together with the  
particular part of the admissions of the de-  
fendant relating thereto, is admissible. This  
was just what happened in the case at bar.  
It is true that, before making the alleged  
confession, the defendant, a policeman,  
thought he had securely intrenched himself  
behind promises which would forever keep  
closed the mouths of the persons in whose  
presence he was speaking. It is often said,  
however, that a little learning is a danger-  
ous thing, and the truth of the maxim is  
well illustrated in the case at bar. The ex-  
perience of a policeman is such that he must  
soon become acquainted with the general  
principle that a confession not voluntarily  
made cannot be used against the confessor.  
Few of them, however, would have occasion  
to know the limitation on this principle to  
which allusion has been made. If the de-  
fendant had been content to remain intrench-  
ed behind the general principle, he would  
have been safe; but he went further, and  
disclosed clues which resulted in the un-  
earthing of extraneous evidence which weav-  
ed about him a web so strong that even the  
most incredulous of all the doubting Thom-  
ases would not call for a confirmation.  
There are the ladies' shoes in his locker  
at the police barracks, positively identified  
as having come from the stock alleged to  
have been burglarized; there is the key,  
found in his possession, with which he says  
he opened the door and which proved to fit  
it; there are the lot of shoes of the same  
kind, with the private mark and identified  
as sold at Augusta only by this firm, which  
never in the memory of the senior member  
had sold so large a quantity at retail to one  
person; there is the fortune teller, with  
whom the defendant was intimate, and at  
whose house he directed the negro hackman  
to call for the shoes and return them to the  
firm, from whom he says he had taken them;  
there is the defendant's flight from the  
state—all these circumstances tending to  
show the defendant's guilt, and his own  
statements fitting in so well with the other  
indicia of guilt. The judge properly, there-  
fore, received in evidence these incrimina-  
tory admissions, and correctly charged the  
jury as to the rules of law governing such  
evidence. *Rusher v. State*, 94 Ga. 365, 21 S.  
E. 593, 47 Am. St. Rep. 175; *Pines v. State*,  
21 Ga. 227 (3); *Dixon v. State*, 116 Ga. 186,  
42 S. E. 357 (3); *Waycaster v. State*, 70 S. E.  
885.

[4] 4. The next point urged is that the cor-  
pus delicti was not sufficiently proved. It

appears that the shoes were not missed from the stock at the time of the alleged burglary, and that the only evidence that a crime had been committed was that adduced after suspicion had pointed to the defendant and the investigation resulted in the disclosure of the clues which led to his admission, which in turn unearthed other circumstances of guilt. We are aware of the rule that a confession uncorroborated is not sufficient proof of the corpus delicti; but we are also cognizant of the counter proposition that the corpus delicti may be proved by circumstantial evidence, coupled with an incriminatory admission of the defendant. The jury were authorized to infer from the evidence, direct and circumstantial, that the store had been burglarized and that the defendant was the burglar; and, after all, this is what corpus delicti means.

[5-7] 5-7. Various other grounds of the amended motion complain that the court erred in admitting certain testimony over the defendant's objection that it was hearsay or irrelevant. A careful examination of each ground, together with the record as a whole, fails to disclose any error so prejudicial to the defendant as to justify a new trial. We are inclined to believe that some of the evidence which was admitted possessed such a slight degree of relevancy, if relevant at all, that it might properly have been rejected; and that in one or two instances the judge allowed a little hearsay evidence of slight relevancy to creep in; but in a case so free from other material error, and one wherein the proof is so strongly indicative of guilt, the admission of irrelevant or hearsay harmless testimony is not cause for a new trial. The venue was properly proved. The requests to charge, so far as pertinent and appropriate, were covered by the general charge.

Judgment affirmed.

(10 Ga. App. 153)

STANLEY v. STATE. (No. 3,618.)

(Court of Appeals of Georgia. Nov. 20, 1911.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 563\*)—EVIDENCE—WEIGHT AND SUFFICIENCY—CORPUS DELICTI.

The circumstantial evidence, in connection with the incriminatory admission of the defendant, sufficiently proves the corpus delicti. See *Garnett v. State*, 72 S. E. 951, this day decided. The verdict of guilty is amply supported by the evidence, and the record is free from material error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1269; Dec. Dig. § 563.\*]

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Shade Stanley was convicted of crime, and brings error. Affirmed.

B. J. Fowler, for plaintiff in error. Walter J. Grace, Sol. Gen., for the State.

RUSSELL, J. Judgment affirmed.

(157 N. C. 270)

CLARK v. W. R. BONSAI & CO. et al.

(Supreme Court of North Carolina. Nov. 27, 1911.)

1. INSURANCE (§ 435\*)—ACCIDENT INSURANCE—ACCRUAL OF ACTION.

If the indemnity provided in an employer's accident insurance policy is against loss or damages, an action will not lie by insured, where he has not suffered damage by payment of some part of an employé's claim; but if the indemnity is against liability by the employer a right of action accrues to him when an employé is injured, or, in some cases, when the amount and legality of the claim has been established by a valid judgment, if so provided by the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. § 435.\*]

2. INSURANCE (§ 624\*)—EMPLOYER'S ACCIDENT INSURANCE—PERSONS ENTITLED TO SUE.

Unless an employer's accident insurance policy expressly provides that it is for the benefit of injured employés, and that amounts recovered should be paid to them, an injured employé may not, in the first instance, sue on the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 624.\*]

3. PARTIES (§ 25\*)—DEFENDANTS.

That a judgment may determine points of law adverse to a person is not sufficient ground for making him a defendant; it being necessary as a rule that all defendants have a responsible interest.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 36-40; Dec. Dig. § 25.\*]

Appeal from Superior Court, Anson County; Justice, Judge.

Action by W. H. Clark, administrator, against W. R. Bonsai & Co. and the Maryland Casualty Company. From a judgment dismissing the action as against the Casualty Company, plaintiff appeals. Affirmed.

Civil action to recover damages for death of plaintiff's intestate, an employé of the Bonsai Company, caused by alleged negligence of the employer, and in which the Maryland Casualty Company was joined as an original party defendant, heard on demurrer for misjoinder of parties before his honor, M. H. Justice, at April term, 1911, of the superior court of Anson county. The complaint sets forth a cause of action against the Bonsai Company for negligently causing the death of intestate in the course of his employment with that company, and alleges that Bonsai & Co. held a contract of indemnity insurance with the Casualty Company, and makes the contract a part of the complaint. The complaint contained no allegations of insolvency on the part of the Bonsai Company; nor any facts ultra, having a tendency to give the court jurisdiction, in application or distribution of an insolvent's estate; nor was there allegation of assignment to plaintiff by the insured company. The right of joinder is made to rest on the terms of the policy and the stipulations therein, relevant to the questions presented, are as follows: "The Casualty Co. guarantees the assured against loss from

the liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered by any employé or official, or employes and officials, of the assured while the said employes or officials are engaged in the occupations and at the places mentioned in the schedule below; provided such bodily injuries or death are suffered as a result of accidents occurring within the period of twelve (12) months, beginning on the first day of December, 1908, at noon, and ending on the first day of December, 1909, at noon, standard time, at the place where the policy has been countersigned.

\* \* \* The company's liability for loss from an accident resulting in bodily injuries, including death resulting therefrom, to one person, is limited to five thousand dollars (\$5,000), and subject to the same limit for each person, the company's total liability for loss from an accident resulting in bodily injuries, including death resulting therefrom, to more than one person, is limited to ten thousand dollars (\$10,000). In addition to these limits, however, the company will, at its own cost (court costs being considered part thereof), investigate all accidents and defend all suits, even if groundless, of which notices are given to it as hereinafter required, unless the company shall elect to settle the same. \* \* \* Immediate notice of any accident and of any suit resulting therefrom, with every summons or other process, must be forwarded to the home office of the company or its authorized representative. The company is not responsible for any settlements made or any expenses incurred by the assured, unless such settlements or expenditures are first specifically authorized in writing by the company, except that the assured may provide at the time of the accident, at the expense of the company, such immediate surgical relief as is imperative. In the event of an accident causing injuries to more than one person, the company may terminate its liability under this policy on account of such accident, by payment to the assured of its total limit of liability above named. \* \* \* This policy may be canceled by either the company or the assured at any time by written notice to the other, stating when the cancellation shall be effective." The court below sustained the demurrer and dismissed the action as to the Casualty Company, and plaintiff, having duly excepted, appealed.

Lockhart & Dunlap and Robinson & Caudle, for appellant. McLean, Varner & McLean and Murray Allen, for appellee.

HOKE, J. (after stating the facts as above). [1, 2] In construing contracts of this character, the courts have generally held that if the indemnity is clearly one against loss or damages no action will lie in favor of the insured till some damage has been

sustained, either by payment of the whole or some part of an employé's claim; but if the stipulation is in effect one indemnifying against liability a right of action accrues when the injury occurs, or, in some instances, when amount and rightfulness of the claim has been established by judgment of some court having jurisdiction, this according to the terms of the policy, but, unless the contract expressly provides that it is taken out for the benefit of the injured employes, and the payment of recoveries by them, none of the cases hold that an injured employé may, in the first instance, proceed directly against the insurance company. In all of them, so far as examined, a right of action arising on the policy is treated and dealt with as an asset of the insured employer, and, in the absence of an assignment from him, the employé cannot appropriate it to his claim, except by attachment or bill in the nature of an equitable *f. fa.*, or some action, in the nature of final process, incident to bankruptcy or insolvency. Certainly this position is supported by the great weight of authority. *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981; *Bain v. Atkins*, 181 Mass. 240, 68 N. E. 414, 57 L. R. A. 791, 92 Am. St. Rep. 411; *Embler v. Hartford Boiler Co.*, 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512; *Cushman v. Fuel Co.*, 122 Iowa, 656, 98 N. W. 509; *Hawkins v. McCalla*, 95 Ga. 192, 22 S. E. 141; *Carter v. Insurance Co.*, 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155; *Finley v. Casualty Co.*, 113 Tenn. 592, 83 S. W. 2; *Kinnan v. Casualty Co.*, 107 Ill. App. 406; *Vance on Insurance*, p. 608; 15 Cyc. p. 1038; 11 A. & E. (2d Ed.) p. 16. The doctrine, as announced and sustained in these citations, is very well epitomized in *Vance on Insurance* as follows: "The fund, payable under a liability policy, is not subject to any trust in favor of the person whose right to damages for personal injury gave rise to the insurer's liability; nor has such third person any other right in connection with the insurance, save the common right of reaching the fund, when payable, by garnishment or other proper process." The cases from other courts, chiefly relied upon by plaintiffs, are not necessarily in conflict with this position. In *Fritchie v. Miller's Co.*, 197 Pa. 401, 47 Atl. 351, *Hoven v. Employer's Liability*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388, and *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689, judgment had been first obtained against the employer, and garnishment was issued against the company. In *Sanders v. Frankfort Insurance Co.*, 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, judgment was first obtained, and the action was in the nature of an equitable *f. fa.*, seeking to appropriate claim as the property of the insured; and in *Insurance Co. v. Moses*, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am.

St. Rep. 663, the insured employer had become bankrupt, and appropriation was had, to an amount of loss, as indicated by a pro rata distribution of the other assets among the creditors, reversing, in this respect, a decree of the vice chancellor, in which the entire amount of claim had been held applicable to injured employé's recovery. See same case, 61 N. J. Eq. 59, 47 Atl. 579. What amount may be recovered on proceedings of garnishment or bill in aid of collecting the judgment will depend on the nature of the stipulations of indemnity and the facts and circumstances of the particular case. Thus when, as in the Massachusetts, Tennessee, and Iowa cases, *supra*, the policy is clearly an indemnity against "loss actually paid" by the assured, "to reimburse him for a loss actually sustained and paid in satisfaction of a judgment after the issue determined" (the language in the Iowa case, *supra*), and it appears that there has been nothing paid, it seems that no amount is applicable. In the New Jersey case, as stated, on similar stipulations, it was finally held that the loss would be considered paid by the insured and recoverable from the company to the amount indicated by the pro rata distribution of the other assets, etc. In the Minnesota and New Hampshire cases, *supra*—and we incline to the opinion that the present policy comes within the principle—it was held that the term "insured against loss from liability arising," etc., in the first portion of the policy, was so modified by subsequent clauses that it amounted to insurance against liability, and the entire amount could be applied to the employer by appropriate process—process that recognizes and deals with it as an asset of the employer.

The cases in our own court, to which we were especially referred by counsel, do not sustain his contention. In *Alken's Case*, 141 N. C. 339, 53 S. E. 867, in which the court said that a casualty company, while not a necessary, was a permissible, party, the policy was not before the court, or made part of the record. The allegation concerning it was to the effect that the employer had a policy and stipulations to indemnify it against all injuries to any of its employés, including the plaintiff, and to pay any sum that might be recovered by any of said employés, including the plaintiff—a direct stipulation to pay the recovery sought in the action. In case of *Shoaf v. Insurance Co.*, 127 N. C. 306, 37 S. E. 271, a policy holder in a fire insurance company brought his action directly against a reinsuring company, and the decision was made to rest on the ground that, by the express terms of the agreement the reinsuring company was to pay the losses on policies already issued, and so, as between the two contracting parties, became the principal debtor; and on the further ground that the property of the

original company, as part of the consideration, was assigned and transferred to the company sued, as it was in *Johannes v. Insurance Co.*, 66 Wis. 50, 27 N. W. 414. 57 Am. Rep. 249, a case cited and relied on in the Shoaf decision. And so, in all the decisions cited by plaintiff, where the claimant was allowed to sue the indemnitor by direct action, the contract, either in express terms or by fair intendment, was made for the benefit of the plaintiff, as in *Gorell's Waterworks*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598; or, by the nature of the contract, or by virtue of property passed and the attendant facts, the party assumed towards the other the place of primary debtor, and was held bound to plaintiff, under the general equitable principles of *indebitatus assumpsit*, as in *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667, and *Voorhees v. Porter*, 134 N. C. 591, 47 S. E. 31, 65 L. R. A. 736; or the bond taken under statutory provision was for the benefit of claimant; or the action was permissible in tort for wrongful seizure of property, and the bond of indemnity constituted the obligor a participant in the wrong; but no such facts are presented here.

An ordinary indemnity contract of this character is not made for the benefit of the employé, either in its express terms or in its underlying purpose. It is made for the protection and the indemnity of the employer, fortifying him against unexpected and uncertain demands which might otherwise prove disastrous to his business, and the rights arising under such a contract are his property, and actions to recover the same are and should be under his control. The nature of the contract and the principles applicable are well stated in one of the Massachusetts cases, above cited (*Bain v. Atkins*), as follows: "The only parties to the contract of insurance were Atkins and the company. The consideration for the company's promise came from Atkins alone, and the promise was only to him and his legal representatives. Not only was the plaintiff not a party to either the consideration or the contract, but the terms of the contract do not purport to promise an indemnity for the benefit of any person other than Atkins. The policy only purports to insure Atkins and his legal representatives against legal liability for damages respecting injuries from accidents to any person or persons at certain places within the time and under the circumstances defined. It contains no agreement that the insurance shall inure to the benefit of the person accidentally injured, and no language from which such an understanding or intention can be implied. Atkins was under no obligation to procure insurance for the benefit of the plaintiff, nor did any relation exist between the plaintiff and Atkins which could give the latter the



right to procure insurance for the benefit of the plaintiff. The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in any other property belonging absolutely to Atkins." This being the correct position the complaint as it now stands, sets forth no cause of action against the insurance company; nor does it contain facts giving plaintiff any present right to recover against it, nor to have judgment in any way directly affecting its rights.

[3] The principle is very well stated in 30 Cyc. p. 125, as follows: "It is not sufficient reason for joining a person as defendant that the adjudication of the case at bar may determine points of law adversely to its interests. As a rule, the record must show a responsible interest in all the defendants, citing, among other cases, *Conklin v. Thurston and Others*, 18 Ind. 290; *U. S. v. Pratt Coke & Coal Co. (C. C.)* 18 Fed. 708. In our opinion, the Casualty Company has no interest or place in this controversy, and the judgment of his honor, sustaining the demurrer, must be affirmed.

Affirmed.

(157 N. C. 175)

# KELLY v. ENTERPRISE LUMBER CO.

(Supreme Court of North Carolina. Nov. 27, 1911.)

## 1. LOGS AND LOGGING (§ 2\*)—RESERVATION OF TIMBER.

Where the fee of land was granted with a reservation of timber, there being no indication of when rights under the reservation would expire, the mere lapse of time will not defeat it, but the grantee of the fee must give the owner of the reserved timber reasonable notice to remove before his rights will be cut off.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 2.\*]

## 2. INJUNCTION (§ 178\*)—TEMPORARY INJUNCTION.

In an action to restrain the cutting of timber, it appearing that when the land was conveyed to plaintiff the trees then matured were reserved, and that defendant was threatening to cut trees which have matured since the grant, a temporary injunction, restraining the cutting of such timber, was improperly dissolved on defendant's giving a bond, where the court did not find that plaintiff was not bona fide in his contention, since *Revisal 1905, §§ 807, 808*, does not make insolvency of the defendant a condition precedent to an injunction, and section 809 allows a bond, in lieu of an injunction, only where the application appears not to be bona fide, and it is not impossible for experts to determine which trees have matured since the grant.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 390; Dec. Dig. § 178.\*]

## 3. REFERENCE (§ 14\*)—COMPULSORY REFERENCE.

Under *Revisal 1905, § 519*, subsec. 3, providing for a compulsory reference where a case is one requiring a personal view of the premises, compulsory reference may be had to determine

what trees were included in a reservation of timber.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. § 29; Dec. Dig. § 14.\*]

## 4. LOGS AND LOGGING (§ 2\*)—RESERVATIONS OF TIMBER ON SALE OF LAND—EFFECT.

Where timber land was granted with a reservation of all timber of every description on said land, the instrument providing that until said timber was cut the grantee might have all the necessary firewood and fence rails, to be cut from pine trees, not over 14 inches in diameter, and two marked cypress trees, the reservation embraced only such trees as were large enough for timber trees when the grant was made.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 2.\*]

Appeal from Superior Court, Duplin County; Peebles, Judge.

Action by Gaston Kelly against the Enterprise Lumber Company. From a judgment dissolving a temporary injunction and denying defendant's right to certain timber, both parties appeal. Reversed on plaintiff's appeal and affirmed on that of defendant.

H. D. Williams and Davis & Davis, for plaintiff. Langston & Allen and Stevens, Beasley & Weeks, for defendant.

CLARK, C. J. The question on this appeal arises upon the construction of the following reservation in a deed, of December 2, 1900, from the Cape Fear Lumber Company to the plaintiff: "It is understood and agreed by the parties to this deed, that the party of the first part hereby conveys to the party of the second part only the land with its agricultural privileges, together with all the necessary firewood and fence rails that may be needed on said land herein conveyed (*until said timber is cut by the Cape Fear Lumber Co.*), to be cut from pine trees not over 14 inches in diameter two feet from the ground; also two cypress trees to be marked with the name of the party of the second part by the agent of the said Cape Fear Lumber Co.; reserving in the grantors, the said Lumber Co., *all the timber* of every description on said land, except as hereinbefore specified, together with the rights and privileges appertaining thereto."

[1] On February 11, 1911, the Cape Fear Lumber Company conveyed to the defendant, the Enterprise Lumber Company, the timber which it had reserved in conveying the land to the plaintiff. The deed of the Cape Fear Lumber Company to the defendant uses the following language: "The land upon which this said tract of timber stands belongs to Gaston Kelly, having been sold to him by the Cape Fear Lumber Co., *with the timber reserved.*" Cases of this nature usually arise where the owner conveys the timber, reserving the land. Here the deed of the Cape Fear Lumber Company to the plaintiff, December 2, 1900, conveyed the land, reserving the timber. The court held that

only the trees which were large enough to be "timber" trees on December 2, 1900, were reserved, but, it being impossible to ascertain what trees had become timber trees since that date, dissolved the injunction upon the defendant giving bond in the sum of \$5,000.

In *Mining Co. v. Cotton Mills*, 143 N. C. 307, 55 S. E. 700, the court held: "Whether the right to cut timber is a grant or a reservation, it expires at the time specified. When no time is specified, the grantee of such right takes upon the implied agreement to cut and remove within a reasonable time; whereas, when the grantor of the fee reserves or excepts the timber, and there is no limitation to indicate when the reservation shall expire, then the grantee of the fee must give notice for a reasonable time that the grantor must cut or remove the timber included in his reservation." The defendant, the Enterprise Lumber Company, here holds the reservation of the timber in the same plight that the Cape Fear Lumber Company held it, and the grantee of the fee, the plaintiff, Kelly, should give reasonable notice to the defendant to cut or remove all timber which was included in the reservation, i. e., such trees as were large enough to be timber at the time of the deed of December 2, 1900.

[2, 3] The court not having found as a fact that the contention of the plaintiff was "not bona fide," as required by Revisal 1905, § 809, he should have continued the injunction under Revisal 1905, §§ 807, 808, as to all trees not large enough to have been "timber" on December 2, 1900. This is not impossible, as his honor held, but may be fairly approximated by experts. The parties may possibly agree as to the trees, or in default of agreement the court may designate an expert or a referee for that purpose, just as a surveyor is appointed in cases of a disputed boundary. Revisal, § 519 (3), provides for a compulsory reference: "(3) When the case involves a complicated question of boundary or [is] one which requires a personal view of the premises."

The order requiring a bond is set aside, and an injunction till the hearing is ordered as to all trees that were not timber trees on December 2, 1900.

Reversed.

#### Defendant's Appeal.

[4] The sole question presented on this appeal is the ruling of his honor that under the reservation in the deed above set out the grantor reserved only such trees as were large enough for timber trees on December 2, 1900. The language used is that he reserves "all the timber" of every description. There being no prospective words, this ruling was correct. *Robinson v. Gee*, 26 N. C. 186; *Whitted v. Smith*, 47 N. C. 36; *Warren v. Short*,

119 N. C. 39, 25 S. E. 704; *Lumber Co. v. Hines*, 126 N. C. 254, 35 S. E. 458; *Hardison v. Lumber Co.*, 136 N. C. 175, 48 S. E. 588. It is true the deed permitted the grantee, Kelly, to cut firewood, and fence rails from pine trees, if "not over 14 inches in diameter 2 ft. from the ground," and also allowed him to cut two cypress trees without restriction as to size. But these privileges to Kelly do not affect the fact that the grantor reserved only the "timber trees," without any prospective words, and therefore the reservation was only of the trees that were large enough to be timber trees at the date of the deed. The judgment in this respect is affirmed.

ALLEN, J., did not sit.

(157 N. C. 146)

**HORTON v. SEABOARD AIR LINE RY.**  
(Supreme Court of North Carolina. Nov. 22, 1911.)

#### 1. COMMERCE (§ 27\*)—INJURIES TO SERVANT—RAILROADS—EMPLOYER'S LIABILITY ACT—INTERSTATE COMMERCE.

Where a railroad engineer was injured while hauling a train containing cars engaged in both interstate and intrastate commerce, he was himself engaged in interstate commerce, and entitled to sue under the employer's liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171.]). [Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.\*]

#### 2. MASTER AND SERVANT (§ 228\*)—INJURIES TO SERVANT—RAILROADS—DEFECTIVE APPLIANCES—NEGLIGENCE.

Where a railroad engineer was furnished with an engine equipped with a water glass without any shield or guard, and on his return from his first trip applied to his foreman for a shield or guard, and was informed that defendant had none, and plaintiff was injured by the explosion thereof on another trip, defendant was negligent, and any contributory negligence of plaintiff was no defense under Act Cong. April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1171).

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 228.\*]

#### 3. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—NONSUIT—EMPLOYER'S LIABILITY.

Under employer's liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]), plaintiff, a railroad employe, engaged in interstate commerce, can elect to sue under such statute in the state court. The statute forbids a nonsuit where there is any evidence of negligence on the part of defendant. *Held*, that where plaintiff, engaged in interstate commerce, elects to sue in the state court under such statute, the court cannot direct a nonsuit on the ground of contributory negligence, though under Revisal 1905, § 483, defendant is entitled to set up in his answer contributory negligence as a defense.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.\*]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by James F. Horton against the Seaboard Air Line Railway. Judgment for defendant, and plaintiff appeals. Reversed.

Douglass, Lyon & Douglass and Holding & Snow, for appellant. Murray Allen, for appellee.

CLARK, C. J. [1] This is an action to recover damages for injury to one of plaintiff's eyes caused by the bursting of a defective water glass on a locomotive engine which plaintiff, as engineer, was operating on defendant's railroad. Plaintiff alleges that he was injured while he and the defendant were engaged in interstate commerce, and brought this action under the federal employer's liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]). The parts of said act material to this action are as follows:

"Section 1. Every common carrier by railroad engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury, resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its engines, appliances, machinery," etc.

"Sec. 3. In all actions hereafter brought against any such common carrier by railroad, under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe."

"Sec. 5. Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void."

The plaintiff testified that he had in the train cars of several railroads located beyond the state boundary and some of them were lumber cars destined for Richmond, Suffolk, Portsmouth, Norfolk, and Franklin, Va., and Pittsburg, Pa. In *Railroad v. Johnson*, 178 Fed. 643, 102 C. C. A. 89, it was held that an employe of a railroad company charged with the duty of seeing to the coupling of cars some of which were being used in interstate commerce was employed in interstate commerce within the provisions of the employer's liability act. The same was held as to a section hand working on the track of a railroad over which both interstate and intrastate traffic is moved. *Zikos v. Railroad* (C. C.) 179 Fed. 893.

In a very recent case decided by the United States Supreme Court October 30, 1911 (*Railroad v. United States*, 222 U. S. —, 32 Sup. Ct. 2, 56 L. Ed. —), it was held that when the defendant railroad company was operating a railroad which was "a part of a through highway over which traffic was

continually being moved from one state to another," hauled over a part of its road five cars, the couplers of which were defective, two of the cars being used at the time in moving interstate traffic, and the other three in moving intrastate traffic. Though the use of the last three was not in connection with any car or cars used in interstate commerce, yet the federal liability statute applied to said three cars, and the defendant was liable to the penalty for not having automatic couplers thereon because the act applies "on any railroad engaged in interstate commerce." Applying that decision to this case, it is very certain that for a stronger reason the plaintiff was entitled to bring this action under the federal statute. He was at the time engaged in hauling cars which were being used in interstate commerce.

The engine on which the plaintiff was placed by the defendant was equipped with a "Buckner water glass" without a shield or guard. The plaintiff testified: That "while he was in the discharge of his duty, and without any act on his part and without his fault, the defective water glass exploded, and injured his eye. \* \* \* That, if the water glass had been supplied with a shield or guard, the glass would not have struck his eye when the tube exploded. \* \* \* And that water glasses of the character of the Buckner glass are in general and accepted use by the railroad companies operating in this country." Pusey, a witness for plaintiff, testified: "If the shield is left off \* \* \* when the inner tube breaks, the glass will fly, but it cannot fly out in front of the shield. \* \* \* It is the duty of the inspectors to examine the engine and report all defects. It was the duty of the inspectors at Raleigh to ascertain and report the defects in this water glass." The plaintiff also further testified "that on his return from his first trip with the defective water glass he applied to Matthews, the foreman, for a shield or guard, and was informed by him that the company had none, that they were put on at Portsmouth." The plaintiff then arranged to have one made himself, but, before it was done, the glass exploded, and for lack of the shield his eye was injured.

[2] The plaintiff was furnished with a defective and dangerous appliance. This constituted negligence on the part of the defendant. Whether the plaintiff was guilty of contributory negligence or not, it is immaterial to consider, for this statute provides that in such actions as this "the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe." In *Owens v. Railroad*, 88 N. C. 502, two of the three judges then constituting the court held that, in an action by an employe against a railroad company for personal injuries sus-

tained by its negligence, the burden was upon the plaintiff to negative contributory negligence on his part; Mr. Justice Ruffin dissenting. Thereupon the Legislature promptly enacted chapter 33, Laws 1887, now Rev. 1905, § 483, which required the defendant in such cases to "set up in the answer and prove on the trial" contributory negligence as a defense. As the court cannot logically direct a nonsuit when the burden of proof is upon the defendant (*Spruill v. Ins. Co.*, 120 N. C. 141, 27 S. E. 39, and cases citing it in *Anno. Ed.*) the intent of the statute was evident. This court, however, in *Neal v. Railroad*, 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684, held by a divided court—two judges dissenting—that, notwithstanding the statute, the court in such case upon a demurrer to the plaintiff's evidence could direct a nonsuit.

[3] The act of Congress of 1908 clearly forbids a nonsuit to be entered in any case where there is any evidence of negligence on the part of the defendant. As under this statute the plaintiff can elect to sue in the state court, he has naturally chosen to bring his action under the provisions of the federal statute. Doubtless the next Legislature will make similar provision in this state. All that is necessary for us to say in this case is that the plaintiff was engaged in interstate commerce at the time of his injury; that there was evidence of negligence on the part of the defendant; that the plaintiff could elect to sue in the state court specifying in his complaint, as he does, that he invokes the protection of the federal statute; and that under its terms the court is forbidden to direct a nonsuit upon the ground that there is evidence of contributory negligence shown by the plaintiff's testimony because the statute provides that, though the plaintiff may have been guilty of contributory negligence, it shall not bar a recovery.

In directing a nonsuit, therefore, the judge was guilty of error.

(157 N. C. 173)

ROSE et al. v. BRYAN et al.

(Supreme Court of North Carolina. Nov. 27, 1911.)

1. FRAUDULENT CONVEYANCES (§ 95\*)—TRANSFER—INVALIDITY—CONVEYANCES IN FRAUD OF CREDITORS.

Where an insolvent by way of gift deeded property to his wife, such conveyance was, under Revisal 1905, §§ 961-963, fraudulent and void as to his creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 243-288; Dec. Dig. § 95.\*]

2. HOMESTEAD (§ 167\*)—ABANDONMENT OF HOMESTEAD.

Where an insolvent, who had not had his homestead assigned, conveyed to his wife by way of gift the land which was subject to homestead, and such conveyance, being void, was set aside, the insolvent was entitled to claim his

homestead in the land so conveyed, Revisal 1905, § 686, providing that a homestead shall be exempt from levy so long as occupied by the homesteader, but when conveyed the exemption thereof ceases, applying only to an allotted homestead, and, the deed to the homestead having been set aside, the title still remained in the insolvent, and he could claim the exemption. [Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 331, 332; Dec. Dig. § 167.\*]

Appeal from Superior Court, Nash County; Ward, Judge.

Action by Charles Rose and others against D. T. Bryan and O. Sadler, copartners, doing business under the firm name of Bryan & Sadler. From a judgment awarding defendant Sadler a homestead, plaintiffs appeal. Affirmed.

Jacob Battle, for appellants. T. T. Thorne, for appellees.

CLARK, C. J. On November 7, 1908, the defendant O. Sadler made an assignment of all his property, including this lot of land and dwelling house, for the benefit of creditors, specifying therein that the trustee should reserve and set apart his homestead exemption in said lot. On December 28, 1908, Sadler conveyed said lot to his wife without any consideration. Soon thereafter the plaintiffs docketed their judgments. The court set aside the conveyance to the wife as void in regard to the plaintiffs, but adjudged that the debtor O. Sadler was entitled to have his homestead set apart in said lot. The plaintiffs excepted, and that presents the only point before us.

[1, 2] Sadler being insolvent, the deed of gift to his wife was fraudulent at law and void as to his creditors (Revisal 1905, 961-963); but, when the deed was set aside, the judgment debtor was entitled to claim his homestead in the land conveyed (*Crummen v. Bennett*, 68 N. C. 494; *Arnold v. Estis*, 92 N. C. 162; *Rankin v. Shaw*, 94 N. C. 406; *Dortch v. Benton*, 98 N. C. 190, 3 S. E. 638, 2 Am. St. Rep. 331). The land is still occupied by Sadler, and he is a resident of the state, and hence entitled to his homestead. The court having declared the deed of gift to his wife void, he holds the title, as to these plaintiffs, as if no deed had been executed.

Revisal 686, applies only to the "allotted homestead," which it provides "shall be exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the Constitution, art. 10, sec. 8, the exemption thereof ceases as to liens attaching prior to the conveyance. The homestead right being indestructible the homesteader who has conveyed his allotted homestead can have another allotted, and as often as may be necessary." This section has no application to this case.

The plaintiffs rely, also, upon *Sash Co. v.*

Parker, 153 N. C. 130, 69 S. E. 1. That, also, has no application. There, a judgment having been docketed, the judgment debtor and his wife subsequently conveyed the land out of which the homestead might have been allotted, and the grantee took possession. The court held that the judgment debtor, not "owning and occupying" the land, was not entitled to have a homestead allotted therein, and that it was subject to sale under the lien of the docketed judgment. This has been cited with approval. *Fulp v. Brown*, 153 N. C. 533, 69 S. E. 612; *Davenport v. Fleming*, 154 N. C. 293, 70 S. E. 472. The judgment debtor there, having in a legal mode conveyed his interest in said land and given possession thereof, was no longer "owner and occupier" of said land, and therefore could not claim a homestead therein, and the purchaser had no right to claim the homestead of another man against the lien of a judgment docketed against the property before he bought it.

The judgment below is affirmed.

(157 N. C. 232)

**COLTRANE v. LAUGHLIN et al.**

(Supreme Court of North Carolina. Nov. 27, 1911.)

**1. JUDGMENT (§ 713\*)—RES JUDICATA—PARTIES AND QUESTIONS CONCLUDED.**

A judgment of a court having jurisdiction of the subject-matter and of the parties binds all the parties and their privies as to all issuable matter in the pleadings and all material matters within the scope of the pleadings which were in fact investigated and determined.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.\*]

**2. JUDGMENT (§ 747\*)—RES JUDICATA—QUESTIONS CONCLUDED.**

A judgment, in a suit by an heir against coheirs and the ancestor's widow, for partition and for an allowance for improvements placed on the land pursuant to a contract, whereby it was agreed that the heir should have the land in consideration of his moving thereon and taking care of the ancestor's widow, which adjudges that there was no contract, and which awards the heir a specified sum above rents for which he was chargeable, bars an action by the heir against the coheirs for breach of contract to convey the land to the heir.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1236; Dec. Dig. § 747.\*]

**3. PARTITION (§ 38\*)—JURISDICTION—RELIEF.**

Where a suit for partition was, after issues joined, removed to the superior court, the superior court had, under Revisal 1905, §§ 614, 717, jurisdiction to determine all questions presented by the pleadings and afford adequate relief.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 38.\*]

**4. REFERENCE (§ 34\*)—DEFECT IN ORDER OF REFERENCE—CURED BY APPROVAL OF FINDINGS.**

Where all exceptions to the findings of the referee were withdrawn and his report approved, any defect in the order of reference was cured.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 62; Dec. Dig. § 34.\*]

**5. PARTITION (§ 74\*)—ISSUES—DETERMINATION.**

In partition, a plea of sole seisin may be entered before the clerk, and on transfer to the court in session the issue will be determined as in an action of ejectment.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 74.\*]

Appeal from Superior Court, Randolph County; Daniels, Judge.

Action by R. L. Coltrane against Seth W. Laughlin, administrator, and others. From a judgment for plaintiff, defendants appeal. Reversed, and judgment rendered for defendants.

Defendants denied the existence of the contract and pleaded an estoppel of record against recovery by reason of a judgment on action commenced before the clerk of Randolph county as a special proceeding to sell land for division among tenants in common, transferred on issues joined to the superior court of Randolph county, and determined there by judgment on report of referee, duly entered in the superior court of said county, July term, 1909, as follows: "Superior Court of Randolph Co. July Term, 1909. This cause coming on for a hearing upon exception to report of referee, all exceptions are withdrawn, and it is adjudged that the report of referee be in all respects approved and confirmed. The referee allowed a fee, etc. [Signed] B. F. Long, Judge Presiding." On the present trial his honor, reserving the question of estoppel, submitted issues, and the following verdict was rendered by the jury:

"(1) Did the plaintiff and S. L. Coltrane enter into the contract alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff comply with the terms of said contract, as alleged in the complaint? Answer: Yes."

And the court being of opinion on the question reserved that there was no estoppel of record shown, and, the amount of damages, if any due, having been admitted, entered judgment for plaintiff, and defendants excepted and appealed.

Sapp & Williams and Morehead & Morehead, for appellants. J. A. Spence, for appellee.

HOKE, J. (after stating the facts as above). On the question of estoppel it was made to appear by admission and the inspection of the record chiefly that: "In the year 1866 or 1867 Abner Coltrane died in Randolph, seised of a tract of land containing 111 acres, leaving a widow and three children, his only heirs at law, to wit, the plaintiff, R. L. Coltrane, S. L. Coltrane, and Ruth Gardner; S. L. Coltrane, then a non-resident, having moved from this state while a minor. Mrs. Gardner left the state soon after her father's death. The plaintiff mov-

ed in with his mother immediately after the death of his father and resided with her till she died—about 40 years—raising a family while so living with her and repairing and putting improvements upon the premises. In May, 1906, soon after the death of the life tenant, his mother, the plaintiff instituted a special proceeding in the superior court of Randolph county to sell the land for division—S. L. Coltrane and Mrs. Gardner, she being a widow—and in the complaint made a claim for an allowance by reason of permanent and valuable improvements put upon the land during his occupation, and basing his claim also on separate and specific allegations made in terms as follows: "That, just after the death of the said Abner Coltrane, the defendants contracted and agreed with the plaintiff that he should move on said lands and take care of his mother and in consideration of his taking care of his mother, who was also the mother of the defendants, that the said petitioner should have their interest in the lands aforesaid; that, in pursuance of the aforesaid agreement, the said R. L. Coltrane did move on said lands and carried out his part of the aforesaid agreement in spirit and letter by taking care of his mother, who died a year or two ago; that, while in possession of said lands under the aforesaid agreement and as tenant in common, the petitioner put valuable and permanent improvements on said lands, to wit, dwelling house, barn, grainary, smokehouse, and the digging of a well and other things worth in all \$500 to \$600, and the said petitioner is advised and believes that he should be paid for the value of said improvements before the defendants are allowed anything from the proceeds of said sale." Defendants S. L. Coltrane and Mrs. Gardner made answer alleging that they were tenants in common with plaintiff, denied there was ever any contract to convey their interest to plaintiff, alleged that rents and profits received should be accounted for as against the claim for permanent improvements and amount, if any, due defendants paid, and prayed judgment that the land be sold for division, etc. The cause was transferred to civil issue docket, and, S. L. Coltrane having died, his heirs at law were duly made parties defendant, and at March term, 1908, an order of reference was made containing the following recitals: "This cause being called for trial, and it appearing to the court that the plaintiff alleges that he and the defendants are tenants in common, and which is admitted by the defendants, and both parties in open court having agreed that the land described in the petition should be sold and that the questions raised by the pleadings should be referred." And after directing a sale the said order proceeded: "And the said referee is hereby ordered to hear evidence as to the increased value of said land because of any

improvements, if any, placed upon said land by any of the parties thereto, and ascertain and find the value of the same, and also to hear evidence as to the rental value of said land, and to find what the rental value of said land amounts to, and also to find from the evidence whether or not the plaintiff should be paid for his improvements, and, if so, how much, and whether or not the plaintiff should account for rents and profits arising from this land, and, if so, what amount."

Said referee made his report to July term, finding facts specially relevant to this inquiry, as follows: "(1) That the plaintiff, R. L. Coltrane, moved on the tract of land described in the complaint in the year 1867, and has lived thereon continuously to the present. (2) That there was no contract between plaintiff and defendants that the plaintiff should have the land in consideration of his moving there and taking care of his mother. (3) That the said R. L. Coltrane resided on and cultivated only that part of the land which was embraced in his mother's dower, which had been allotted covering a portion of said tract of land. (4) That his mother, the dower tenant, died in January, 1905, since which time the plaintiff has been receiving the rents and profits of the place." The report then proceeds to state the account, and as a conclusion of law awards plaintiff the sum of \$300 over and above rents for which he was properly chargeable, which said sum was first allowed plaintiff from the proceeds of sale. Judgment was entered confirming report as heretofore shown, and Mrs. Gardner having received her share of this money, and defendant McLaughlin having duly qualified as administrator of S. L. Coltrane, deceased, plaintiff instituted the present action against him and the children, heirs at law of S. L. Coltrane, to recover damages for breach of the contract to convey the land and condemn and apply the share belonging to the estate of S. L. Coltrane to payment of same.

Upon these, the controlling facts relevant to the inquiry, we are of opinion that plaintiff is concluded as to the existence of the contract upon which he brings suit, and that no recovery may be had thereon.

[1] It is well recognized, here and elsewhere, that when a court, having jurisdiction of the cause and the parties, renders judgment therein, it estops the parties and their privies as to all issuable matter contained in the pleadings, and, though not issuable in the technical sense, it concludes, among other things, as to all matters within the scope of the pleadings which are material and relevant, and were in fact investigated and determined, on the hearing. *Gilliam v. Edmonson*, 154 N. C. 127, 69 S. E. 924; *Tyler v. Capehardt*, 125 N. C. 64, 34 S. E. 108; *Tuttle v. Harrill*, 95 N. C. 456; *Fayerweather v. Ritch*, 195 U. S. 277, 25

Sup. Ct. 58, 49 L. Ed. 193; *Aurora City v. West*, 74 U. S. 82, 103, 19 L. Ed. 42; *Chamberlain v. Gallard*, 26 Ala. 504; 23 Cyc. p. 1302, 4-8.

In *Capehardt's Case*, supra, it was held: "A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them, but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings."

In *Fayerweather's Case*, it was held: "Where it appears that a question was distinctly put in issue and the parties presented, or had an opportunity to present, their evidence, and the question was decided by a court of competent jurisdiction, private right and public welfare both demand that the question so adjudicated shall, except in direct proceedings for review, be considered as finally settled and conclusive upon the parties."

In *Aurora City v. West*, supra, it is said: "The better opinion is that the estoppel when the judgment was rendered on its merits, whether on demurrer, agreed statement, or verdict, extends to every material allegation or statement, which, having been made on one side and denied on the other, was at issue in the cause and was determined in the course of the proceedings." Associate Justice Miller dissented in the case, on the ground that the decision was in some respects too broad, but he gave full adherence to the proposition here stated, as follows: "It is true that some of the earlier cases speak as if everything which might have been decided in the first suit must be considered as concluded by that suit; but this is not the doctrine of the courts of the present day, and no court has given more emphatic expression to the modern rule than this. That rule is that, when a former judgment is relied on, it must appear from the record that the point in controversy was necessarily decreed in the first suit or be made to appear by extrinsic proof that it was in fact decided."

[2] In the proceedings relied upon by defendant, it may not have been essential to plaintiff's recovery for permanent improvements to allege that there was a contract to convey him the land, but he alleged the existence of such a contract and made the same a basis for such recovery, issue was joined thereon by express averment, the matter was fully investigated, and the facts determined against him, and, under the doctrine of estoppel as recognized and instanced in the authorities cited, plaintiff is and should be concluded.

[3] It was objected on the argument that the clerk had no jurisdiction to award the equitable relief by decreeing specific performance, and the position might be maintained if the proceedings had remained before him, but on issues joined the cause was properly removed to the superior court in term, and under the provisions of our statute that court had full jurisdiction to determine all questions presented and afford adequate relief. Revisal 1905, §§ 614, 717; *Oldham v. Rieger*, 145 N. C. 254, 58 S. E. 1091; *Foreman v. Hough*, 98 N. C. 386, 3 S. E. 842.

[4] It was further insisted that the referee was not authorized to consider and pass upon the existence of the contract, and so the question was not properly presented in the former proceedings. We do not take this view of the order of reference. Paying due regard to the preliminary recitals, we think that all matters embraced in the pleadings were within the purview of the order, except the tenancy in common and the necessity for a sale, both of which were admitted; but, conceding that the question was not within the terms of the order, it was fully investigated and determined. All exceptions to the findings of the referee withdrawn, and the report in all respects approved and confirmed. Any defect in the order of reference, if it existed, is thereby fully cured. *Morris v. Haas*, 54 Neb. 579, 74 N. W. 828.

[5] Apart from all this, it has always been held that in proceedings for partition a plea of sole seisin could be entered before the clerk, and on transfer to the court in session that this issue would be determined as in an action of ejectment. *Purvis v. Wilson*, 50 N. C. 22, 69 Am. Dec. 773. In the original proceedings, while inconsistent with the other portion of his pleading and the prayer for relief, the allegation of plaintiff's petition amounted, in substance, to this: That he had a contract with defendants, his brother and sister, that they would convey him the land for taking care of his mother; and that he had paid the price. If this was established, defendants had no interest, and, recognizing this, they joined issue on these averments, denied the existence of the contract, and alleged that they were tenants in common, and asked for a sale. In this view, the existence of the contract was directly involved in the issue as to tenancy in common, and, in any event, the plaintiff should be estopped by the judgment. *Carter v. White*, 134 N. C. 466, 46 S. E. 983, 101 Am. St. Rep. 853; *Weeks v. McPhail*, 129 N. C. 73, 39 S. E. 732.

There is error, and, on question reserved, judgment must be entered for defendant.  
Reversed.

(157 N. C. 110)

BRITE et ux. v. PENNY et al.

(Supreme Court of North Carolina. Nov. 22, 1911.)

**1. ACKNOWLEDGMENT (§ 55\*)—CERTIFICATE—PRIVY EXAMINATION OF WIFE—UNDUE INFLUENCE BY HUSBAND—EFFECT.**

Laws 1889, c. 389 (Revisal 1905, § 956), provides that no deed executed by a husband and wife, if the private examination of the wife be certified in the manner prescribed by law, shall be deemed invalid because its execution was procured by undue influence, unless the grantee participated in the undue influence or had notice thereof. *Held*, that the undue influence of a husband at a wife's privy examination upon the execution of a deed will not vitiate a certificate of acknowledgment regular in all respects, unless the grantee has notice of such undue influence.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 303-315; Dec. Dig. § 55.\*]

**2. ACKNOWLEDGMENT (§ 59\*)—PRIVY EXAMINATION OF WIFE—UNDUE INFLUENCE—BURDEN OF PROOF.**

The burden is upon one, claiming that a wife was under the undue influence of her husband at a privy examination in acknowledging a deed, to show that fact.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 328; Dec. Dig. § 59.\*]

**3. APPEAL AND ERROR (§ 987\*)—REVIEW—FINDINGS—CONCLUSIVENESS.**

The Supreme Court will not determine whether the evidence showed the existence of a certain fact, but only whether there was evidence to justify the trial court in submitting it to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.\*]

**4. MORTGAGES (§ 87\*)—VALIDITY—SUFFICIENCY OF EVIDENCE—FRAUD.**

Evidence, in an action to cancel a note and mortgage given for stock sold plaintiff by defendant, *held* to make it a jury question whether defendant made fraudulent representations to induce plaintiff to purchase.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 87.\*]

**5. CORPORATIONS (§ 428\*)—AGENTS AND OFFICERS—NOTICE TO AS NOTICE TO CORPORATION.**

A corporation is not chargeable with the knowledge of its agents as to transactions in which the agents act for themselves, and not for the corporation, but is chargeable with knowledge of its officers as to a transaction conducted by them for the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.\*]

**6. CORPORATIONS (§ 314\*)—OFFICERS—FIDUCIARY RELATION.**

The law will not permit a corporate officer to appropriate to himself business legitimately belonging to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1396; Dec. Dig. § 314.\*]

**7. CORPORATIONS (§ 519\*)—REPRESENTATION BY OFFICER—SUFFICIENCY OF EVIDENCE.**

In an action to cancel a note and mortgage executed by plaintiff for stock purchased from an individual defendant who was also an officer of defendant corporation, evidence *held* to show that an individual defendant acted for the corporation of which he was an officer in selling the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2089; Dec. Dig. § 519.\*]

Appeal from Superior Court, Guilford County; O. H. Allen, Judge.

Action by B. F. Brite and wife against George Penny and others. From a judgment for plaintiffs, one defendant appeals. Affirmed.

These issues were submitted to the jury:

(1) Did the defendant George T. Penny by false representations and fraud, as alleged in the complaint, procure the execution of the note and mortgage described in the complaint? Answer: Yes.

(2) Did the defendant Carolina Loan & Realty Company, at the time of the execution of the mortgage and the issuance of its check for \$2,000, have notice of such fraud? Answer: Yes.

(4) Was the privy examination of Laura Brite to the mortgage described in the complaint taken as required by law, that is, separate and apart from her husband? Answer: No.

From the judgment rendered the defendant appealed.

King & Kimball and Thos. S. Beall, for appellant. Justice & Broadhurst, for appellees.

BROWN, J. The assignments of error bring up for consideration practically three propositions.

1. The charge of his honor upon the fourth issue was erroneous, and the finding upon that issue alone would not be sufficient to uphold the judgment.

[1, 2] The act of the General Assembly Laws of 1889, c. 389 (Revisal 1905, § 956), has been heretofore construed, and it is held that "The presence and undue influence of the husband at the ceremony of privy examination would not vitiate a certificate in all respects regular, unless the grantee had notice of it, and the burden would be upon the plaintiffs to show such notice." *Davis v. Davis*, 146 N. C. 163, 59 S. E. 659; *Hall v. Castleberry*, 101 N. C. 155, 7 S. E. 706. In this connection, we will say that the concurring opinion of Clark, J., in *Benedict v. Jones*, 129 N. C. 474, 40 S. E. 223, is a clear presentation of the law and receives our indorsement. In it the learned judge points out strongly the great danger to the security of titles which would result, if the reasoning of the court on that case is carried to its logical conclusion, and well says: "It was, as is well known, to cure the effect of a decision of this court that a privy examination did not have the effect of a fine and recovery (as had been understood by the profession), that chapter 389, Laws 1889, was passed."

2. Is there any evidence of fraud?

[3] It is not for us to say that Penny acted fraudulently, but whether there was evi-



dence enough to justify his honor in submitting that issue to the jury.

[4] All the evidence was introduced by the plaintiffs, and none by the defendants.

The evidence offered tends to prove that Moser was the owner of 20 shares of stock of the par value of \$100 each in the High Point Planing Mill Company; that at the time of the transaction that corporation was insolvent, and it is a legitimate inference that Penny knew it. This stock was placed in Penny's hands for sale by Moser, who was to receive only \$800 of the proceeds and Penny was to receive the remainder. Penny or his corporation actually received \$1,200 for their part. Penny approached feme plaintiff to sell her the stock and to give him a mortgage on her house and lot. She at first declined and afterwards agreed to buy. She told Penny she knew nothing about the stock and relied on him. Penny assured her of its value, said the corporation owed but little and had an account due sufficient to pay. He told feme plaintiff that he owned stock in the planing mill and her husband could be secretary and treasurer at \$75 a month with an increase, as the business grew, to \$150 a month. The feme plaintiff further said: "Mr. Penny did not tell witness whose stock this was he was selling. He said Mr. Moser was dishonest, and that the firm—the reason they were standing still then and wasn't working, he said that they wanted to get Mr. Moser out; he was tricky and dishonest. Mr. Penny did not state that Mr. Moser was in the business further than that. Q. You understood it was Mr. Moser's stock you were buying? A. No, sir. Q. Whose stock did you understand it was? A. I did not know whose stock it was. He said he had bought out 20 shares and if witness would take \$2,000 stock in it it would give witness and Mr. Penny the controlling interest." Penny further told plaintiff he had bought Loughlin and Dodamead's stock for himself, and further that "we would make so much money, 20 per cent, on the dollar from the start." Plaintiff further testifies that: "Mr. Penny said: 'Don't you appear to be over anxious about this. If you do Mr. Moser will back out. I don't think he wants to sell very badly, anyway.' So he looked out of the window and saw Mr. Moser and Mr. Ingold approaching, and he said, 'There comes the boys now.' And when they came in he reached his hand in his pocket and pulled out some stock and said, 'Well, Mr. Moser, I have bought out Mr. Dodamead since I saw you,' and Mr. Moser, he says, 'You have?' and he says, 'Yes,' and Mr. Moser says, 'You have been hustling since I saw you last.' Q. What occurred then? A. On the 17th I said to Mr. Penny, 'Is there any indebtedness on this stock?' He said: 'Nothing to amount to anything. I have looked over the books, and there is little indebtedness; but there is an out-

standing account that will overbalance all the indebtedness on the stock. I will see all that out. Don't you have any uneasiness whatever. I will see that is all right. We will be running here in two or three days.'"

Penny did not offer himself as a witness and deny any of these charges. He did not show that he owned any stock in the planing mill, or that he had purchased Dodamead's or Loughlin's stock. The planing mill never commenced operations again and was very shortly forced into bankruptcy by its numerous creditors.

We will not recite further from the evidence in the record, and comment is unnecessary. That his honor was justified in submitting the first issue to the jury is manifest from a simple recital of the facts in evidence.

3. Is the Carolina Loan & Realty Company upon the facts in evidence bound by Penny's acts?

Upon this phase of the case we were strongly impressed by the forcible argument of counsel for defendant; but a close analysis of the evidence discloses that the principles of law so earnestly contended for by them do not apply.

[5] We recognize the general doctrine held by all courts that a corporation is not bound by the action or chargeable with the knowledge of its officers or agents in respect to a transaction in which such officer or agent is acting in his own behalf, and does not act in any official or representative capacity for the corporation. *Bank v. Burgwyn*, 110 N. C. 267, 14 S. E. 623; *Le Duc v. Moore*, 111 N. C. 516, 15 S. E. 888; *Bank v. School Committee*, 118 N. C. 383, 24 S. E. 792; *Kennedy v. McKay*, 43 N. J. Law, 283, 39 Am. Rep. 581. But that doctrine cannot be successfully invoked by the realty company under the facts of this case.

His honor substantially charged the jury upon the third issue that, if Penny acted for the corporation in this transaction, the company would be bound by his conduct, and that the realty company is presumed to know what its agent knew. This is elementary law and has been invoked repeatedly in the cases of insurance companies whose agents make false representations in selling insurance. *Caldwell v. Insurance Co.*, 140 N. C. 100, 52 S. E. 252; *Frazell v. Insurance Co.*, 153 N. C. 60, 68 S. E. 912.

What was the "transaction" in this case? It was the sale of the stock for Moser, and in order to carry out that main purpose, and realize a large profit, the loan of the money or mortgage by the realty company was incidentally necessary.

The plaintiff offers part of Penny's examination taken before a commissioner and parts of his answer. Penny states that he is president as well as secretary, treasurer, general manager, and the person who looks after all the affairs of the Carolina Loan & Realty Company, and "that it is true that the sale

by said Moser of his 20 shares of stock in the said Planing Mill Company to the plaintiff at the price of \$2,000 resulted in a benefit to this defendant of \$1,200 in pursuance of an arrangement made with this defendant by the said Moser at the time said stock was listed with this defendant for sale, to the effect that such sum as might be realized upon the sale of said stock within the time limited, whether sale were effected by this defendant or by the defendant Moser, should belong to this defendant after the said Moser had received net therefor the sum of \$800."

It thus appears that Penny was not selling his own stock, but was selling Moser's stock, which had been listed with him for sale at a huge commission. Now, with whom was that stock listed for sale, with Penny individually or his corporation, of which he was practically the "whole thing"?

The corporation was not engaged in a banking business. It loaned money, it is true, and it dealt in real estate; but it also was a dealer in stocks and bonds, and, when Moser listed his stock for sale through Penny, he listed it with the corporation. It is not to be supposed that Penny, the corporation officer, was acting adversely to the interests of his corporation that employed and paid him and was engaged in selling stocks on his own account, thereby constituting himself a rival in business to his corporation, and both occupying the same place of business.

[6] The law would not permit him to act in any such double capacity to appropriate business for himself belonging legitimately to his corporation and to reap the profits of it. Good faith to the stockholders forbade it.

Penny did not advance the money to pay for this stock, but it was the corporation's money, as evidenced by this check: "No. 479. Carolina Loan & Realty Company. Real estate, loans, stocks and bonds. High Point, N. C., May 18, 1909. Pay to the order of B. F. Brite and Laura Brite 2,000 dollars. Carolina Loan & Realty Co., By George T. Penny, Sec. Treas. Home Banking Co., High Point, N. C. Mtg. due 5-11-1911." Stamped on the face of the above check: "Cashed Home Banking Co., Paid May 18th, 1909. High Point, N. C." Indorsed on the back of the check: "B. F. Brite. Laura Brite." This check was at once turned over to Moser, and Penny admits he received his share of it.

It is unjust to Penny to suppose that he was using the corporation's funds in order to make \$1,200 for himself in the sale of stocks, when dealing in stocks was a part of the corporate business intrusted to his management. It is a significant fact that in its separate answer in the case the realty company does not allege that Penny was not acting for it.

[7] In any view of the evidence in this case, his honor would have been warranted in charging the jury as matter of law that

the Carolina Loan & Realty Company is bound by Penny's acts in selling Moser's stock to the feme plaintiff.

Upon a review of the entire record, we find no error.

(157 N. C. 252)

### BAILEY v. CITY OF WINSTON.

(Supreme Court of North Carolina. Nov. 22, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§ 751\*)—TORTS—PERFORMANCE OF CONTRACT WITH MUNICIPALITY—INDEPENDENT CONTRACTOR.

A municipality cannot relieve itself from the duty to keep its streets in proper repair by transferring it to an independent contractor, and it will be responsible for the acts of a contractor if the matter involved in his contract is one of absolute duty owed by the city to an individual, or if the work is intrinsically dangerous, or if, even when properly done, it creates a nuisance, so that a municipality which authorizes the performance of work which necessarily renders the streets dangerous is liable for injuries due to the absence of barriers, lights, and other precautions for safety, but it will not be liable for acts of the contractor where the injury is through some negligence of the contractor in a matter in which the city owes no duty to the person injured.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580-1582; Dec. Dig. § 751.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 751\*)—TORTS—INDEPENDENT CONTRACTOR—SUPERVISION BY CITY OFFICERS.

A city will be liable for the negligence of a contractor in its employ where the work is performed under the direct control of the city's own officers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580-1582; Dec. Dig. § 751.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 751\*)—TORTS—INDEPENDENT CONTRACTOR—STIPULATIONS AS TO LIABILITIES.

If otherwise liable, a city will continue liable, although it has no control over the workmen of a contractor, and although, in its agreement with the contractor, it is stipulated that he shall be liable for accidents occasioned by his negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580-1582; Dec. Dig. § 751.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 763\*)—TORTS—DEFECTS IN STREETS—CARE REQUIRED.

A municipality is under an absolute duty to put its streets and highways in passable condition, and to keep them so by the exercise of reasonable care and supervision.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 788\*)—TORTS—DEFECTS IN STREETS—NOTICE.

Where streets become unfit for use by reason of defects which could not be anticipated or guarded against under ordinary circumstances, a city should have some notice of the defects, either actual or implied from the circumstances, but it is bound to exercise a reasonable and continuing supervision over its streets so as to know that they are in safe condition for use.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1641-1643; Dec. Dig. § 788.\*]

**6. MUNICIPAL CORPORATIONS (§ 791\*)—TORTS—DEFECTS IN STREETS—CONSTRUCTIVE NOTICE.**

Where a defect in a street has existed so long as to show that a city has omitted or neglected its plain duty of supervision, there is a constructive notice of the defect which charges it with liability for injuries resulting therefrom.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1647-1651; Dec. Dig. § 791.\*]

**7. MUNICIPAL CORPORATIONS (§ 821\*)—DEFECTS IN STREETS—ACTION FOR INJURIES—QUESTION FOR JURY—CONSTRUCTIVE NOTICE.**

Upon the question of notice to a city implied from the continued existence of a defect in a street no fixed rule can be laid down as to the time required to charge it with notice, and the question is usually for the jury, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect, and other circumstances.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1750; Dec. Dig. § 821.\*]

**8. MUNICIPAL CORPORATIONS (§ 788\*)—DEFECTS IN STREETS—EXPRESS NOTICE.**

The doctrine of express notice is not relevant on the question of a city's notice of a defect in a street, when the very danger is created by the city itself or by some one under its direction, since there notice is necessarily implied, nor does it apply to the existence of a defect resulting from the negligence of a contractor, since the fact of the contract charges it with such notice.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1641-1643, 1646, 1652; Dec. Dig. § 788.\*]

**9. TRIAL (§ 138\*)—QUESTIONS OF LAW AND FACT—PRELIMINARY QUESTIONS.**

It is the duty of the court in the first instance to decide whether there is any evidence of the facts assumed in a hypothetical question.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 138.\*]

**10. TRIAL (§ 138\*)—QUESTIONS OF LAW AND FACT—PRELIMINARY QUESTIONS.**

Where a medical expert in a personal injury case had answered hypothetical questions, the action of the court in leaving it to the jury to say whether the facts assumed in such questions had been established by the proof and directing them to disregard the answers thereto if not so established is proper.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 138.\*]

**11. WITNESSES (§ 372\*)—CREDIBILITY—BIAS.**

A question tending to show bias of the witness is competent.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.\*]

Appeal from Superior Court, Forsyth County; Adams, Judge.

Action by M. D. Bailey, Jr., against the City of Winston. Judgment for plaintiff, and defendant appeals. No error.

This action was brought by the plaintiff to recover damages for injuries sustained by his falling into an unprotected sewer ditch, which was being constructed on Liberty street, within the corporate limits of the city of Winston. The plaintiff alleged that the ditch was not properly guarded and protected on the night that he fell into it

and was injured; whereas the defendant averred that it was sufficiently protected, and, if plaintiff suffered injury, he brought it upon himself by his own carelessness and negligence, and also by reason of the fact that he was intoxicated. The principal matters involved in the case were questions of fact, and the plaintiff offered evidence to sustain his contention; that is, that the ditch was not properly guarded and protected, and that he was not intoxicated. The defendant offered evidence to the effect that the plaintiff was a drinking man; that the ditch was protected by sufficient lights, ropes, and other barriers. Upon the issues thus raised the jury adopted the plaintiff's version of the facts, and rendered a verdict for him, as appears in the record. The defendant appealed from the judgment entered upon the verdict.

Manly, Hendren & Womble, for appellant.  
L. M. Swink and J. E. Alexander, for appellee.

**WALKER, J.** It appeared that the ditch was two feet wide and nine feet deep, and was so near the path in common use, and in such an exposed position with reference to the street, that it became necessary to safeguard pedestrians and others using the sidewalk and street by placing lights or barriers, or both, if the situation required them, at or near the excavation, so as to prevent an injury to them by falling into the ditch. The city had the clear right to dig the ditch for the purpose of laying mains or pipes in the construction of a water or sewerage plant, and to employ the Bibb Company to do the work, but it did not, by reason of that fact, shift its duty and responsibility to those using its streets and who are injured by any defect in them, provided it had or should have had notice of the defect. The plaintiff had the right to use the street in going from the Kinzendorf Hotel, where he was boarding, to Gentry's Dog and Pony Show, under the circumstances shown in the evidence.

The jury found, under proper instructions from the court, that he was not guilty of contributory negligence, so that the only remaining question is: Was the ditch properly guarded? The defendant contended, and introduced evidence to prove, that it was, and that the injury was not caused by any negligence in that respect, either of the city or the independent contractor, assuming for the sake of discussion that the Bibb Company was such a contractor. Evidence was introduced by the plaintiff to show that there was negligence in the fact that no proper safeguards had been placed at or near the ditch to warn approaching pedestrians or others using the street of the danger. The defendant excepted to the charge of the

learned judge (W. J. Adams) upon the ground that he had told the jury that it was the duty of the defendant to guard the dangerous place both with lights and barriers, but we do not so understand the very able and clear-cut charge of the judge; on the contrary, he instructed the jury that the defendant was required to exercise only ordinary care in the matter, and to guard the place by "lights or barriers," or in such other way as was reasonably sufficient for the protection and safety of the public. The charge was eminently fair and just to both parties, and, after a careful consideration of it, we think it stated fully, and with remarkable clearness, the principles of law applicable to the facts as the jury might find them to be, and is entirely without error. The city of Winston was under the duty to keep its streets in proper condition and repair, and, if in prosecuting any work of public improvement it became necessary to dig a ditch in one of them, the law requires that it should protect the public against injury therefrom by sufficiently guarding the dangerous excavation in the exercise of such care at least as a prudent man would use under like circumstances.

[1-3] The duty and liability of a municipality in this respect is well stated in Moll on Independent Contractors' and Employers' Liability, §§ 139-140, though we do not quote him literally: It is not easy to determine when a municipality is liable for the negligence of a contractor. It certainly cannot relieve itself from the duty which rests upon it by transferring that duty to the contractor. The corporation must see that the public is properly protected, and, if the contractor fails to perform that duty, the city is liable for the resulting damage. The city will be responsible for the acts of an independent contractor if the matter involved in his contract is one of absolute duty, owed by the city to an individual, or the work is intrinsically dangerous, or when properly done creates a nuisance. It is the general rule that a city will be liable for the negligence of a contractor in its employ, where the work is performed under the direct control of the city's own officers. If otherwise liable, a city will continue liable, although it has no control over the workmen of a contractor, and although it has in its agreement with the contractor stipulated that he shall be liable for accidents occasioned by his neglect. If the work be done by an independent contractor, the city will not be answerable where the injury is through some negligence of the contractor or his servant, not amounting to a failure of a duty which the city itself owes to the person injured; otherwise it would be liable for his neglect in like manner as where the work is executed by its officers. Whether the city will be jointly liable with a contractor must depend on the circumstances of the case.

If, for example, an excavation is left unguarded or unlighted by the contractor during the progress of the work, and the city has notice of its dangerous condition, express or implied, then the city will be liable to a traveler who without fault on his part is injured by driving or falling into it, because it would be liable if the excavation were made by a stranger. It may be said generally that it is as much the duty of a municipality to remove or guard against an obstruction to a public highway placed there by a third person as if it was so placed by the city itself, provided the city has actual or implied notice. The duty of the city to erect barriers and to establish signals in case of dangerous defects, etc., in the highway is not discharged by engaging a contractor to perform it. But, where the negligence relates to a matter with reference to which the corporation is under no special obligation, the liability rests on the contractor alone. The generally accepted doctrine in this country is said to be—"that a municipality which is charged with the duty of keeping certain highways in safe condition for public travel, and which has either authorized, or has been constrained by the operation of statute to permit, the performance of the work which, in the absence of certain precautions, will necessarily render one of these highways abnormally dangerous for the time being, is liable for injuries caused by the absence of these precautions, whatever may be its relation to the party who is actually engaged in doing the work. The municipality lies in this regard under a primary, absolute, or nondelegable duty, in the performance of which it is bound to use reasonable care and diligence." Moll Ind. Contractors, p. 243, note 71, and cases cited in that and the other notes to sections 139 and 140, especially *Bennett v. Mt. Vernon*, 124 Iowa, 537, 100 N. W. 349, where it is said: "If the matter involved was one of positive duty to the plaintiff, then, of course, the defendant town could not relieve itself by delegating the work to an independent contractor. Or if the work itself was intrinsically dangerous, or, when properly done, was likely to create a nuisance, the defendant town would be responsible for any damage resulting therefrom. *Wood v. Ind. Dist.*, 44 Iowa, 30."

The same doctrine is stated in *Brusso v. City of Buffalo*, 90 N. Y. 679, as follows: First. "The defendant's counsel claims that, before the city can be made liable, it must be shown that it had notice of the dangerous condition of the street. But that rule does not apply to a case like this. The city was under an absolute duty to keep its streets in a safe condition for public travel, and was bound to exercise reasonable diligence and care to accomplish that end, and, when it caused this excavation to be made in the street, it was bound to see that it was care-

fully guarded, so as to be reasonably free from danger to travelers upon the street. It is not absolved from its duty and its responsibility because it employed a contractor to make the excavation. That is settled by a long line of decisions in this and other states. *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Chicago City v. Robbins*, 2 Black, 418, 17 L. Ed. 298; *Robbins v. Chicago City*, 4 Wall. 657-659, 18 L. Ed. 427; *Water Company v. Ware*, 16 Wall, 566, 21 L. Ed. 485; *City of St. Paul v. Seitz*, 3 Minn. 297 (Gil. 205), 74 Am. Dec. 753; *City of Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Dillon on Municipal Corporations*, §§ 791, 792, 793. There was a controversy upon the trial of the action as to whether the excavation at the place where the plaintiff was injured was properly guarded. The verdict of the jury is conclusive upon that point in favor of the plaintiff. Second. It is claimed that there was a stone walk across the street, and that, if the plaintiff had crossed upon that walk, he would not have been injured. But a person desiring to cross the street, either in the nighttime or in the daytime, is not confined to a crossing. He has a right to assume that all parts of the street intended for travel are reasonably safe; and if, in the nighttime, he desires to cross from one side to the other, and knows of no dangerous excavation in the streets or other obstruction, he may cross at any point that suits his convenience without being liable to the imputation of negligence. *Raymond v. City of Lowell*, 6 Cush. (Mass.) 524, 530, 53 Am. Dec. 57. Third. It was claimed that the proof showed that the place where this excavation was made was not in one of the streets of the city, but that it was in a turnpike belonging to the 'Buffalo & Aurora Plankroad Company.' I think the evidence satisfactorily shows that it was in one of the public streets of the city. It was within its limits, and, whether one of its streets or not, it was a highway used by the public, and that is sufficient to render it liable for the consequences of an excavation made under its direction and left unguarded."

[4] A municipality is under a positive or absolute duty to put its streets and highways in passable condition, and to keep them so by the exercise of reasonable care and supervision. The decisions of this court are to that effect. *Bunch v. Edenton*, 90 N. C. 431; *Russell v. Monroe*, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823; *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548; *Foy v. City of Winston*, 126 N. C. 381, 35 S. E. 609; *Cresler v. Asheville*, 134 N. C. 311, 46 S. E. 738. Numerous other cases might be cited from our own reports, but those already given will suffice to show what the doctrine is, with its limitations.

[5] Very instructive and useful cases on this point are *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309; *Brown v. Durham*, 141

N. C. 252, 53 S. E. 513; *Brewster v. Elizabeth City*, 142 N. C. 11, 54 S. E. 784; *Kinsey v. Kinston*, 145 N. C. 108, 58 S. E. 912; *Revis v. Raleigh*, 150 N. C. 353, 63 S. E. 1049. They all tend to this conclusion that a city or town or village must keep its streets in good condition and repair so that they will be safe for the use of its inhabitants or of those entitled and having occasion to use them. If they become unfit for use by reason of defects which could not be anticipated, and consequently guarded against, under ordinary circumstances, the municipality should have some notice of the defect, either actual, or else implied from the circumstances, and in this connection it must be said that it is the duty of the city (and, of course, these principles apply generally to all forms of municipalities) to exercise a reasonable and continuing supervision over its streets in order that it may know they are kept in a safe and sound condition for use.

[6, 7] Sometimes notice of their defective condition is actual or express, again, it is constructive or implied, where, for instance, the defect has existed for such a length of time as to show that the city has omitted or neglected its plain duty of supervision, and, still again, it may be inferred by the jury from the facts in evidence. This principle is illustrated and was applied in *Fitzgerald v. Concord*, supra, where it is said, approving 1 Sh. & Red. on Negligence, § 369: "Unless some statute requires it, actual notice is not a necessary condition of corporate liability for the defect which caused the injury. Under its duty of active vigilance, a municipal corporation is bound to know the condition of its highways, and for practical purposes the opportunity of knowing must stand for actual knowledge. Hence, when observable defects in a highway have existed for a time so long that they ought to have been seen, notice of them is implied, and is imputed to those whose duty it is to repair them; in other words, they are presumed to have been discovered by the exercise of reasonable diligence." And, again, in the same section: "It is only reasonable that notice of latent defects should not be so readily presumed from their continuance as open and obvious defects. If these were so dangerous as to challenge immediate attention, the jury is justified in finding a very short continuance of such condition to constitute sufficient notice. Active vigilance is required to detect defects from natural decay in wooden structures, like bridges, plank sidewalks, and the like, which will necessarily become unsafe from age, but the most that ought to be required is the use of ordinary diligence by making tests and examinations with reasonable frequency to ascertain whether they are safe or not. It has been held that notice will not be implied unless the defect was so open and noticeable as to attract the attention of passers-by. But travelers are not charged with any duty to

search for defects in a highway as road officers are, and the better rule in our judgment is that knowledge of a defect may be inferred, notwithstanding it may have escaped the attention of all travelers or even of an officer frequently passing by. It is not a question whether all passers-by actually notice a defect, but whether it was noticeable.' And the decided cases support the doctrine as stated. *Jones v. Greensboro*, 124 N. C. 310, 313, 32 S. E. 675; *Kibele v. Philadelphia*, 105 Pa. 41; *Kunz v. Troy*, 104 N. Y. 346, 10 N. E. 442, 58 Am. Rep. 508; *Pomfrey v. Saratoga*, 104 N. Y. 459, 11 N. E. 43. On the question of notice implied from the continued existence of a defect, no definite or fixed rule can be laid down as to the time required, and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect, its placing," and other considerations not necessary to be stated.

The general duty of a municipality with reference to the condition of its streets is discussed in *Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070; *Jeffress v. Greenville*, 154 N. C. 490, 70 S. E. 919. The law applicable as between individuals is not the same when we come to consider the obligation of municipal authorities to the public, for in the latter case the duty to keep streets and highways in repair and free from dangerous pitfalls is a positive one, which they cannot, as public trustees, delegate to another to perform, and thereby relieve themselves from liability for nonperformance, or for negligence in the manner of doing the requisite work in the proper way.

[8] The doctrine of express notice is not relevant to the question when the very danger is created by the city itself or by some one under its direction, for there notice is necessarily implied. The principle is well stated by Moll, § 141, as follows: "If the act or omission of the independent contractor is a violation of some primary or inalienable duty of the city, such as that of keeping its streets in a reasonably safe condition for public travel, the city will be liable therefor. The duty of a city to exercise reasonable care, to the end that its highways, streets, sidewalks, etc., shall be reasonably safe for ordinary travel, is absolute in the sense that it is primary, and cannot be delegated so as to absolve it. The duty rests on a municipal corporation to keep its streets in a safe and passable condition, and where a contractor with the city failed to place proper guards about an excavation, thereby causing injury to a passer-by, the city was held liable. And the city is nevertheless liable for the unsafe condition of its streets even where it exercises no control over the contractor in re-

spect of the manner of doing the work, except to see that it is done according to certain specifications. It is on sound principle that a city is responsible for injuries proceeding from dangerous and unguarded excavations left in its highways by an independent contractor, and the very fact of the contract charges the city with notice that the street is being dug up and puts it on inquiry as to whether any excavation made by the contractor is properly guarded and lighted. Nor can a municipality claim exemption from liability from defects in a street by reason of its not accepting the work of the contractor, where the defect has existed long enough to charge its officials with knowledge. A city is chargeable with notice of the existence of a dangerous obstruction in one of its streets, where such defect is the result of the negligence of contractors under the city, so as to dispense with the necessity of giving it express notice of its existence." Applying these well-settled principles to the facts before us, as evidently found by the jury, we have little difficulty in adjudging the liability of the defendant for the injury received by the plaintiff when he fell in the ditch.

[9, 10] There are some matters of evidence which require notice. The hypothetical questions put to the medical experts cannot be criticised for lack of evidence to support them. It was the duty of the judge in the first instance to decide whether there was any evidence of the facts assumed to exist, which he did, and then he left it to the jury to say whether the facts had been established by the proof, instructing them that, if they had not been, they should disregard the answers. We do not think the defendant can complain of the charge in this respect.

[11] The question tending to show the bias of one of the witnesses was competent, for it enabled the jury the better to determine the value of his testimony. It may have been slight, but there was enough evidence of a leaning towards the defendant to let it in, so that it might pass for what it was worth.

The case, it appears, was well tried, and is, as we look at the record, free from any error.

No error.

(157 N. C. 286)

#### JOYNER v. HARRIS.

(Supreme Court of North Carolina. Nov. 27, 1911.)

#### 1. STATUTES (§ 225\*)—CONSTRUCTION—STATUTE IN PARI MATERIA.

Revisal 1906, § 2088, relating to the issuance of marriage licenses by registers of deeds, and section 2090, providing a penalty for unlawfully issuing a license, are in pari materia, and are to be considered together.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**2. MARRIAGE (§ 25\*)—LICENSING OFFICERS—ISSUING LICENSES—"REASONABLE INQUIRY."**

Under Revisal 1905, § 2088, which declares that every register of deeds shall, on application, issue a marriage license, provided it shall appear to him probable that there is no legal impediment to such marriage, and that where either party to the proposed marriage is under 18 years no license shall be issued without the written consent of the parent, guardian, etc., and section 2090, which provides a penalty for issuing a license unlawfully, without "reasonable inquiry," the inquiry to be made is such as makes it probable that there is no legal objection to the marriage, and involves at least the idea that it should be made of some person known by him to be a reliable party, or, if unknown to him, information as to his reliability should be obtained from some person known by the officer to be reliable.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 34; Dec. Dig. § 25.\*]

For other definitions, see Words and Phrases, vol. 7, p. 5973.]

**3. MARRIAGE (§ 25\*)—LICENSING OFFICERS—ACTIONS AGAINST OFFICER—QUESTIONS OF LAW OR FACT—BURDEN OF PROOF.**

In an action under Revisal 1905, § 2090, imposing a penalty upon registers of deeds for unlawfully issuing a license, without reasonable inquiry, where there is a conflict of evidence upon the question as to whether due inquiry had been made, it should be submitted to the jury, and whether the register inquires as to the age of the party, by examining the witnesses or the applicant under oath, is only a circumstance; but, where the facts are established, what is reasonable inquiry becomes a question of law, and the court may peremptorily instruct the jury, and the burden of proof is on the plaintiff to show that the officer issued the license when he knew of the impediment to the marriage, or that it was forbidden by law, or when he had not made reasonable inquiry.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 35; Dec. Dig. § 25.\*]

**4. APPEAL AND ERROR (§ 927\*)—PRESUMPTIONS—DIRECTION OF VERDICT.**

Where the charge of the court is equivalent to saying that there is no evidence which, if believed, would entitle defendant to the verdict, the evidence will be viewed by the appellate court in the light most favorable to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3743; Dec. Dig. § 927.\*]

**5. MARRIAGE (§ 25\*)—LICENSING OFFICERS—ISSUING LICENSES—ACTION AGAINST OFFICER—"REASONABLE INQUIRY."**

In an action to recover the penalty under Revisal 1905, § 2090, for issuing a marriage license for the marriage of plaintiff's daughter while under the age of 18, without the written consent of the plaintiff, it appeared that defendant, as register, took the word of the prospective bridegroom and his friend as to the age of the daughter, and made no further inquiry of any one; that the register did not know the bridegroom or his friend, and that, if such statement had not been made, defendant would not have issued the license; that he did not ask if there was any objection to the marriage, or telephone to the place where her parents lived. *Held*, that the defendant failed to make reasonable inquiry as to the age of plaintiff's daughter, and that he was liable under the statute.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 34; Dec. Dig. § 25.\*]

Appeal from Superior Court, Cabarrus County; Biggs, Judge.

Action by R. D. Joyner against J. F. Harris, for the recovery of a statutory penalty.

Judgment for plaintiff, and defendant appeals. Affirmed.

Montgomery & Crowell and H. S. Williams, for appellant. T. D. Maness, for appellee.

**WALKER, J.** This is an action to recover the penalty given by Revisal 1905, § 2090, for unlawfully issuing a marriage license to Martin Burrus and Julia B. Joyner, without proper inquiry as to the age of the prospective bride.

The statute, under which this suit was brought, is a wise and beneficent one; the object being to protect the parties themselves, and the community as well, from hasty and improvident matrimonial alliances, which eventually produce discord and unhappiness in the family—one of the essential units of our republican household—and are hurtful to society in many ways. Let us examine the case, in view of this main purpose of the law. Martin Burrus and Julia B. Joyner, by themselves, had consented to their marriage, but, in order to make it a valid union, it is required by the statute that he should be 16 years and she 14 years old (Revisal, § 2083), provided that, if they are under the age of 18 years, the consent of the person designated by the statute shall first be obtained, and if a register of deeds knowingly, or without reasonable inquiry, issues a license for the marriage of any two persons, either of whom is under that age, without the written consent required by law to be delivered to him (Revisal, § 2088), he forfeits the sum of \$200, as a penalty, to any parent, guardian, or other person, standing in loco parentis, who may sue for the same. It is further provided that the register of deeds shall issue the license, if it appears to him probable that there is no legal impediment to the marriage. Revisal, § 2088.

[1, 2] It has been held that the several sections, and especially sections 2088 and 2090, being in pari materia, should be construed together, and when this is considered, the inquiry required to be made before issuing the license is such as makes it *probable* that there is no legal objection to the marriage. *Bowles v. Cochran*, 93 N. C. 398.

[3] With this general definition of a reasonable inquiry established, we find that the following rules have been adopted by this court, for the purpose of determining if such an inquiry or investigation has been made: (1) Where there is a conflict of evidence upon the question, it should be submitted to the jury to decide, under proper instructions from the court, whether due inquiry had been made. (2) Where the facts are admitted or established, what is reasonable inquiry becomes a question of law, and the court may instruct the jury to answer the

issue according as it may decide the law upon the facts to be. *Joyner v. Roberts*, 114 N. C. 389, 19 S. E. 645. (3) The statute (Revisal, § 2088) does not require that the register shall inquire as to the age of the party by examining the witnesses or the applicant under oath, but merely declares that he may do so, and his doing or not doing so, in the exercise of his discretion, is only a circumstance for the jury to consider in finding whether the proper inquiry has been made. (4) While the court cannot prescribe any exact rule for the guidance of the officer, it would seem that "reasonable inquiry" involves, at least, the idea that it should be made of some person known by him to be a reliable party, or, if unknown to him, information as to his reliability should be obtained from some person who is known by the officer to be reliable. (5) The burden of proof is upon the plaintiff to show that the officer issued the license when he knew of the impediment to the marriage, or that it was forbidden by the law, or when he had not made reasonable inquiry. *Furr v. Johnson*, 140 N. C. 157, 52 S. E. 664; *Trolinger v. Boroughs*, 133 N. C. 312, 45 S. E. 662. The fourth rule may be somewhat modified in its application by the particular facts and circumstances of the case in hand; what is due inquiry depending largely upon them.

[4] Let us now apply the law, as thus understood, to the facts of this case. The court instructed the jury, if they believed the evidence, to answer the first issue, "Yes," and the second issue, "No," and, if they did not believe the evidence, to reverse their answers, as the burden of the issues was upon the plaintiff. Under these instructions, the jury returned the following verdict:

"(1) Was the plaintiff's daughter, Julia Burrus, under 18 years of age at the time of her marriage? Answer: Yes.

"(2) Did the defendant issue the marriage license without plaintiff's consent, and without reasonable inquiry? Answer: Yes.

"(3) What amount, if any, is plaintiff entitled to recover of the defendant? Answer: \$200." The charge of the judge was equivalent to saying that there was no evidence which, if believed, entitled the defendant to the verdict, and this being so, we must view the evidence in the light most favorable to him.

We will, therefore, take his version of the facts, which in substance is as follows: Martin Burrus, the prospective groom, went to the register's office with his brother, Adam Burrus, and applied for the license. They were well dressed, and defendant says he thought they were trustworthy, and would not get him in trouble. He asked them if they were related to J. A. Harris, whom defendant knew very well, and one of them replied that he was his uncle. He inquired of Martin Burrus his age, and was told that he was 21 years old, and lived in No.

9 township with his father. He then stated the ages of his father and mother. Defendant then asked him as to the age of the young lady, and he answered that "she said she was 18." Defendant told him "that would not do—that is not the question"—but, "Is she 18, and will you swear it?" to which he replied that he would, and thereupon the license was issued, and defendant testified that, if he had not made that statement, he would not have issued the license. Martin Burrus also gave the names of her father and mother and their place of residence, and further stated that they all lived on Tom Bost's farm, within three or four hundred yards of each other. When he was asked to qualify as to the girl's age, he replied, "She said she was 18," but when he was again told that his answer would not do he swore that she was 18. Defendant knew the plaintiff, but did not know at the time that she was his daughter. He did not ask if there was any objection to the marriage. The two men answered the defendant's questions openly and frankly, and there was nothing in their manner or conduct to arouse suspicion. He knew there was a telephone to Bost's mill, where the girl's parents lived, but he did not use it. He had never seen the two young men before, and did not know anything about them up to that time, and issued the license solely upon their statement; they not being identified or vouched for by any one. There was no further inquiry by the defendant about the matter. The plaintiff's evidence varied a little from the defendant's, it appearing therefrom that the questions were addressed to the brother of the applicant, Adam Burrus, and the answers thereto given by him; but this makes little or no practical difference in the result. Plaintiff testified that defendant afterwards told him that he regretted the occurrence, and asked him not to think hard of him, and that "nobody else would get him in a hole like that again." The plaintiff's witness, Adam Burrus, differed with the defendant as to what he or his brother had said as to the age of the girl; he stating that they did not say that she was 18, but that "she had said so to him," and he had no reason to doubt her word. In this respect, defendant was corroborated by his witness, W. M. Weddington, who stated that the one who answered the questions signed the oath as to her age. The plaintiff testified that his daughter was a little over 14 years old at the time of the application for the license, and there was no evidence to the contrary as to her age.

[5] We do not think upon this statement of the facts, which is most favorable to the defendant, that he made the requisite inquiry. The two young men were entirely unknown to him, and it is perfectly apparent that they were either ignorant of the girl's age, or were attempting to suppress the truth as to it.



The defendant had no reason to rely upon them as men of good character, and as being trustworthy, for he knew absolutely nothing about them; and, besides, it should have been evident to him, or to any prudent man, under the same circumstances, that they were basing their opinion as to her age upon her own statement, and not upon their own knowledge. He could easily have obtained reliable information by the use of the phone, or by requiring them to produce some person, known to him, who would identify them as being the persons they had represented themselves to be, and who would testify as to their good character. This case is not, in its main features, unlike *Cole v. Laws*, 104 N. C. 651, 10 S. E. 172, the syllabus of which fairly states the facts and the ruling, and is as follows: "When a register of deeds issues a license for the marriage of a woman under 18 years of age, without the assent of her parents, upon the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information, held, that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect." And likewise, in *Morrison v. Teague*, 143 N. C. 186, 55 S. E. 521, it was held that, "in an action against a register of deeds to recover the penalty under Revisal, § 2090, for issuing the marriage license contrary to its provisions, where the uncontradicted evidence showed that the register took the word of the prospective bridegroom and his friend, neither of whom he knew, as to the age of the young lady, and made no further inquiry of any one, the court should have given the plaintiff's prayer for instruction that, as a matter of law, defendant failed to make reasonable inquiry as to the age of the plaintiff's daughter." To the same effect are the following cases: *Williams v. Hodges*, 101 N. C. 300, 7 S. E. 786; *Trolinger v. Boroughs*, supra; *Laney v. Molkey*, 144 N. C. 630, 57 S. E. 386. If we should hold that a register of deeds can satisfy himself as to the essential facts upon such an inadequate investigation as was made in this case, we would defeat the very object and purpose of the statute to throw safeguards about the young and inexperienced, who would, by reason of their youthful impulses, be liable to enter into so solemn and serious a relation lightly or unadvisedly, and not soberly, discreetly, and reverently, as they should do, and as the best interests of society require should be done. It was suggested that the defendant had just taken office, and intended no wrong. We do not doubt it, and it is a matter which might, perhaps, induce the plaintiff to relent in his prosecution, and constitutes a strong appeal to his generosity; but the law must be up-

held, and ignorance of it is no excuse. The best way to compel obedience to it is by its strict enforcement. This will make the citizen and the officer more careful to observe it. We sympathize with the defendant, under the circumstances, but cannot help him. He has violated the law, and, if the plaintiff exacts it, must pay the penalty, as did Shyllock, the Jew, of his victim.

There is no force in the contention that the witness Adam Burrus testified to the age of the girl, as given by her to him. He was manifestly merely repeating to the court what occurred before the register of deeds, and did not intend to state, independently and substantively, that she had told him her age. It was therefore no evidence for the defendant upon the first issue, conceding that it would have been, had he so testified.

No error.

(157 N. C. 188)

# FARRISH-STAFFORD CO. v. CHARLOTTE COTTON MILLS.

(Supreme Court of North Carolina. Nov. 27, 1911.)

## 1. CORPORATIONS (§ 180\*)—STOCKHOLDERS—RIGHTS AS TO CORPORATION.

A corporation must as a rule treat all shareholders of the same class alike.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 180.\*]

## 2. CORPORATIONS (§ 629\*)—STOCKHOLDERS—WHO ARE.

Where factors purchase certain preferred stock in a corporation, in order to obtain its entire production, under an agreement that the arrangement is to remain effective as long as such factors hold the stock, and that the corporation may take up the stock at par should it desire to change the account, they are, upon the voluntary liquidation of the company before the contingency happened upon which they were entitled to a redemption, preferred stockholders, and not entitled to share as creditors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 629.\*]

Appeal from Superior Court, Mecklenburg County; Adams, Judge.

Action by the Farrish-Stafford Company against the Charlotte Cotton Mills. From a judgment for defendant, plaintiff appeals. Affirmed.

J. Crawford Biggs and F. L. Fuller, for appellant. Tillett & Guthrie, for appellee.

BROWN, J. The case agreed, which embraces much correspondence unnecessary to set out, discloses that Eldredge Lewis & Co., commission merchants of New York, were the factors of defendant, sold its product on commission, and advanced it money as its needs demanded. To retain defendant's business, that firm became preferred stockholders in defendant corporation. By mutual consent the account was transferred to plaintiff, in consideration of which 250 shares

of preferred stock of defendant were issued to plaintiff, for which it paid \$25,000. It has held this stock for many years and received dividends at 7 per cent. annually thereon, aggregating \$7,000. The defendant went into voluntary liquidation in May, 1908, under the provisions of section 1195 of the Revisal, and the directors, D. W. Oates, J. M. Oates, and R. M. Oates, became trustees in dissolution. These trustees have paid all the debts of the corporation, and converted into money all of its assets, and are now prepared to distribute these assets among those entitled thereto. There is not a sufficient amount to pay the preferred stockholders in full. The question before the court under the facts stated is whether the plaintiff is a stockholder, and therefore entitled only to its ratable share of the assets, or whether the plaintiff is a creditor, and entitled to be paid in full. The contract or agreement between the parties is contained in their correspondence, the substance of which is that plaintiff on August 29, 1903, in order to secure defendant's business and become its factor, offered to loan it \$25,000, and take as collateral security the same amount in preferred stock. This proposition was declined; the defendant stating to plaintiff that it did not care to increase its indebtedness. Thereupon plaintiff at once wired defendant to forward certificate for 250 shares preferred stock, as check for same was being then mailed. At same time plaintiff wrote defendant, confirming the telegram, and saying: "Our understanding of the agreement between us is as follows: We are to represent the entire production of your mill and receive as compensation therefor 5 per cent. commission on all goods made and shipped, we to guarantee the accounts. We will remit you on the 15th and 1st of each month for all invoices in hand up to those dates. This arrangement to remain in effect just so long as we hold the \$25,000 worth of preferred stock. Should you for any reason desire to change the account, you are to take up this stock at par."

[1] It is unnecessary to consider the feature of the case so learnedly argued by counsel on both sides as to the power of a corporation to redeem or retire the stock of one shareholder to the prejudice of others. It is elementary that a corporation as a rule must treat all shareholders of the same class alike.

[2] We are of opinion that the plaintiff was never a creditor of the defendant for the \$25,000, and is only a preferred stockholder, and must share with the others of like class. The contingency has never happened which is referred to in the letter from which we have quoted when according to the agreement the defendant could be called on to redeem the stock. Defendant's account has never been

changed, or transferred from plaintiff to another factor. The defendant has continued to do business continuously with plaintiff from that date until it has ceased to manufacture. The record shows that at the time the defendant went into voluntary liquidation in May, 1908, the plaintiff had on hand a stock of goods of the defendant which it continued to sell and receive its commissions until October 23, 1909, when the last goods were sold. At the time of the sale of the last goods which the plaintiff had on hand, the account, being balanced, disclosed that the plaintiff owed the defendant on account \$946.31, and the plaintiff still owes this amount to the defendant on account. The agreement did not mention the voluntary retirement of the defendant from business, or its failure in business and subsequent insolvency. Those contingencies do not seem to have been in the contemplation or thoughts of either party. Evidently the plaintiff was willing to take the chances as those.

We find nothing in the agreement which could prevent the defendant from going out of business, or which required it to take back the stock in case it did.

The judgment is affirmed.

(187 N. C. 179)

#### McCALL v. SUSTAIR.

(Supreme Court of North Carolina. Nov. 27. 1911.)

#### LIBEL AND SLANDER (§ 123\*)—AMBIGUOUS WORDS—QUESTION FOR JURY.

Where the evidence showed that defendant had charged that plaintiff had "taken or gotten" cotton of another, and that defendant and his brother had attempted to settle the matter by having plaintiff pay for the cotton, and defendant testified that he did not mean to charge plaintiff with larceny of the cotton, the words "taken or gotten" were ambiguous, and whether they were intended to charge larceny, and were so understood by the hearers, was properly submitted to the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 358-364; Dec. Dig. § 123.\*]

Walker and Hoke, JJ., dissenting.

Appeal from Superior Court, Mecklenburg County; Biggs, Judge.

Action by M. D. McCall against J. T. Sustain. From a judgment for defendant, plaintiff appeals. Affirmed.

McCall & Smith, Burwell & Cansler, and R. S. Hutchison, for appellant. Stewart & McRae and Maxwell & Keerans, for appellee.

CLARK, C. J. This is an action for slander, on an allegation that the defendant had charged the plaintiff with stealing cotton; said charge having been made on three several occasions, viz., to John Cochrane, to L. A. Ferguson, and to Charles Simpson. Neither justification nor privilege was pleaded.

but a denial of having charged the plaintiff with larceny.

The issues submitted were: "Did the defendant speak and publish of and concerning the plaintiff the alleged slanderous words set out in article 1 of the complaint, with the intent to thereby charge the plaintiff with the crime of larceny?" This paragraph alleged that the charge was made to one John Cochran. The second issue was in the same words, as to the alleged conversation with L. S. Ferguson, and the third issue was in the same words, as to the alleged conversation with Charles Simpson. There was no exception to the issues. The judge in charging the jury told them that the charge of larceny need not be made in express terms, by declaring that the person is a thief, or that he has stolen, but the imputation may be made by the use of any apt words which, in connection with the other words and in view of the circumstances under which they are used, naturally import that the person spoken of has committed the crime of larceny, and that the words were used in that sense. And further charged them that if they found "from the greater weight of evidence that the defendant spoke to or in the hearing of John Cochran words which should be reasonably construed to mean a charge of larceny of cotton by McCall from J. P. Sustair, and that defendant intended to charge him with larceny in uttering said words," they would answer the first issue, "Yes." The plaintiff excepted because the judge inserted the words "and that defendant intended to charge him with larceny in uttering said words."

The plaintiff also excepted because the court charged the jury: "The words to be slanderous must have been spoken with the intent to charge the crime of larceny, and the words used under the circumstances must be so understood by the hearers." The judge used the same instructions, that there must be an intent on the part of the defendant to charge the plaintiff with larceny, in instructing the jury on the second and third issues. This presents substantially the controversy submitted on appeal.

The proof was not that the defendant had used the word "stole," but that he said to Cochran that his brother had "ketched McCall taking some pokes of cotton out of his cotton patch the night before." As to the second issue, Ferguson testified that he "told defendant that he didn't doubt that Thomas had lost the cotton, but didn't believe that Dave McCall got it, to which defendant replied, 'I do,' and that defendant further said, 'I believe Dave McCall got it, for Thomas said he had seen him get it.'" As to the third issue, Simpson testified that the "defendant told McCall that he had come down to make up with him," and said, "'Now, we have come up here to make up this trouble between you and Thomas about taking Thomas' cotton,' to which McCall replied, 'I never took any cotton from Thomas, or any one

else.' The defendant replied: 'Thomas saw you take it, and you know you got it. Thomas says you got it.' And McCall replied that he didn't get it, and was very sorry they accused him of getting it, and he had not taken cotton from any one."

If the evidence had been that the words used were unequivocal that the plaintiff "had stolen the cotton," then the judge would have been justified in charging the jury that if they believed the evidence they should answer the issue "Yes." But here the words proven were that the plaintiff had "taken the cotton." The judge therefore properly charged the jury that the burden was upon the plaintiff to find whether the words, in view of the circumstances under which they were used, naturally imported that the persons spoken of had committed the crime of larceny, and that the words were used with the intent to charge the plaintiff with larceny in uttering said words. The words were not an express charge of larceny, because a "taking" of cotton is not necessarily larceny. Whether the use of that word was intended to convey, under the surrounding circumstances, a charge that the defendant had "stolen" the cotton was a matter which was properly left to the jury.

In *Lucas v. Nichols*, 52 N. C. 36, the court said: "The words used being ambiguous and capable of a double construction, it was proper for the judge to leave it to a jury to decide under the circumstances whether it was intended thereby to charge the plaintiff with a crime. The plaintiff contends here that this well-settled principle is not in point, because only one opinion could be drawn as to the meaning of the language used. But we do not think so, and neither did the jury to whom the matter was submitted. They have found, as a matter of fact, that the defendant did not intend to charge the plaintiff on either occasion with larceny. We cannot know how far the jury may have been influenced by the fact that, if the defendant intended to charge the plaintiff with larceny, his conduct in attempting to make up the matter with him would have been the compounding of a felony, and therefore that it was unlikely that he charged the plaintiff with the felonious taking of the cotton.

No witness testified that the word "steal" was used at any time, but in all the conversations the word used was "take," or "got," which does not necessarily imply a "felonious taking," and as to the surrounding circumstances there is the fact that there was an attempt by the defendant and his brother to settle the matter by getting the plaintiff to pay for the cotton. There is also the testimony of the defendant that he did not mean to charge the plaintiff with stealing the cotton, and did not think that the plaintiff had stolen it, and had never told any one that he thought the plaintiff had stolen the cotton. In *Hampton v. Wilson*, 15 N. C. 470, *Ruffin, C. J.*, said that, unless the words used

could bear only one construction, "it was for the jury to pass upon the intent, to be collected from the mode, extent, and circumstances of the publication." To same effect is *Studdard v. Linville*, 10 N. C. 474, where the court laid down the rule: "Words to be slanderous must be spoken with an intent to slander, and must be so understood by the hearer." That case has been approved in *McBrayer v. Hill*, 26 N. C. 139; *Pugh v. Neal*, 49 N. C. 369.

The words "took" and "got" being susceptible of more than one construction, the court properly left the question of the intent and meaning of the language to the jury to say whether the hearers would reasonably have construed them as charging larceny of the cotton. "Where, in an action for slander, the words are ambiguous; but admit of slanderous interpretation, it should be left for the jury to say, under all the circumstances, what meaning was intended." *Reeves v. Bowden*, 97 N. C. 32, 1 S. E. 549; *Lucas v. Nichols*, 52 N. C. 32. The intent with which the words were used was left to the jury in *State v. Benton*, 117 N. C. 788, 23 S. E. 432, *Webster v. Sharpe*, 116 N. C. 470, 21 S. E. 912, and *Hudnell v. Lumber Co.*, 133 N. C. 169, 45 S. E. 532.

In *Wozelka v. Hettrick*, 93 N. C. 13, relied on by the plaintiff, the defendant admitted that he spoke the words charged, which were slanderous per se, and the court held that an honest belief in the truth of the charge was not a defense, and could be considered by the jury only in mitigation of damages.

In the recent case of *Fields v. Bynum*, 72 S. E. 449, at this term, it was not contended that the words spoken were of doubtful import, as in this case; but they plainly and unequivocally charged that the plaintiff, Fields, in the nighttime, had burned, not one, but two, sawmills of the defendant. The language there used is set out in the opinion by Mr. Justice Brown, and is too plain to admit of any doubt as to its meaning. It was not even contended that the words were not actionable per se. The defense was that the occasion upon which they were spoken was privileged. The difference between that case and this is plainly manifested in the statement of facts.

No error.

**WALKER, J. (dissenting).** A man's intention cannot, in the nature of things, have anything to do with the slanderous character of his words. He is to be judged by what his words mean, and not by what his secret intention may have been. The law gives an action for slander because of the dangerous tendency of the words. You violate a fundamental maxim of the law when you say that a man may utter words which, on their very face, mean one thing, defamatory of his neighbor, and yet another, because he did not intend that they should have that meaning. It is not his intent that does the harm,

but his actual words. It is a well-known maxim of the law that a man is presumed to intend the natural consequences of his acts. It ignores his hidden purpose, and measures his liability by what he has done or said, if it is injurious in its consequences. His secret intention is something intangible, and sometimes unprovable, and he must therefore be held to have meant what his words import. If the doctrine of the majority is to be declared as the law, a man may utter words outrageously derogatory of his neighbor, and, unless they constitute what the law regards as a slander per se, he is not liable, unless he had the bad motive. This cannot be the law. I have the highest authority for saying that it is not. "In actions for defamation, it is immaterial what meaning the speaker intended to convey. He may have spoken without any intention of injuring another's reputation, but if he has in fact done so he must compensate the party. He may have meant one thing and said another; if so, he is answerable for so inadequately expressing his meaning. If a man in jest conveys a serious imputation, he jests at his peril. Or he may have used ambiguous language which, to his mind, was harmless, but to which the bystanders attributed a most injurious meaning; if so, he is liable for the injudicious phrase he selected. What was passing in his own mind is immaterial, save in so far as his hearers could perceive it at the time. Words cannot be construed according to the secret intent of the speaker. 'The slander and the damage consist in the apprehension of the hearers.'" *Newell on Slander*, p. 301, § 22.

In *Belo v. Smith*, 91 Tex. 221, 42 S. W. 850, the court said substantially that in an action for using defamatory words it is not so much the idea which the speaker or writer intends to convey, as what he does *in fact* convey. If the language used may import a slanderous charge, its meaning must be ascertained from the words as commonly understood, and as to how it would impress the bystanders, and not from what the defendant intended by it. The intention of the speaker is material, not on the question of liability, but only as bearing on the question of damages. The cases supporting the principle just stated are very numerous, and emanate from courts of the highest authority upon the subject. *King v. Sassaman* (Tex.) 54 S. W. 304; *Dunlevy v. Wolferman*, 106 Mo. App. 46, 79 S. W. 1165; *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730; *Short v. Acton*, 33 Ind. App. 361, 71 N. E. 505; *Nicholson v. Rust* (Ky.) 52 S. W. 933; *Hamlin v. Fantl*, 118 Wis. 594, 95 N. W. 955; *Jackson v. Williams*, 92 Ark. 486, 123 S. W. 751, 25 L. R. A. (N. S.) 840; *Hatch v. Potter*, 2 Gilman (Ill.) 725, 43 Am. Dec. 88; *Holmes v. Jones*, 147 N. Y. 59, 41 N. E. 409, 49 Am. St. Rep. 646. In *Rodgers v. Kline*, 56 Miss. 808, 31 Am. Rep. 389, the court said: "The absence of this intent or purpose does not per

se exonerate the publishers of the article from responsibility, if in fact such language was used in it as would inflict an illegal injury on plaintiff; for the injury to him would be all the same, whether it was the result of design on the part of defendants, or of their carelessness and negligence."

I have not discussed the question whether the words used, being in their nature an unequivocal, though not direct, charge of larceny, are actionable per se. There is authority for saying that they are, and similar words have been held to constitute slander per se. *Estes v. Antrobus*, 1 Mo. 197, 13 Am. Dec. 496; *Hinesley v. Sheets*, 18 Ind. App. 612, 48 N. E. 802, 63 Am. St. Rep. 356; *Alcorn v. Bass*, 17 Ind. App. 500, 46 N. E. 1024; *Bornman v. Boyer*, 3 Bin. (Pa.) 515, 5 Am. Dec. 380. In *Alcorn v. Bass*, supra, the court said: "If the words charged, taken in connection with the circumstances under which they are alleged to have been spoken, were calculated to induce the hearers to suspect that the plaintiff was guilty of the crime of larceny, they were actionable. *Drummond v. Leslie*, 5 Blackf. (Ind.) 453. The words alleged to have been spoken by appellant, 'Well, I believe you took it,' were not actionable per se, but they might be so by reason of extrinsic facts, including other words spoken in the same conversation." See, also, *Wozelka v. Hettrick*, 93 N. C. 10, which seems to be practically to the same effect.

In this case, the words uttered, under any possible or reasonable construction of them, clearly and unmistakably implied a charge of slander, and they present a very aggravated case. The use of them was the equivalent of saying that the defendant had stolen the corn, and therefore, they amounted to a charge of larceny; in other words, they meant that the plaintiff had committed larceny, and nothing else. The law does not permit a man to clearly insinuate, in the presence and hearing of others, and in the most insulting way, that his neighbor, who is also present, has stolen corn, and excuse himself because he did not say, in so many words, and in direct and positive speech, that he had stolen it. The insinuation, under the circumstances, stands for the express charge, for it does just as much harm, and tends to a breach of the peace. If a fight had ensued, we would not hesitate to hold the defendant guilty of an affray, because of the provocation he gave. I cannot well distinguish the words in this case from those which were held, at this term, in *Fields v. Bynum*, 156 N. C. —, 72 S. E. 449, to be actionable, except in this respect: That they are more offensive and more significant of a purpose to slander and defame the plaintiff. In that case the defendant accused the plaintiff of burning the mill, and added that his neighbors believed it, as he burnt it last June; while in this case the defendant plainly accused the plaintiff of stealing the cotton, if his words mean anything at all. What were

they? "I have been over to my brother Tom's, helping to watch his cotton, as Dave McCall has been taking it." That his brother had caught him "taking some pokes of cotton out of the patch the night before." He said to plaintiff that his brother had told him he had taken the cotton, and he had better fix it up. This was in the presence of Charles Simpson. Even after plaintiff had denied taking the cotton, he repeated the charge against him, saying, "Thomas saw you take it, and you know you got it," and upon further denial, he persisted in making the accusation. In the *Fields Case*, there was no more unequivocal charge of arson than in this case of larceny. In both cases, the words imputed but one thing—the perpetration of a felony; in the one case, arson, and in the other, larceny—and it is impossible to make anything else out of them. In the *Fields Case*, the words were not privileged because of the time, place, and manner of using them. That was one question in the case; the other was whether they were actionable, to which we gave an affirmative answer.

But it is said that the issues submitted were those raised by the plaintiff's own allegations and the denials of the answers. I do not so understand the allegations of the complaint. The words are set out with an innuendo, the office of which is to show the meaning and application of the charge, and is merely explanatory of the preceding words. It is said to mean no more than "id est" (that is), or "scilicet" (a word used in pleadings, as introductory to a more particular statement of matters previously mentioned in general terms). *Black's Dict.* (1st Ed.) 626; 25 Cyc. 449. It is intended to disclose the injurious sense imported by the charge. 25 Cyc. 451. Where the words are actionable per se, or the meaning of the publication is plain and unambiguous, the use of it is not required, as its peculiar function is to point the meaning of the words. It has no reference to the intention of the speaker who made the charge. It is what he says, and his words mean, and not what he intended, that hurts, or makes his victim smart under his plain accusation, and so it has been said that want of actual intent to injure furnishes no legal excuse. Read, then, the complaint in the light of these principles, and we find that nothing is said about intent, but everything about the meaning of the defendant's words, if it was necessary to explain that which was perfectly intelligible. No reasonable man in that audience could have heard the words without *knowing* instantly, and without the trouble of thinking, what the defendant meant. It was therefore prejudicial error to inject into the issues submitted by the court the question of intent. The court should have accepted, and submitted to the jury, the issues tendered by the plaintiff. The charge also was erroneous, in that it made the liability of the defendant

turn entirely upon the intent with which the words were used, and not upon their meaning and the impression they made, and were calculated to make, upon his hearers; or at least the court laid too much emphasis upon the intent, and misled the jury. They may have found the words to have been slanderous, and yet gave the verdict against the plaintiff, because they did not find that he had the intent to slander. This error in the charge is the subject of several of the assignments of error, and permeates the entire charge. It is more pronounced in the instruction that, "Words to be slanderous, must be spoken with the intent to charge the crime of larceny," which is duly excepted to in the second assignment of error. I do not understand that to be the law, but rather the meaning and effect of the words which are used, without regard to the intent, which would not injure, if the words had not been spoken.

My conclusion is that there should be a new trial for the alleged error.

HOKE, J., concurs.

(187 N. C. 166)

PELTZ et al. v. BAILEY.

(Supreme Court of North Carolina. Nov. 27, 1911.)

JUSTICES OF THE PEACE (§ 153\*)—APPEAL—TIME FOR TAKING.

Under Revisal 1905, § 608, requiring an appeal from a justice's judgment to be docketed at the next ensuing term of the superior court, as construed to mean the next term beginning more than 10 days after rendition of the judgment appealed from, an appeal from a justice's judgment, rendered July 22, 1910, was properly dismissed, where the appeal was not docketed until March 27, 1911, there having been regular terms of the superior court in July and November, 1910, since the only case in which an appeal can be docketed after the next ensuing term is by consent, or when there has been no laches on appellant's part.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524-532; Dec. Dig. § 155.\*]

Brown, J., dissenting.

Appeal from Superior Court, Mitchell County; Long, Judge.

Action by E. Peltz and another against J. Milton Bailey. From an order dismissing defendant's appeal from a justice's judgment for plaintiffs, defendant appeals. Affirmed.

W. L. Lambert, Councill & Yount, and Black & Ragland, for appellant. Chas. E. Greene, for appellees.

CLARK, C. J. This is an appeal from an order dismissing an appeal from a justice of the peace. The judge finds the facts as follows:

The judgment was rendered by a justice of the peace July 22, 1910. The defendant appealed, and gave notice thereof in open court. The justice was doubtful whether his fee of 30 cents was paid, but upon conflicting

evidence the court found that it was. The next term of the superior court began July 25th, and the next regular term was held in November. The appeal was not sent up till March 27, 1911. At November term the defendant attended court, but was informed by his attorneys that the cause could not be tried at that term, and returned home. Neither the defendant nor his counsel asked the clerk, nor examined the docket at that term to see, whether the cause was docketed or not; nor was any recordari asked for; nor was there any offer at that term to docket the case.

The appellee has rights, as well as the appellant. The failure to docket the appeal in this case at the November term was negligence on the part of the appellant, which entitled the appellee to have the appeal dismissed. This point has been so often held by this court that it admits of a mild surprise that it can again be presented. In *Pants Co. v. Smith*, 125 N. C. 588, 34 S. E. 552, the court held that an appeal from a justice of the peace should be dismissed, on motion of the appellee, "if not docketed for trial at the next succeeding term of the superior court, if it began more than 10 days after judgment rendered." The court further said that this provision of the statute was "reasonable, in order to prevent further delay and put an end to litigation in a reasonable time"—citing *State v. Johnson*, 109 N. C. 852, 13 S. E. 843; *Ballard v. Gay*, 108 N. C. 544, 13 S. E. 207; *Davenport v. Grissom*, 113 N. C. 38, 13 S. E. 78.

In *Davenport v. Grissom*, supra, the court held that an appeal from the judgment of a justice of the peace, rendered more than 10 days before the next ensuing term of the superior court, should be docketed at that term, and that an attempted docketing at a subsequent term is a nullity. Hence that such appeal was not in the superior court, and the plaintiff could not take a nonsuit. In that case the court held that the judge properly held that he "had no discretion to permit the appeal to be docketed at a subsequent term to the one to which it should have been returned. The appellant had his remedy (if in no default) by an application for a recordari at the first ensuing term of the superior court after appeal taken. *Boing v. Railroad*, 88 N. C. 62." This case has been cited since with approval. *Pants Co. v. Smith*, supra; *Johnson v. Andrews*, 132 N. C. 380, 43 S. E. 926; *Johnson v. Reformers*, 135 N. C. 386, 47 S. E. 463; *Blair v. Coakley*, 136 N. C. 407, 48 S. E. 804; *McKenzie v. Development Co.*, 151 N. C. 278, 65 S. E. 1003.

In *Johnson v. Andrews*, supra, the appellant was held excused, because the return to the appeal was delivered to the clerk, and 50 cents was paid him by the appellant to docket the appeal, and, there being no civil dock-

et made up at that term, the appellant asked the clerk if the appeal had been docketed, and was told by him that it had been; hence the appellant was in no default, and was entitled to have his case tried. In the present case, the appellant did not pay the clerk for docketing the appeal, and made no inquiry as to whether it had been sent up, or whether it had been docketed; and neither he nor his counsel paid any attention to the matter. The appellee had the right under the statute and the repeated decisions of the court to consider the litigation terminated.

Revisal 1905, § 606, requiring an appeal from the justice of the peace to be docketed at the next ensuing term of said court which the court has held, means the next ensuing term "which begins more than 10 days after the judgment in the magistrate's court"; and the statute provides further that the case shall be triable at such first term of the superior court at which the appeal is required to be docketed. The courts have no more right to dispense with such requirement as to docketing an appeal in the superior court than to disregard the similar provision as to docketing an appeal in this court. To further expedite the trial of appeals from justices, Revisal, § 609, provides that such causes shall be tried upon the original papers. The only cases in which an appeal can be docketed, either in the superior court or in this court, after the next ensuing term is when there has been no laches on the part of the appellant, or when there is the consent of parties. *Jerman v. Gullledge*, 129 N. C. 242, 39 S. E. 835.

In *McKenzie v. Development Co.*, 151 N. C. 277, 65 S. E. 1003, this court reviewed the decisions and reaffirmed the ruling that: "An appeal from a justice of the peace must be docketed at the next ensuing term of the superior court, commencing more than 10 days

after the notice of appeal. An attempted docketing at a later term is a nullity." Revisal, §§ 607, 608. And further reiterated what was said in *Pepper v. Clegg*, 132 N. C. 316, 43 S. E. 906: "That the employment of counsel does not excuse the client from giving proper attention to the case. *McLean v. McLean*, 84 N. C. 366; *Vick v. Baker*, 122 N. C. 98 [29 S. E. 64]; *Norton v. McLaurin*, 125 N. C. 185 [34 S. E. 269]"—to which was added, "When a man has a case in court, the best thing he can do is to attend to it."

The courts have sufficient employment to decide the cases which are presented to them on the merits, without taking up valuable time to consider pleas to excuse the negligence of parties who do not think enough of their appeals to attend to them in the time provided by statute. After such time, the appellee is entitled to consider the litigation at an end.

The judgment dismissing the appeal is affirmed.

BROWN, J. (dissenting). Upon the facts as found by the judge of the superior court, the defendant took an appeal in open court from the judgment rendered, and paid the fees of the justice of the peace fixed by law, and demanded that the transcript be forwarded to the superior court. This was not done. I think the defendant did all the law required of him, and that it was the duty of the justice to forward the appeal without further request. Having done all the law required, I think the defendant ought not to be charged with the justice's neglect, and that the case should be docketed as upon recordari. Where there is no substantial negligence upon part of a litigant, his cause should not be dismissed. The law favors trials upon the merits.

(157 N. C. 209)

**CURRIE et al. v. GOLCONDA MIN. & MILL. CO. et al.**

(Supreme Court of North Carolina. Nov. 27, 1911.)

**1. JUDGMENT (§ 153\*)—SETTING ASIDE—TIME FOR APPLICATION.**

Where a default judgment in a suit where service was by publication was entered in April, 1910, defendants whose motion to set aside such judgment was made returnable to the July term, 1911, were not entitled to relief because of excusable neglect, since the motion was not made within 12 months from the rendition of the judgment, nor, having had notice of the judgment more than one year before moving for leave to defend, are they then entitled to relief under Revisal 1905, § 449, allowing defendant against whom judgment has been rendered upon service by publication to defend that judgment upon good cause shown.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 153.\*]

**2. JUDGMENT (§§ 354, 379, 386\*)—SETTING ASIDE—"IRREGULAR JUDGMENT."**

An irregular judgment is one rendered contrary to the course and practice of the courts, and may be set aside within a reasonable time and upon showing a meritorious defense.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. §§ 354, 379, 386.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3768.]

**3. CORPORATIONS (§ 641\*)—STATUTORY PROVISIONS—PUBLICATION OR OTHER NOTICE—SERVICE ON SECRETARY OF STATE.**

Revisal 1905, § 1243, which provides for personal service on corporations having property or doing business in the state by leaving a true copy of the summons with the Secretary of State, is valid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 641.\*]

**4. PROCESS (§ 106\*)—PUBLICATION OR OTHER NOTICE—MODE AND SUFFICIENCY.**

Publication of summons and notice of attachment was not irregular because commenced within 30 days from the time of issuing the summons, nor was it necessary that the service thereof should be complete 10 days before the term of court to which it was returnable.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 133; Dec. Dig. § 106.\*]

**5. PLEADING (§ 301\*)—VERIFICATION.**

A complaint in a suit against a nonresident corporation against whom there was only service by publication, verified by plaintiff's sworn statement that the complaint was true of his own knowledge, except as to that part stated to be upon belief, witnessed and signed by a justice of the peace, is a sufficient compliance with the statute, though it is not subscribed by the affiant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 318, 892-897, 904-906; Dec. Dig. § 301.\*]

**6. JUDGMENT (§ 17\*)—NONRESIDENT DEFENDANT—PROCESS—PUBLICATION.**

In the absence of an attachment levied upon property of a nonresident within the state, an attempt at service by publication does not authorize personal judgment, and is ineffective for any purpose.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.\*]

**7. JUDGMENT (§ 17\*)—PROCESS—ATTACHMENT—PERSONAL JUDGMENT.**

Where an attachment has issued, or the res has otherwise been brought within its con-

trol, the court acquires jurisdiction as against a nonresident defendant only to the extent that the res will satisfy the plaintiff's recovery, and any general or personal judgment beyond that is irregular.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 29-33; Dec. Dig. § 17.\*]

**8. GARNISHMENT (§ 81\*)—PROPERTY SUBJECT—DEBT OF NONRESIDENT TO NONRESIDENT.**

Where a corporation doing business in this state and its president are both nonresidents, a debt of the corporation to the president is not property of his subject to attachment in this state.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 146, 147; Dec. Dig. § 81.\*]

**9. CORPORATIONS (§ 675\*)—DEFAULT JUDGMENT—PLEADING TO SUSTAIN JUDGMENT.**

Summons in an action against a corporation and its president, both nonresidents, was served by leaving a copy with the Secretary of State, and also by publication, and property of the corporation in this state was attached. The complaint alleged a promise upon the part of the president to pay the plaintiffs \$5,000 upon certain conditions, performance of such conditions, and that the corporation had promised to pay the president \$18,000 under a contract made for the benefit of the plaintiffs to the amount of their debt, and an assignment to plaintiffs of such debt to the extent of their claim against the president, but did not allege any promise by the corporation to pay the plaintiffs, or that it had notice of the assignment to the plaintiffs, and did not negative an uncertainty in the amount of the company's liability; and the contract between the president and the corporation, made a part of the complaint, showed a provision made therein for the payment of the \$18,000, but the complaint contained no allegation as to what was done under it. *Held* that, as the amount for which the defendant corporation would be liable was not made certain by the complaint, the plaintiffs were not entitled to judgment by default final therein, and that such judgment was irregular.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 675.\*]

**10. JUDGMENT (§ 154\*)—DEFAULT JUDGMENT—SETTING ASIDE JUDGMENT—PARTIES ON APPLICATION.**

On application by a nonresident corporation to set aside a default judgment whereby its property, seized under an attachment, has been sold and a deed made to a bona fide purchaser, such purchaser is a proper party to the proceeding.

[Ed. Note.—For other cases; see Judgment, Cent. Dig. § 305; Dec. Dig. § 154.\*]

**11. APPEARANCE (§ 9\*)—ACTS CONSTITUTING DEFAULT JUDGMENT—MOTION TO OPEN—REQUEST TO ANSWER.**

Where defendants in their application to have a judgment by default final set aside asked to be allowed to answer, such request was equivalent to a general appearance by both.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.\*]

Appeal from Superior Court, Montgomery County; Daniels, Judge.

Suit by J. C. Currie and others against the Golconda Mining & Milling Company and O. M. Allen, Jr. Judgment for plaintiffs by default, and motion by defendants to set aside judgment. Judgment set aside for irregularity, and plaintiffs appeal. *Affirmed*.



This is a motion to set aside a judgment for irregularity.

The summons was issued on the 3d day of March, 1910, against the Golconda Mining & Milling Company and O. M. Allen, Jr. Both defendants were nonresidents, and, as far as the record discloses, the only property owned by the said Allen is a debt of \$18,000 due him by said Golconda Company, which is a corporation owning property in this state, but not doing business therein when the action was commenced. A warrant of attachment was issued at the time of the issuing of the summons, and the return thereon shows that it was levied on said debt of \$18,000 and on the property of said corporation. A copy of the summons against the Golconda Company was left with the Secretary of State in accordance with Rev. § 1243, on March 19, 1910. An order of publication of summons and of the attachment was procured against both defendants on the 15th day of March, 1910. The publication began on the 24th day of March, 1910, and was continued once a week for four weeks, the last publication being on April 14, 1910. The term of court at which the judgment was rendered began on the 18th day of April, 1910. Within the first three days of said term, the plaintiffs filed their complaint, with the following form of verification thereon: "J. C. Currie, one of the plaintiffs, being duly sworn, deposes, and says that the foregoing complaint is true of his own knowledge, except as to those matters and things therein stated on information and belief, and as to those he believes it to be true. Witness my hand, this 18th day of April, 1910. Hiram Freeman, Justice of the Peace."

They allege as to the defendant Allen a promise to pay them \$5,000 as the purchase price of certain property on certain conditions, and that the conditions have been performed. They also allege: That said property was sold by said Allen to the Golconda Company, and that it is indebted to him in the sum of \$18,000 for the same, and that the purchase price of \$5,000 agreed to be paid by the defendant O. M. Allen, Jr., to the plaintiffs for their interests in the tracts of land aforesaid was included in the \$18,000 agreed to be paid by the defendant the Golconda Mining & Milling Company to the said Allen for the purchase price of said tracts of land, and the said Allen in securing said agreement from the defendant the Golconda Mining & Milling Company to pay the \$18,000 purchase price of said property, became the agent or trustee of the plaintiffs to the extent of \$5,000 of said purchase price agreed to be paid by the defendant the Golconda Mining & Milling Company for said property, and said indebtedness of the defendant the Golconda Mining & Milling Company to the defendant O. M. Allen, Jr., was contracted for the benefit of the said plain-

tiffs to the extent of \$5,000 of said \$18,000, and in pursuance of the agreement hereinbefore alleged and the agreement referred to herein as "Exhibit A," and the defendant the Golconda Mining & Milling Company thereby became liable to the plaintiffs in the said sum of \$5,000 for the purchase price of the interests of the plaintiffs in and to the lands and property hereinbefore set forth. That thereafter the defendant O. M. Allen, Jr., pursuant to the agreement hereinbefore set forth, assigned, transferred, and set over to the plaintiffs the indebtedness due from the defendant the Golconda Mining & Milling Company to the defendant O. M. Allen, Jr., for the purchase price of said tracts of land, as aforesaid, to the extent of \$5,000 thereof, with interest on the same from the time the defendants the Golconda Mining & Milling Company and O. M. Allen, Jr., are due and owing to the plaintiffs the said sum of \$5,000, with interest thereon from the said 19th day of January, 1904, until paid.

Upon the hearing of the motion, the following judgment was rendered:

"This cause coming on to be heard upon the motion of the defendants to set aside the judgment rendered herein at April term, 1910, of Montgomery superior court, and being heard upon the complaint and affidavits filed by the parties, the court finds the following facts:

"First. That judgment by default final was rendered in this action at April term, 1910, of said court, and that motion to set aside the said judgment was made returnable to July term, 1911, of said court, and the said motion was continued by consent and heard at Lexington, in the county of Davidson, on this the 21st day of August, 1911.

"Second. That service of summons in the case was made upon the defendants through the Secretary of State and also by publication, but publication of summons and notice of attachment by publication were begun immediately after the summons issued, and not after 30 days from the issuing of said summons.

"Third. That the plaintiffs at the return term of the summons in this action offered testimony as to the proof of the claims set up in the complaint.

"Fourth. That the defendants have a good and meritorious defense to the action of the plaintiffs.

"Fifth. That as to the first cause of action the complaint does not set forth a contract between the plaintiffs and the defendant corporation with sufficient definiteness and certainty and of the nature and character required by the statute for the rendition of a judgment by default final at the return term.

"Sixth. That the defendant O. M. Allen at the time referred to in the complaint after the organization of the defendant corporation was the president of said corporation.

"Seventh. That as to the first and second causes of action, the complaint sets forth a contract between the plaintiffs and the defendant O. M. Allen, Jr., with sufficient definiteness and certainty and of the nature and character required by law for the rendition of a judgment by default final as against said defendant Allen.

"Eighth. That April term, 1910, of Montgomery superior court began on the 18th day of April, 1910. \* \* \*

"Tenth. That this action was begun in the superior court of Montgomery county, N. C., on the 3d day of March, 1910, the summons issued therein being returnable to April term, 1910, of said court, the summons in said case being issued both to Montgomery county and to Wake county. That the summons issued to the sheriff of Montgomery county was returned, 'No officer or agent of the defendant the Golconda Mining & Milling Company upon whom process against the defendant can be served can be found in Montgomery county,' and summons issued to the sheriff of Wake county was served by the sheriff of said county on March 19, 1910, as shown by the return thereon made by leaving a true copy of the summons with J. Bryan Grimes, Secretary of State of the state of North Carolina, and by paying him 50 cents at the instance of the plaintiffs in said cause. That, upon affidavits made as shown by the judgment roll in said action, the summons and notice of the issues of the warrant of attachment therein was also served by publication as shown by said judgment roll, and a warrant of attachment was issued against said defendant the Golconda Mining & Milling Company on the 16th day of March, 1910, which said warrant was on the 17th day of March, 1910, levied by the sheriff of Montgomery county upon the property described and referred to in the judgment rendered in this cause and the complaint herein filed, and that thereafter and within five days from said levy said levy was certified by the said sheriff to the clerk of the superior court of Montgomery county, and the same was docketed on the judgment docket of said court as shown by the judgment roll in this action. That within the first three days of the April term, 1910, of the superior court of Montgomery county, it being the term to which said summons were returnable, the plaintiffs filed the complaint appearing in the judgment roll and record, and there was no answer filed to the same during said term. That the plaintiffs moved for judgment upon said complaint by default for want of an answer immediately before the adjournment of said April term, 1910, of said court, and offered evidence to establish the claims and demands of the plaintiffs, and the judgment appearing in the judgment roll in this cause in favor of the plaintiffs and against the defendants was rendered by the court at said term.

"Eleventh. That the Golconda Mining & Milling Company, defendant, is a foreign corporation, created and organized under the laws obtaining in the District of Columbia. In the United States, and on or about the 11th day of September, 1905, became the owner of the real estate described in the complaint in this cause by a deed executed to it by the defendant Oscar M. Allen, Jr., and his wife, Lucile D. Allen, which said deed was, after probate, recorded in the office of the register of deeds of Montgomery county in Book of Deeds No. 43, at page 490. That thereafter the said defendant the Golconda Mining & Milling Company began to do business in the county of Montgomery, in the state of North Carolina, and purchased certain machinery and proceeded to make certain excavations and sink certain shafts upon the real estate aforesaid referred to, and operated its property for the purpose of mining for gold and other minerals thereon, and continued to operate said mine and engage in business, as aforesaid, in said county of Montgomery and state of North Carolina until about the year 1907, when it ceased to operate its mine and discontinued the working and development of its mine and property, and has not worked or operated the mine and property, and has not worked or operated the mine since the year of 1907, and has not, since that time, worked or developed said mine to any extent whatever. That the said defendant the Golconda Mining & Milling Company has at no time filed in the office of the Secretary of State of the state of North Carolina a copy of its charter or articles of agreement, attested by its president and secretary, under its corporate seal, and a statement, attested in like manner, of the amount of its capital stock authorized, the amount actually issued, the principal office of this corporation in this state, and the name of the agent in charge of said office, the character of the business which it transacts, and the names and post-office addresses of its officers and directors, as required by law, and has not since the year 1907 had an officer or agent in the state of North Carolina upon whom process in all actions or proceedings against it can be served, as required by law.

"Twelfth. That the defendant the Golconda Mining & Milling Company had actual knowledge of the bringing of this action for some time prior to the taking of the judgment herein at the April term, 1910, of the superior court of Montgomery county, and said defendant had actual knowledge of the judgment so rendered herein at said April term, 1910, for more than one year before serving the notices in this cause that it would move to set aside said judgment and before making said motion.

"Thirteenth. That the complaint appearing in the judgment roll and record was actually sworn to by J. C. Currie, one of the plain-

tiffs, as set forth in the affidavit attached to the complaint on the day it bears date, before Hiram Freeman, a justice of the peace of Montgomery county, N. C., who was duly authorized to administer such oath shown by affidavits filed upon the hearing of this motion, but at the time judgment by default was rendered no certificate or jurat appeared to the verification, except what appears on the face of the complaint.

"Fourteenth. That since the rendition of the judgment herein at April term, 1910, of the superior court of Montgomery county, execution duly issued thereon, and by virtue thereof the sheriff of Montgomery county, to whom said execution was issued and delivered, sold the real estate described in the complaint in this cause pursuant to the mandate of said execution and deed made to the purchaser.

"Fifteenth. That the Pittman-McDonald and Black warranty deeds, referred to in 'Exhibit A,' attached to the complaint, were actually executed and delivered to O. M. Allen, Jr., and conveyed the lands referred to in said contract.

"Upon the foregoing findings of fact, the court adjudges that the judgment by default final rendered in this cause was and is irregular, and not taken according to the regular course and practice of the court, and the said judgment is hereby set aside, and the defendants allowed to answer the complaint."

The plaintiff excepted and appealed.

U. L. Spence, for appellants. T. J. Jerome and J. A. Spence, for appellees.

ALLEN, J. [1] The defendants are not entitled to relief on the ground of excusable neglect, because the motion was not made within 12 months from the rendition of the judgment (Clement v. Ireland, 129 N. C. 220, 39 S. E. 838; Insurance Co. v. Scott, 136 N. C. 157, 48 S. E. 581), nor under Rev. § 449, allowing a defendant against whom a judgment has been rendered upon service by publication to defend after judgment upon good cause shown, because more than 12 months had elapsed after notice of the judgment before any notice of the motion issued. They must therefore rely upon the right to have the judgment set aside upon the ground that it is irregular.

[2] An irregular judgment is one rendered contrary to the course and practice of the courts, and may be set aside within a reasonable time, and upon showing a meritorious defense. Scott v. Life Ins. Co., 137 N. C. 520, 50 S. E. 221. We must then inquire into the regularity of the proceeding.

[3] The summons was duly served on the corporation under section 1243 of the Revisal, and also by publication. The section of the Revisal referred to provides for personal service on corporations "having property or

doing business in this state" by leaving a true copy of the summons with the Secretary of State, and it appears that the Golconda Company had property in the state, and that a copy of the summons was left with the proper officer on the 19th of March, 1910. A statute similar to this has been held valid. Fisher v. Insurance Co., 136 N. C. 222, 48 S. E. 667.

[4] The publication of the summons and attachment was not irregular because commenced within 30 days from the time of issuing the summons (Best v. British & Am. Co., 128 N. C. 351, 38 S. E. 923; Grocery Co. v. Bag Co., 142 N. C. 174, 55 S. E. 90, the last case overruling McClure v. Fellows, 131 N. C. 509, 42 S. E. 951), and it was not necessary that the service thereof should be complete 10 days before the April term of court (Guilford v. Georgia Co., 109 N. C. 310, 13 S. E. 861). The same principles apply to the service by publication on the defendant Allen, except in one particular, to which we will hereafter refer.

[5] The verification of the complaint is a substantial compliance with the statute, and it sufficiently appears that the plaintiff was sworn, and by an officer authorized to administer oaths. It was not necessary that it should be subscribed. Alford v. McCormick, 90 N. C. 153. As against the defendant Allen, the complaint alleges an express promise to pay a sum certain, and, if there had been personal service of summons, the plaintiff would have been entitled to judgment by default final against him. Hartman v. Farrier, 95 N. C. 178; Scott v. Life Ass'n, 137 N. C. 522, 50 S. E. 221.

[6] There was, however, no personal service on him, and, as he was a nonresident, jurisdiction could only be had by levying the attachment on property belonging to him in this state, and, when thus obtained, it would not authorize a personal judgment against him. Winfree v. Bagley, 102 N. C. 515, 9 S. E. 198; Goodwin v. Claytor, 137 N. C. 230, 49 S. E. 173, 67 L. R. A. 209, 107 Am. St. Rep. 479; May v. Getty, 140 N. C. 318, 53 S. E. 75; Lemly v. Ellis, 143 N. C. 213, 55 S. E. 629.

[7] These cases fully sustain the propositions that, in the absence of an attachment levied upon property of a nonresident within the state, an attempt at service by publication is ineffective for any purpose, and that "the court acquires jurisdiction where an attachment has issued or the res has otherwise been brought within its control only to the extent that the res will satisfy the plaintiff's recovery, and no general or personal judgment will be binding beyond that." Lemly v. Ellis, supra. Applying these principles to the judgment against the defendant Allen, it must be held to be irregular, because a personal judgment was rendered against him, which might, however, be treated as an adjudication of the amount

found to be due, and not a judgment for its recovery (*Goodwin v. Claytor*, 137 N. C. 230, 49 S. E. 173, 67 L. R. A. 209, 107 Am. St. Rep. 479), and for the further and stronger reason that the attachment was not levied on any property belonging to him situate in this state.

[8] It is not alleged that the defendant Allen has any interest in the property of the Golconda Company, and the only property belonging to him referred to in the attachment is the debt of the company to him. He and the company are outside of the state, and nonresidents, and the debt cannot be property of his in this state.

The case of the Golconda Company rests on different facts. The summons as to this defendant was served by leaving a copy with the Secretary of State, and also by publication, and the attachment was levied on property of the defendant in this state.

[9] If, then, the complaint is sufficient to sustain a judgment by default final, the judgment as to this defendant is regular, and otherwise not. As was said in *Junge v. McKnight*, 137 N. C. 236, 49 S. E. 474: "The plaintiff must be careful to draw his judgment when by default final, according to the right arising upon the case stated by the complaint, 'because the defendant is concluded by the decree, so far at least as it is supported by the allegations of the bill.' If the decree or judgment do not conform to this well-settled principle, if it give relief in excess of or of a different character from that to which the plaintiff is entitled upon the allegations of fact in the complaint, the court will promptly set it aside upon application. It thus becomes important that the pleader, when he wishes to take a judgment by default final, set forth clearly the facts upon the admission of which by failure to answer he bases his right to relief, so that the court may, upon an inspection of his complaint, adjudge his rights to correspond with such facts." The complaint alleges a promise upon the part of Allen to pay the plaintiffs \$5,000 upon certain conditions, and that the conditions have been performed; that the defendant the Golconda Company has promised to pay the said Allen \$18,000 under a contract made for the benefit of the plaintiffs to the amount of their debt; and that the said Allen has assigned to the plaintiffs said debt to the extent of their

claim against Allen, but it does not allege any promise upon the part of the Golconda Company to pay the plaintiffs any sum, or that it had notice of the assignment to the plaintiffs. If so, the amount for which the Golconda Company would be liable to the plaintiffs is of necessity uncertain, as the debt to Allen was contracted in 1906, and under the facts stated its liability would be determined as of the time the attachment was levied. The contract between the said Allen and the other defendant is also made a part of the complaint, and it appears from an inspection of it that provision was made therein for the payment of said sum of \$18,000, and there is no allegation as to what was done under it. If the amount for which the defendant would be liable is not made certain by the complaint, the plaintiffs were not entitled to judgment by default final therein, and such judgment is irregular. *Witt v. Long*, 93 N. C. 390; *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668; *Jeffries v. Aaron*, 120 N. C. 169, 26 S. E. 696; *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18.

[10] We conclude, therefore, that there is no error in the judgment rendered, but we note that the property seized under the attachment has been sold, and a deed made to the purchaser, who is not a party to this motion, and will not be prejudiced thereby. If he is an innocent purchaser for value, it may be that the judgment would be set aside as between the parties, and retained for his protection, as was done in *Harrison v. Hargrove*, 120 N. C. 96, 26 S. E. 936, 58 Am. St. Rep. 781, and in determining his rights the fact that Allen was president of the Golconda Company, which appears from affidavits on file, and that both defendants knew of the pendency of the action before the judgment was rendered, and that neither moved in the matter for more than twelve months, would have an important bearing. It is advisable that he be made a party.

[11] The defendants Allen and the Golconda Company in their application to have the judgment set aside ask to be allowed to answer, and this is equivalent to a general appearance by both. *Scott v. Insurance Co.*, 137 N. C. 515, 50 S. E. 221.

Affirmed.

(157 N. C. 290)

**HALL v. PRESNELL et al.**

(Supreme Court of North Carolina. Nov. 27, 1911.)

**1. ATTORNEY AND CLIENT (§ 81\*)—PRINCIPAL AND SURETY (§ 105\*)—AUTHORITY OF ATTORNEY—DISCHARGE OF SURETY.**

An attorney is not authorized to give a debtor an extension of time, and where an attorney employed to collect a note secured by a mortgage, without the consent or ratification of his principal, gave the debtor a slight extension of time upon a mortgage given to secure the note, such an extension will not discharge a surety upon the note, as the extension was not valid.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 141-146; Dec. Dig. § 81;\* *Principal and Surety*, Cent. Dig. §§ 191-210; Dec. Dig. § 105.\*]

**2. ATTORNEY AND CLIENT (§ 81\*)—AUTHORITY—NOTICE.**

One dealing with an attorney employed solely to collect a debt must take notice of such attorney's lack of authority to grant extensions to the debtor.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 141-146; Dec. Dig. § 81.\*]

Appeal from Superior Court, Watauga County; Long, Judge.

Action by W. G. Hall against W. W. Presnell and E. F. Lovell and another. From a judgment for plaintiff, defendant Lovell appeals. Affirmed.

Edmund Jones, for appellant.

**WALKER, J.** There is but one question in this case. On November 5, 1906, G. W. Presnell made his note to W. G. Hall for \$135.96, payable May 1, 1907, and indorsed by W. W. Presnell and E. F. Lovell as sureties. This note was deposited by Hall with the Bank of Blowing Rock as collateral security for a debt he owed the bank. Presnell, at the request of Lovell, gave a mortgage to Hall for \$120.70 on a pair of horses to secure the debt and indemnify his sureties, and it was duly registered. The note and mortgage were placed in the hands of an attorney for collection, and he immediately pressed the defendants for payment. Lovell requested the attorney to take immediate steps to secure possession of the horses for the purpose of selling them, we assume, under the power contained in the mortgage, and gave him \$5 to pay his expenses. The attorney demanded the horses of Presnell, the debtor, who asked indulgence for several days, so that he might dispose of the horses and pay the debt, which was granted, and Presnell paid the attorney \$5 for his expenses. The attorney afterwards sold the horses, but did not realize enough to pay the debt, and meanwhile Presnell left the state. W. G. Hall had no knowledge of the transactions between the attorney and the bank, and, of course, did not authorize the extension of time, nor did the bank. It was simply a slight accommodation given by the attorney to Presnell on his own responsibility,

and without any express authority or any ratification afterwards of his act. It does not appear whether or not Presnell was solvent at the time the attorney granted the slight indulgence to him, and has remained so to this time, nor does it appear distinctly that the attorney extended the time for paying the debt, but it rather appears that the short extension was restricted to the time of seizing and selling the horses under the mortgage. Upon the facts admitted by the parties, the court rendered judgment for the plaintiff, and the defendant Lovell appealed.

[1, 2] We think the decision of the court below was right. It is not clear to us how the appellant was injured by the transaction of which he complains, but assuming that it was such an extension of the time for paying the note as would have discharged him, as surety, if it had been given by the plaintiff, we are of the opinion that the attorney had no express or implied authority to bind his client, the bank, or Hall, the payee, by the agreement. He was retained to collect the debt, and not to release it or any party liable to Hall or the bank for its payment; and any one dealing with him was fixed in law with notice of this lack of authority. As said in *Bank v. Hay*, 143 N. C. 326, 35 S. E. 811: "There is a general rule that, when one deals with an agent, it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal, for, under any other rule, it is said every principal would be at the mercy of his agent, however carefully he might limit his authority. The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so, and the person who proposes to contract with him as agent for his principal should first inform himself where his authority stops or how far his commission goes before he closes the bargain with him. *Briggs v. Ins. Co.*, 88 N. C. 141; *Ferguson v. Mfg. Co.*, 118 N. C. 946 [24 S. E. 710]." No one could reasonably suppose that it was within the scope of an attorney's authority to release a debt or any party to a note, or to do anything which would have that effect, when his commission extended only to the collection of the debt. It is stated in the books that an attorney has no implied authority to work any discharge of a debtor, but upon actual payment of the full amount of the debt, and that in money. He cannot release sureties or indorsers, nor enter a retraxit, when it is a final bar (*Lambert v. Sanford*, 2 Blackf. [Ind.] 137, 18 Am. Dec. 149), nor release a witness (*Wood v. Hopkins*, 3 N. J. Law, 689; *Campbell v. Kincaid*, 3 T. B. Mon. 63), nor a party in interest (*Succession of Weigel*, 18 La. Ann. 49). It is a general rule that an attorney, who is in many respects considered as a

mere agent, cannot waive any of the substantial rights of his client without the latter's consent, and in such a case he is not barred thereby without ratification, or something which amounts to an estoppel, to deny his attorney's authority. These principles will be found to be sustained by the following authorities: *Weeks on Attorneys*, § 219, and cases cited in the notes; *Savings Inst. v. Chinn*, 70 Ky. (7 Bush) 539; *Ireland v. Todd*, 36 Me. 149; *Givens v. Briscoe*, 3 J. J. Marsh. (Ky.) 529; *Union Bank v. Govan*, 10 Smedes & M. (Miss.) 333, and cases cited; *Tankersley v. Anderson*, 4 S. C. (4 Desaus.) 44; *Terhune v. Colton*, 10 N. J. Eq. 21.

It was directly held in *Roberts v. Smith*, 3 La. Ann. 205, that an attorney at law in whose hands a note has been placed for collection has no power by an agreement made out of court without authority of his client to give an extension of time to the principal obligor, which would have the legal effect, if the act were valid, to relieve or discharge a surety on the note. Of like effect is *Varnum v. Bellamy*, 4 McLean 87, s. c. 28 Fed. Cas. 1096, No. 16,886. In *Savings Inst. v. Chinn*, supra, it was held to be well settled that an attorney at law employed to collect a debt has not authority to release the sureties upon his client's claim, either directly or indirectly, nor to do any act with reference thereto prejudicial to his interest. "No implied power (of an attorney) exists, under a general retainer, to grant additional time to his client's debtor" (4 Cyc. 945), "nor has an attorney the implied power to release his client's claim, and, where there is security for the demand, he cannot surrender it to his client's detriment, nor has he implied authority to release sureties on an obligation to his client." 4 Cyc. 949, and the numerous cases cited. In *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335, the sheriff, upon the request of the plaintiff's attorney, permitted the defendant in custody on a ca. sa. to go at large for the purpose of securing money with which to pay the debt. It was held that the attorney had no authority to order the release of the defendant without the plaintiff's consent or a previous satisfaction of the debt, and that the sheriff was therefore liable for an escape. See, also, *Lewis v. Gamage*, 18 Mass. (1 Pick. [2 Anno. Ed.]) 847 and cases cited; *Simonton v. Barrell*, 21 Wend. (N. Y.) 362; *Jackson v. Bartlett*, 8 Johns. (N. Y. 3d Ed.) marg. p. 361. Justice Patterson said, in *Savory v. Chapman*, 89 E. C. L. 242 (11 Ad. Ell. 829): "It is clear that the attorney could not of his own authority, without payment, discharge the defendant out of custody as a matter of indulgence; nor, indeed, is it contended that he could. Either the money must have been actually paid, or the plaintiff (himself) must have chosen to show favor; that would be his act. The plea does not allege either fact. It is true that, if the at-

torney has power to receive the money, he may, having received it, order a discharge; but then, in pleading the discharge, it should be shown that the money was paid. So, if the plaintiff chose to dispense with the further detention, it should have been alleged that he authorized the attorney to discharge." And Justice Coleridge in the same case said: The party "is bound to know the legal qualifications of persons filling certain employments. The question, therefore, turns on the authority of the attorney; and there is nothing here to show that he had any, either in his general character, or with reference to the circumstances of the suit. He could, as it appears here, be only an agent de facto; and there is nothing shown to make him one for the present purpose." It seems, therefore, to be the generally accepted doctrine that an attorney charged with the collection of a debt has no power in virtue of his general authority to do any act which will either release his client's debtor, or his surety, or substantially jeopardize his interests in any way."

The cases cited by the learned counsel of the appellant are not in point. There the question was as to the authority of an attorney in the actual conduct of a suit in court, whether in prosecution or defense, and in matters of practice and procedure, as in *Beck v. Bellamy*, 93 N. C. 129, the case cited by appellant's counsel. Chief Justice Smith thus refers to the subject: "The conduct of the case by caveators' counsel would, in the absence of connivance, be binding upon their clients, and it would be a dangerous innovation in judicial proceedings to hold otherwise. In the words of Nash, J., in reference to the authority of counsel retained in a case: 'By his acts and agreement made in the management of the cause the plaintiff was bound.' *Greenlee v. McDowell*, 89 N. C. 485. Not less explicit is the language of *Merrimon, J.*, in *Branch v. Walker*, 92 N. C. 89, where he says of an attorney that, 'as soon as he is duly retained in an action or proceeding, he has, by virtue of his office, authority to manage and control the conduct of the action, on the part of his client during its progress, and subject to the supervision of the court.' 'As between the client and the opposite party, the former is bound by every act which the attorney does in the regular course of practice, and without fraud or collusion, however injudicious the act may be.' *Weeks on Att.* § 222, and cases cited." We add *Pierce v. Perkins*, 17 N. C. 250. But this is far from saying that he can release a debt or any part of it, or relinquish substantial or important rights, without the consent of his client. An attorney cannot compromise his client's case without special authority to do so (*Moye v. Cogdell*, 69 N. C. 93), and, this being so, how can he release it, or any part of it? "A power to collect," says this court, "does not authorize an as-

signment or any disposition other than full payment." *Bradford v. Williams*, 91 N. C. 7.

Nor do we think the case of *Kesler v. Linker*, 82 N. C. 456, cited also by counsel, is pertinent to this case. There is no evidence that the plaintiff agreed to look after the security and see that it was applied to the debt. On the contrary, he did not know that the mortgage or lien on the horses had been taken, nor does it appear that the attorney, whether he had authority or not to act in that behalf for his client, made any agreement which bound the plaintiff to active diligence for the preservation of the security. Nor does it appear that the security or any part thereof has been lost or impaired. The horses were seized, sold, and the proceeds applied to the debt. What more could the surety ask to be done?

Our conclusion is that the defendant Lovell, as surety to the note, was not discharged by anything done by the attorney, nor did the latter intend to release him.

No error.

(157 N. C. 538)

#### STATE v. BROADWAY.

(Supreme Court of North Carolina. Nov. 27, 1911.)

#### 1. CONSTITUTIONAL LAW (§ 197\*)—"EX POST FACTO LAW."

An "ex post facto law" is one which either makes that a crime which was not a crime when the offense was committed, or which imposes a heavier sentence than that which was prescribed by law at that time.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550; Dec. Dig. § 197.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2527-2533; vol. 8, p. 7657.]

#### 2. CONSTITUTIONAL LAW (§ 208\*)—EX POST FACTO LAWS—AMENDMENTS OF STATUTES.

Laws 1911, c. 16, amending Revisal 1905, § 3351, defining and punishing incest by increasing the punishment and declaring that the amendment shall be in force from its ratification, does not apply to an offense committed prior to its enactment, and as to such offense is not an ex post facto law; the original statute being applicable thereto.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 584-590; Dec. Dig. § 203.\*]

#### 3. STATUTES (§ 165\*)—IMPLIED REPEAL—PUNISHMENT OF CRIME.

Repeals by implication are not favored, and Laws 1911, c. 16, amending Revisal 1905, § 3351, defining and punishing incest, by increasing the punishment and declaring that the amendment shall be in force from its ratification, does not repeal by implication the original statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 240; Dec. Dig. § 165.\*]

#### 4. CRIMINAL LAW (§ 369\*)—EVIDENCE—ADMISSIBILITY—OTHER OFFENSES.

On a trial for incest, evidence of other acts of intercourse is competent in corroboration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

#### 5. INCEST (§ 13\*)—EVIDENCE—ADMISSIBILITY.

On a trial of accused for incest with his daughter, evidence of cruel treatment of the daughter is admissible to show compulsion.

[Ed. Note.—For other cases, see Incest, Cent. Dig. § 11; Dec. Dig. § 13.\*]

#### 6. WITNESSES (§ 414\*)—IMPEACHMENT—CORROBORATION.

The prosecuting witness on a trial for incest may be corroborated by proof of statements made before the trial similar to her testimony, and that fact may be shown by her own testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1288; Dec. Dig. § 414.\*]

Appeal from Superior Court, Rowan County; Daniels, Judge.

J. Thomas Broadway was convicted of incest and he appeals. Affirmed.

M. F. Hatcher and R. Lee Wright, for appellant. T. W. Bickett, Atty. Gen., and George L. Jones, Asst. Atty. Gen., for the State.

CLARK, C. J. This is an indictment for incest, under Revisal 1905, § 3351, which provided that the punishment should be "by imprisonment in the state's prison for a term not exceeding five years in the discretion of the court." Laws 1911, c. 16, amended that section "by striking out the words 'five years' in line 5 of said statute, and inserting in stead thereof the words '15 years' between the words 'exceeding' and 'in,'" and provided that the amendment should be in force from its ratification, February 11, 1911. The indictment was found at May term, 1911, and the evidence showed the crime was committed prior to the act of 1911. The defense depends upon the question whether this is an ex post facto law.

[1] An ex post facto law is one which either makes that a crime which was not a crime at the time the offense was committed, or imposes a heavier sentence than that which was prescribed by law at the time the offense was committed.

[2] Here there was no change in the constituent elements of the crime. The change in the punishment took effect only, by the terms of the statute, "from its ratification," and hence did not apply to an offense which was committed prior to its enactment.

[3] Repeals by implication are not favored by the law. In this case there is neither express repeal of any part of the statute nor any repeal by implication. The statute stands intact as it was; the Legislature simply adding 10 years to the quantum of the punishment which the judge might impose. This additional 10 years was to take effect in the future, and, indeed, under the constitutional provision forbidding ex post facto laws, such additional punishment could not have applied to such crime unless committed after the act. The Legislature did not at-

tempt to make it apply to crimes committed before that time, nor did the judge.

The subject is so fully and ably discussed by Mr. Justice Walker in *State v. Perkins*, 141 N. C. 797, 53 S. E. 735, 9 L. R. A. (N. S.) 165, that we can add nothing thereto. He quotes from Potter's *Dwarris on Statutes*, 156, with approval, the following, which is conclusive of this case: "It is a general rule that subsequent statutes, which add accumulated penalties and institute new methods of proceeding, do not repeal former penalties and methods of procedure ordained by preceding statutes, without negative words." He also quotes with approval 26 A. & E. (2d Ed.) 726 as follows: "Every effort must be made to make all the acts stand, and the later act will not operate as a repeal of the earlier one, if by any reasonable construction they can be reconciled. The repeal in any case will be measured by the extent of the conflict or the inconsistency between the acts, and, if any part of the earlier can stand as not superseded by the later one, it will not be repealed." In the present case the extension of the limit of the punishment which the judge could impose in futuro in no wise affected the elements which constitute the crime nor the punishment which would be imposed for its commission prior to the passage of the new act.

Bishop, *Stat. Crimes* (1873) § 1865, is also quoted in *State v. Perkins*, as follows: "Where a provision of the law is thus modified or cut short, it is not in any proper sense repealed. And we may lay down the doctrine broadly that no repeal takes place if the earlier provision can stand to any extent consistently with the later." In *State v. Putney*, 61 N. C. 543, which is also quoted in *State v. Perkins*, supra, we have a case which is on all fours with the present. In that case the offense of stealing a mule was punished by imprisonment, whipping, and fine, or either, at the discretion of the court. The act of 1867 (Laws 1866-67, c. 62) made the stealing of a mule punishable with death, and the point was made, as here, that the defendant could not be punished under the former statute, because it was repealed by the new. But the court held that the act of 1867 did not repeal the former law, but merely made the increase of punishment prospective, and that it should read as if written, "If any person shall hereafter steal a mule, etc., he shall suffer death," and held that all larcenies of that nature committed before the act should be tried and punished without reference thereto.

The defendant in this case relied upon *State v. Massey*, 103 N. C. 360, 9 S. E. 632, 4 L. R. A. 308; but Judge Walker, in *State v. Perkins*, supra, well says: "*State v. Massey* was decided upon the theory that the later statute by its very terms, and as if in so

many words, had unqualifiedly and expressly repealed the earlier one." In *State v. Massey*, 97 N. C. 465, 2 S. E. 445, it was held: "Where a statute only undertakes to amend one already on the statute books, it may be presumed that it did not intend to repeal it, unless there is an express repealing clause."

[4, 5] The exception to proof of other acts of the same nature cannot be sustained. They are competent in corroboration (*Underhill*, *Crim. Ev.* § 396; 22 *Cyc.* 53), as was also evidence of cruel treatment of the daughter offered to show compulsion (22 *Cyc.* 53).

[6] The evidence of similar statements made by the witness before the trial was also competent as corroborative evidence, and this may be shown by the witness himself. *State v. Freeman*, 100 N. C. 434, 5 S. E. 921; *State v. Maultsby*, 130 N. C. 665, 41 S. E. 97.

No error.

(30 S. C. 323)

**F. L. LAYTON & SONS v. CHARLESTON & W. C. RY. CO.**†

(Supreme Court of South Carolina. Nov. 29, 1911.)

**1. CARRIERS (§ 85\*)—CARRIAGE OF GOODS—DELIVERY—NOTICE TO CONSIGNEE.**

While a carrier is not bound to give notice to a consignee of the arrival of goods, in the absence of a contract to that effect, the parties may contract for such notice.

[Ed. Note.—For other cases, see *Carriers*, *Cent. Dig.* §§ 316-321; *Dec. Dig.* § 85.\*]

**2. CARRIERS (§ 85\*)—CARRIAGE OF GOODS—DELIVERY—NOTICE TO CONSIGNEE—CONTRACT IN BILL OF LADING—"ORDER NOTIFY."**

Where a bill of lading contains a provision and condition to the effect that, "if the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the bill of lading, properly indorsed, shall be required before delivery of the property at destination," and the words "order notify" appear before the name of the consignee thereon, such bill of lading requires notice to the consignee and production of the bill of lading before delivery.

[Ed. Note.—For other cases, see *Carriers*, *Cent. Dig.* §§ 316-321; *Dec. Dig.* § 85.\*]

**3. TRIAL (§ 256\*)—INSTRUCTIONS—SUFFICIENCY—FAILURE TO OBJECT.**

An instruction, giving the court's construction of a bill of lading requiring notification and presentation of the bill of lading before delivery of a shipment, is not improper, even though there were other shipments involved in the case, made without such directions, where the court's attention was not called to any distinction between "order notify" shipments and other shipments, which counsel desired to have made.

[Ed. Note.—For other cases, see *Trial*, *Cent. Dig.* §§ 623-641; *Dec. Dig.* § 256.\*]

**4. CARRIERS (§ 87\*)—CARRIAGE OF GOODS—NOTICE TO CONSIGNEE—CONTRACT AND BILL OF LADING—TIME FOR REMOVAL.**

Where a shipment of goods to a consignee is unrestricted, the title and control of the goods is in him, and he must look after his property, and on its arrival remove it within a reasonable

\*For other cases see same topic and section NUMBER in *Dec. Dig.* & *Am. Dig. Key No. Series* & *Rep'r Indexes*

† Rehearing denied January 8, 1912.



time; but, where a shipment is made "order notify," and the bill of lading, made to the shipper or his order, requires notification to the consignee and production of the bill of lading before delivery, title and control of the goods does not pass to the consignee until he acquires a bill of lading, and he is entitled to a reasonable time after arrival to obtain and produce such bill of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 323; Dec. Dig. § 87.\*]

**5. TRIAL (§ 256\*)—INSTRUCTIONS—SUFFICIENCY—FAILURE TO OBJECT.**

Where, in an action by a consignee of goods destroyed while in the depot of a carrier, it is sought to recover a statutory penalty provided for a failure to settle claims in a specified time after filing, and conditional on a recovery of the amount of claims filed, a charge, allowing a recovery of the amount claimed in the cause of action, is not erroneous, though the amount demanded in the claims and alleged in the complaint was greater by a few cents than the prayer for judgment, where it is evident the court did not intend to mislead, and defendant asked for no more explicit instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 628-641; Dec. Dig. § 256.\*]

Appeal from Common Pleas Circuit Court of Spartanburg County; J. W. De Vore, Judge.

"To be officially reported."

Action by F. L. Layton & Sons against the Charleston & Western Carolina Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

F. B. Grier, Nicholls & Nicholls, and Bomar & Osborne, for appellant. John Gary Evans and S. M. Wetmore, for respondents.

JONES, C. J. This suit was for damages for not delivering freight, consigned to plaintiffs at Enoree, S. C., embracing two causes of action; the first being for the value of four shipments in the possession of defendant on September 13, 1907, one for \$14.71, the value of a lot of hardware, one for \$16.89, the value of another lot of hardware, one for a lot of sugar, starch, and soap, of the value of \$40.85, and another for \$101.56, the value of a lot of flour, aggregating \$174.01, for which claims had been filed. Judgment was prayed for this sum, and in addition \$50 penalty for failure to adjust the claims filed therefor, as required by statute. The second cause of action was for \$52.72, the value of a portion of a shipment of flour in the possession of defendant, with penalty for failure to adjust, as required by statute.

Answering the first cause of action, defendant admitted possession of the property in September, 1907, as a common carrier, but alleged that the goods were safely carried to their destination, and were stored in its warehouse, and were there destroyed by fire without fault or negligence on its part. There was no issue raised in the pleadings in this cause of action as to the loss of the goods while in defendant's possession, their value, and the filing of claims therefor; the only issue being whether defendant was

liable, either as common carrier or as warehouseman. As to the second cause of action, the answer was a general denial. The judgment was for \$326, in favor of plaintiffs.

[1, 2] The first question presented by defendant's appeal is whether the court erred in instructing the jury that under the bill of lading produced in evidence it was the duty of the railroad company to notify the consignee of the arrival of the goods, and allow a reasonable time for their removal. The only bill of lading set forth in the record contained the following: "Order notify F. L. Layton, Enoree, S. C.;" also the following: "If the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the bill of lading, properly indorsed, shall be required before the delivery of the property at destination as provided by Sec. 9 of the conditions on the back hereof." On the back of the bill of lading was printed: "If the word 'order' is written hereon, immediately before or after the name of the party to whose order the property is consigned without any condition of limitation other than the name of the party to be notified of the arrival of the property, the surrender of this bill of lading, properly indorsed, shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading." The general rule is well settled that the carrier is not bound to give notice to the consignee of the arrival of goods. *Spears & Colton v. S., U. & C. R. R. Co.*, 11 S. C. 158; *Bristow v. Railroad Co.*, 72 S. C. 46, 51 S. E. 529. But the carrier and shipper may contract that notice shall be given of the arrival of the goods, and we agree with the circuit court that the contract, as shown by the bill of lading, requires notice to the consignee, and the production of the bill of lading, before delivery.

[3] The appellant further contends that, if this construction be correct as to "order notify" shipments, it was error to so instruct in this case, in which there were other shipments, without such directions. The court, however, was only construing the particular bill of lading introduced in evidence, and if counsel wished to discriminate between "order notify" shipments and other shipments the court's attention should have been directed to the matter, if there was any evidence that the other shipments were under a different kind of a contract.

[4] There was evidence that the goods mentioned in the first cause of action were destroyed by fire, which burned defendant's depot at Enoree, on the night of September 13, 1907; that the shipment of sugar, etc.,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

arrived at Enoree on the 10th or 11th of September, the shipments of hardware on the 7th and 10th of September, and the shipment of flour arrived on the 6th of September. It was also in testimony that plaintiff was notified of the arrival of the flour on the 9th and of the arrival of the other goods on the 12th of September. The bill of lading for the flour was retained by the shipper, awaiting the consignee's remittance. Plaintiff sent his check on September 11th, and received the bill of lading on the 12th of September. Plaintiff conducted his business about six miles from the nearest station at Enoree, and on the morning of September 14th had hitched up a team to go for the goods, when he heard of the fire. The court instructed the jury that, if it became necessary to produce the bill of lading before plaintiff, as consignee, could get the goods, it would be the duty of the railway company to give him a reasonable time to produce the bill of lading. This instruction is made the basis of exception, on the ground that the relation of common carrier exists only so long after arrival of the goods as would give the consignee a reasonable time to take his goods away. The general rule is as stated; but since, in an "order notify" shipment under the contract noticed, it was the duty of the carrier to notify the consignee of the arrival of the goods the reason of the rule would require that the consignee must have a reasonable time in which to remove the goods after notice of their arrival; and since, under the contract, there was to be no delivery, except upon production of the bill of lading, the rule must necessarily involve reasonable time to obtain and produce the bill of lading, as a prerequisite of removing the goods. In an unrestricted shipment of goods to a consignee, the title and control of the goods is in him, and he is expected to look after his property, and on its arrival remove the same within a reasonable time; but in a shipment "order notify," where the bill of lading is held by the shipper or his order, title and control of the goods do not pass to the consignee until he acquires the bill of lading. *National Bank of Chester v. Atlanta & Charlotte Ry. Co.*, 25 S. C. 216; *Grocery Co. v. Elevator Co.*, 72 S. C. 453, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627. No duty, therefore, devolves upon a consignee to demand the goods and remove the same, until he acquires the ownership and control of same.

[5] Exception is taken to the following charge: "If you conclude that the value of the property in the first cause of action is less than the amount claimed in the complaint, he cannot recover the penalty. The verdict has to be as much as the amount claimed is, before he can recover the penalty. If you find that plaintiffs are entitled to recover the full amount claimed in the first cause of action, then they would be en-

titled to recover the \$50 penalty; and if you find that he is not entitled to recover the full amount in the second cause of action then they would not be entitled to recover the penalty. In order to recover the penalty in both cases, plaintiffs must satisfy you that they are entitled to recover the full amount of both claims in both causes of action. You may give him the penalty in one or both cases, or in neither one, just as you find the value of the property to be. If you find the value of the property to be what is claimed in both cases, then he would be entitled to the penalty in both cases—both causes of action." It is contended that this charge made the test of the right to recover the penalty depend upon the amount claimed in the complaint, instead of the amount of the claims as filed with the agent at the point of destination. The amount of the claims, as filed with the agent and alleged in the complaint was \$174.01 in the first cause of action, and \$52.72 in the second cause of action, which aggregated \$226.73; and the court no doubt supposed what is true—that the amount of the damages as alleged in the complaint was the same as the amount of value as stated in the claims filed with the agent. The fact that the general prayer for judgment for \$326, including presumably the amount of the claims and \$100 for penalties, was 73 cents less than the amount claimed in the body of the complaint was not called to the court's attention. The plaintiffs proved the amount of their loss precisely in accordance with their claims as filed, and there was really no contest in this regard.

While there is no doubt that the statute requires recovery of the amount demanded in the claims, as filed with the agent, as a condition for recovery of the penalty, as shown in *Best v. Railway*, 72 S. C. 483, 52 S. E. 223, and *Rippy & Co. v. Southern Ry.*, 80 S. C. 526, 61 S. E. 976, we do not think it can fairly be claimed that the charge given by the court meant to instruct otherwise. A consideration of the charge as a whole also leads to this conclusion.

The contention that the court should have instructed the jury that, if their verdict should be less than the amount claimed by the plaintiffs in the claims filed with the agent, they could not recover the penalty is met by the view above stated, and by the further consideration that, if appellant wished a more explicit charge on that subject, a request for instruction should have been made. We are satisfied that Judge De Vore was endeavoring to instruct in accordance with the view now contended for by appellant.

We do not consider that the exceptions and the record present the question whether a recovery for 73 cents less than the amount of the claims as filed with the agent would sustain a judgment for the penalty. We have not noticed in detail all the exceptions,

but they have been considered, and are regarded as controlled by what has been stated above.

The judgment of the circuit court is affirmed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

(90 S. C. 146)

**MATTISON et al. v. STONE**

(Supreme Court of South Carolina. Dec. 4, 1911.)

**1. CONVERSION (§ 15\*)—DIRECTIONS OF WILL—SALE.**

The will gave the residue of testator's estate, real and personal, to his wife for life or widowhood, and provided that, at her death or marriage, the realty and personalty should be sold and equally divided among his children, and that testator desired "that the portion of my estate that shall fall to my daughters," naming them, should be theirs during their lifetime, and then go to their children. *Held* that, upon the death of testator's widow, the realty became converted into personalty so that no realty passed to testator's daughters; the gifts to them being personalty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28-37; Dec. Dig. § 15.\*]

**2. PARTITION (§ 21\*)—TITLE TO SUSTAIN ACTION—INTEREST IN LAND.**

Where the remainder interest to which plaintiff was entitled upon the death of a life tenant was converted into personalty at the life tenant's death by directions in the will to sell the realty, she had no interest in the land devised to the original life tenant as to authorize her to maintain partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 72; Dec. Dig. § 21.\*]

**3. CONVERSION (§ 22\*)—RECONVERSION.**

Legatees to whom the proceeds of the sale of land directed by a will to be sold are bequeathed may cause a reconversion of the proceeds into land by jointly electing by some unequivocal act or declaration to take the land.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 66-72; Dec. Dig. § 22.\*]

Appeal from Common Pleas Circuit Court of Anderson County; Ernest Gary, Judge.

"To be officially reported."

Action by W. E. Mattison and others against W. C. Stone. From a judgment for plaintiff named, defendant appeals. Reversed and remanded for further proceedings.

Paget & Watkins, for appellant. Leon Rice and Bonham, Watkins & Allen, for respondent.

JONES, C. J. In this action for the partition of a tract of land in Anderson county formerly belonging to Peter Johnson, an issue of title was raised by the answer, and that issue was submitted to a jury. After the conclusion of all the testimony, defendant made a motion to direct a verdict in his favor which was refused, and, instead, the court, Judge Ernest Gary presiding, instructed the jury to find for the plaintiff W. E. Mattison a one-fifth interest in the land. The

appeal comes from such judgment. There were other plaintiffs, who were the children of Mary A. E. Ellison, but the court held that suit by them was premature, and, as no exception challenges this ruling, they go out of the case, leaving W. E. Mattison sole plaintiff. Both parties claim under Peter Johnson as common source of title, who died seised and possessed of the land May 9, 1872, leaving his will, upon the construction of which the case depends. The first paragraph of the will is as follows: "1st. My lawful debts and funeral expenses be paid. Then the residue of my estate, real and personal, I give and bequeath to my beloved wife, Nancy A. Johnson, to be hers during her natural life or widowhood and at her death or marriage then the said realty and personalty to be sold and equally divided among my children; and having an eye in such division and settlement to the advances I have already made to them, which advances are hereinafter stated to date, as well shall an eye be had to advances after the date hereof in said division and settlement, moreover I desire that the portion of my estate that shall fall to my daughters, N. Caroline Mattison and Mary A. E. Ellison to be theirs during their lifetime, and then to their children respectively forever." The will was admitted to probate May 18, 1872, and B. L. Johnson, son of testator, duly qualified as executor. On January 4, 1879, the widow, Nancy A. Johnson, and children of the testator, Jas. W. Johnson, Sarah P. Johnson, Mary E. Ellison and her husband, N. C. Mattison and her husband, in consideration of \$1,050, executed a fee-simple warranty deed of the premises in question to B. L. Johnson, the son and executor of the testator. This land was sold under judicial proceedings as the property of B. L. Johnson, and was purchased by B. Frank Mauldin, who received the deed of the master therefor on November 2, 1885. B. F. Mauldin conveyed the premises to the defendant W. C. Stone by deed probated December 21, 1885, and recorded February 10, 1886. Defendant Stone has been in exclusive possession since his purchase in 1885. Nancy A. Johnson the life tenant died in 1888. The plaintiff is the only child of N. Caroline Mattison, who died it seems in 1898, and as such child claims one-fifth interest in the land.

The circuit court construed the will as if there were no directions for sale and division of proceeds, and as giving to Mary Ellison a life estate in the premises to the extent of one-fifth after the death of Nancy A. Johnson, with remainder in fee to her child, the plaintiff. The court further held that the plea of the statute of limitations and adverse possession could not avail against plaintiff, although there was testimony that his mother died in 1898, and this action was not commenced until 1910, for the reason that no

cause of action had accrued in behalf of the children of Mary Ellison, who was living at the time of the trial, and that plaintiff, being tenant in common with the children of Mary Ellison, was not barred because such children were not barred.

[1] We think the court was in error in construing the will. It will be noticed that there is no devise of the fee after the life estate of Nancy A. Johnson, but the express direction is to sell the realty and personalty, and divide the proceeds, equally adjusting for all advances in the settlement. Under the equitable doctrine of conversion, the real estate became personal property after the death of the life tenant, and no real estate passed to N. Caroline Mattison for life, with remainder to plaintiff. The gift was of personal property, money, a legacy to Mrs. Mattison for life, with remainder over to her children. *Perry v. Logan*, 5 Rich. Eq. 215; *Andrews v. Loeb*, 22 S. C. 274; *Wood v. Reaves*, 23 S. C. 385; *Bell v. Bell*, 25 S. C. 149; *Farr v. Gilreath*, 23 S. C. 513; *Earle v. Maxwell*, 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012; *Walker v. Killian*, 62 S. C. 491, 40 S. E. 887.

[2] Plaintiff, having no interest in the land

under the terms of the will, could not maintain this action for partition, or recovery of any portion thereof, in the absence of a proper case made, showing a reconversion of the personalty into real estate.

[3] Parties to whom the proceeds of the sale of land are bequeathed may elect to take the land by some unequivocal act or declaration, in which case there is a reconversion, but it is essential to such reconversion that all the beneficiaries join therein. This subject is fully discussed in *Ukiah v. Rice*, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118. But, when a case is sought to be based upon the theory of reconversion, the requisite facts must be alleged and proved, and there is neither such allegation nor proof in this case. Hence we do not pursue the matter of reconversion further. It follows that it was error to direct a verdict for plaintiff.

The judgment of the circuit court is reversed, and the cause is remanded for such disposition on the equity side of the court as may be just and proper, and in accordance with the view herein announced.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.

157 N. C. 366)

STOUT v. VALLE CRUCIS, S. & E. P.  
TURNPIKE CO.(Supreme Court of North Carolina. Dec. 6,  
1911.)APPEAL AND ERROR (§ 690\*)—QUESTIONS RE-  
VIEWABLE—RULINGS ON EVIDENCE.

Error cannot be predicated on the sustaining of an objection to a question, asked a witness in an action for negligent death, as to whether he heard decedent make any statement as to how the accident happened, where the record does not show that the witness heard decedent make any statement, or, if he made one, that it was material.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 690.\*]

Appeal from Superior Court, Watauga County; Long, Judge.

Action by Emma J. Stout, administratrix, against the Valle Crucis, Shawnee-haw & Elk Park Turnpike Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 153 N. C. 513, 69 S. E. 508, 31 L. R. A. (N. S.) 804.

This is an action to recover damages for the death of the plaintiff's intestate, caused, as it is alleged, by the negligence of the defendant. The facts, showing the nature of the controversy, are fully stated in the opinion on the former appeal in the action, reported in 153 N. C. 514, 69 S. E. 508, 31 L. R. A. (N. S.) 804. The jury rendered the following verdict: (1) Was the death of plaintiff's intestate, W. A. Stout, caused by the negligence of the defendants, as alleged in the complaint? Answer: Yes. (2) Did plaintiff's intestate, W. A. Stout, contribute by his negligence to his own injury? Answer: No. (3) What amount of damages, if any, is plaintiff entitled to recover of the defendant? Answer: \$2,100. Judgment was rendered in accordance with the verdict, and the defendant excepted and appealed.

A. E. Norman, a witness for the plaintiff, testified: "I was at home the night Stout was killed. Heard of the injury just after midnight. Found deceased under the fill, leaning against a log, holding his broken knee. Leg broken twice. Bruised between his hips. Taken to my house. Conscious when he got to my house. Remained conscious for 24 hours. Then became speechless and unconscious." On cross-examination he was asked: "Did you hear the deceased make any statement as to what happened immediately before he went off the road?" Objection by the plaintiff; sustained; defendant excepts. This is the only exception appearing in the record.

L. D. Lowe and Edmund Jones, for appellant. T. A. Love and F. A. Linney, for appellee.

ALLEN, J. The exception of the defendant cannot be sustained. There is a presumption in favor of the correctness of the ruling of his honor, and it is incumbent on the defendant to show that it was erroneous and prejudicial, which it has not done. We cannot see from the record that the witness heard the deceased make any statement, or, if one was made, its materiality does not appear, and, if a new trial should be ordered, the question might be answered in the negative.

In Knight v. Killebrew, 86 N. C. 402, the court says: "It is a settled rule that error cannot be assigned in the ruling out of evidence, unless it is distinctly shown what the evidence was, in order that its relevancy may appear, and that a prejudice has arisen from its rejection"—citing Whitesides v. Twitty, 30 N. C. 431; Bland v. O'Hagan, 64 N. C. 471; Street v. Bryan, 65 N. C. 619; State v. Purdie, 67 N. C. 326. This ruling has been approved many times. Sumner v. Chandler, 92 N. C. 634; State v. McNair, 93 N. C. 628; State v. Rhyme, 109 N. C. 794, 13 S. E. 943; Baker v. Railroad, 144 N. C. 40, 56 S. E. 553.

The case of Watts v. Warren, 108 N. C. 517, 13 S. E. 232, relied on by the defendant, cites Knight v. Killebrew with approval, but holds that, under the facts there appearing, the question indicated clearly the evidence excluded. The action was a creditor's bill against an administrator, to compel an accounting and settlement, and to set aside an assignment to the defendant of a policy of insurance on the life of the intestate. "There was evidence tending to prove that the intestate and the defendant administrator were executors of their deceased father's will, and that the intestate in his lifetime had used very considerable sums of money—how much did not definitely appear—that belonged to legatees of the will, and that the defendant W. A. Warren had paid, and had to pay, the same, etc., and that such payments constituted part of the consideration paid by him for the policy of insurance." The defendant was then examined in his own behalf and was asked: "What payments have you made to other persons than J. B. Warren, in consideration of that assignment?" Having offered evidence that he had paid considerable sums to the legatees, without being able to show definitely the amounts, it was reasonable to infer from the question that he would state the payments made, if allowed to answer.

The defendant does not come within this exception.

There is no error.

No error.

(157 N. C. 376)

**BOWMAN v. BLANKENSHIP.**

(Supreme Court of North Carolina. Dec. 6, 1911.)

**LOGS AND LOGGING (§ 21\*)—CONTRACTS FOR SAWING—TERMS OF CONTRACT.**

In an action to recover the amount due on a contract for sawing lumber, plaintiff claimed that he was to saw the lumber in a manner suitable for market and was to "edge it square so as to save loss at the mills," while defendant claimed that plaintiff was to square it up; that he said he had a good edger and would square it up for the shops and do a guaranteed job, and that a part of the lumber did not come up to the specifications. *Held*, that as there was a dispute as to the exact terms of the contract, and its requirements and plaintiff's evidence tended to establish an agreement general and indefinite in terms, evidence that it was cut "as good as any mill commonly cuts" was admissible.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 53; Dec. Dig. § 21.\*]

Appeal from Superior Court, Catawba County; Long, Judge.

Action by L. G. Bowman against W. S. Blankenship. Judgment for plaintiff, and defendant appeals. No error.

Civil action to recover \$246.77, alleged to be due plaintiff for sawing lumber. There was denial of the debt to the amount alleged to be due. The verdict was for plaintiff for the amount claimed.

W. A. Self and J. H. Burke, for appellant.  
A. A. Whitener, for appellee.

**HOKE, J.** On the argument it was correctly contended by defendant's counsel that an ordinary express contract which is definite, specific, and plain of meaning may not as a rule be changed or varied by evidence of local custom or usage. *Cooper v. Purvis*, 46 N. C. 142; *Baseball Club v. Pickett*, 78 Md. 375, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Mearage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579. But in our opinion the present case does not come within the principle. The plaintiff claimed and testified that he was to saw defendant's lumber, in a manner suitable for market, and was to "edge it square so as to save loss at the mills"; that he had done the work according to contract, and the balance due was \$246.77. Defendant contended and testified: "That plaintiff was to square it up. I told him we wanted the lumber cut for the shops. That defendant said he knew how to do this, said he had a good mill and a good edger and would square it up for the shops and do a guaranteed job." That a part of the lumber did not come up to the specifications. That the amount was not so much as claimed, and the balance due was only about \$60. In support of his position plaintiff introduced witnesses who testified: One: "That it was good lumber and was edged good." Another,

W. A. Holler: "That he had had 22 years' experience in sawing; that the lumber was all right; edged all right." Another, Thomas Moretz: "That he had had 20 years' experience as sawyer, and it was cut as good as any mill commonly cuts." The testimony was admitted over defendant's objection. His position being that each and every piece of the lumber was to be squared, and that evidence to change this specific requirement because the lumber was good as "commonly cut," etc., was inadmissible. There is doubt if by defendant's version of the contract the terms were sufficiently definite and precise as to render the testimony inadmissible, but there was dispute about the exact terms of the contract and its requirements, and plaintiff's testimony tended to establish an agreement in terms sufficiently general and indefinite as justify reception of the evidence. We find no testimony that any of lumber was rejected at the shops because unsuitable. The charge of the court gave defendant the full benefit of the position contended for by him, the jury, adopting plaintiff's version of the contract and facts relevant, have rendered a verdict for the full amount claimed, and we find no error which gives defendant any just ground for complaint.

No error.

**STATE v. GOUGE.** (157 N. C. 602)

(Supreme Court of North Carolina. Nov. 27, 1911.)

**1. RECORDS (§ 22\*)—MUTILATION—INDICTMENT—SUFFICIENCY.**

An indictment, charging that accused unlawfully and with fraudulent intent took from the office of the register of deeds a tax book and unlawfully and fraudulently obliterated, injured, and changed such book, the record required to be kept by the register of deeds, is sufficient under Revisal 1905, § 3508, prescribing a penalty for mutilating, etc., public records.

[Ed. Note.—For other cases, see *Records*, Dec. Dig. § 22.\*]

**2. RECORDS (§ 22\*)—MUTILATION—OFFENSES.**

One's criminal responsibility under Revisal 1905, § 3508, for mutilating and altering a tax list by changing the township totals, is not affected because the law does not require such totals to be recorded.

[Ed. Note.—For other cases, see *Records*, Dec. Dig. § 22.\*]

**3. RECORDS (§ 22\*)—MUTILATION—EVIDENCE—ADMISSIBILITY.**

In a trial for mutilating a tax book by changing the township totals, the register of deeds was properly permitted to testify that the abstract which he made and sent to the auditor was a correct copy of the tax list, and that the books showed that there had been a mutilation and change of the tax list as to the totals which were recorded for certain townships, amounting in the aggregate to about \$3,000; it being unnecessary to produce such abstract.

[Ed. Note.—For other cases, see *Records*, Dec. Dig. § 22.\*]

#### 4. RECORDS (§ 22\*)—MUTILATION—EVIDENCE—ADMISSIBILITY.

In the trial of a deputy sheriff for mutilating a tax book by reducing the township totals, enabling him to settle by the reduced totals, the state could show that he drew gold from the sheriff's deposit in a bank and refused to tell the amount of money which had been paid over to a certain fund.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 22.\*]

#### 5. WITNESSES (§ 330\*)—CHARACTER OF WITNESSES—CROSS-EXAMINATION.

While evidence of accused's good character cannot be attacked on cross-examination by proving specific misconduct, it was not error in the trial of a deputy sheriff for mutilating a tax book to permit a witness, who had testified to accused's good character, to be cross-examined to show that accused twice refused to show his books to proper authority, or to disclose the amount of taxes paid over, until witness threatened to appeal to the superior court judge to force him to do so.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. § 330.\*]

Brown and Allen, JJ., dissenting.

Appeal from Superior Court, Mitchell County; Long, Judge.

A. M. Gouge was convicted of fraudulently mutilating and changing tax books, and he appeals. Affirmed.

W. L. Lambert, W. C. Newland, and S. J. Ervin, for appellant. The Attorney General and Asst. Atty. Gen. Geo. L. Jones, for the State.

CLARK, C. J. [1] The defendant was convicted upon an indictment under Rev. 3508, for fraudulently mutilating and changing tax books covering certain townships in Mitchell county. The indictment charged that the defendant "did unlawfully, willfully, and corruptly, and with a fraudulent intent and purpose, take from the office of the register of deeds of the said county the tax book for the year 1908, said tax book having been deposited in said office as ordered by law, and did unlawfully, maliciously, willfully, and fraudulently obliterate, injure, and change the said tax book for the year 1908, a record required to be kept by the register of deeds."

The indictment comes squarely within the terms of the statute, and the motion to quash was properly denied. The tax list is in a bound volume and is a "book of records" required to be kept by the register of deeds. The register of deeds is ex officio clerk of the board of county commissioners. Rev. 2686. The clerk of the board of commissioners is not a separate office, but a part of the office of register of deeds. The two offices are used interchangeably in the statute. In Rev. 5238, the title says, "The register of deeds can make out tax duplicates." In the same section, it is provided that one of the copies "shall remain in the office of the clerk of the board of commissioners," and further on in the same section it is said that an allowance

shall be made to the "register of deeds." In Rev. 5239, both the terms "register of deeds" and "clerk of the board of commissioners" are used. In Rev. 5240, the same interchangeable use of these words occurs.

[2] The defendant is indicted for altering and mutilating the *tax list* and not a copy of the abstract which was sent to the auditor. The abstract sent to the auditor is taken from the tax list, and a copy of such abstract is not required to be kept. The defendant made the further objection that, since the evidence shows that the township totals were changed, the indictment is not good because the law does not require the total for each township to be put in the record. It is true the statute does not say in so many words that the total of the tax of each township shall be set down by the register of deeds; but, being so set down, as is convenient and customary, to mutilate and change those totals is to mutilate and change the record, which the register of deeds has made in compiling the tax list for the county. Besides, this is a matter of proof and not a question of the sufficiency of the indictment.

[3] The defendant further contends that it was error to permit the witness to state that the abstract which he made and sent to the auditor was a correct copy from the tax list, and that the books show now that there has been a mutilation and change of the tax list as to the totals which were recorded for certain townships, amounting in the aggregate to about \$3,000.

The register of deeds, through his office force, prepared two copies of the tax list, one for his office, and one for the office of the sheriff. In the register's own copy of the tax list book the township totals appeared, and it was these that the defendant was charged with having altered. It was not contended that the general tax items on the tax list had been changed, only the township totals. The evidence of the witness amounted to nothing more than his saying that on a certain day, after the tax lists were made out, he added the general items of the county taxes and arrived at a certain sum, and thereafter, when he compared that sum with the totals of the townships as they appeared on the tax list, the county total made about \$3,000 more than the sum of the township totals as they appeared after the alteration therein. The abstract sent the auditor, having been made from the unchanged items, could be in no wise affected by the alteration in the township totals.

The defendant urges that the abstract sent to the auditor's office should have been produced, and that it was error to permit the witness to testify as to the sum total which was shown by such abstract. But there is no charge that the abstract was in any wise altered by the defendant. The abstract was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

simply a declaration made by the witness and was of no higher dignity, as concerns this trial, than his oral testimony as to what amount it showed. A certified copy of such abstract might have been used to corroborate the witness, or might have been used by the defendant to contradict him. But neither was required. The abstract was a written declaration of the witness which he at one time made as to the amount of the unaltered totals, but that did not prevent him from testifying now what the total was. The addition of the unaltered items on the tax list book, which was before the jury, would show whether he is correct or not without obtaining the abstract, which was a mere statement made out at some other time as to what the total of the general items of the tax list amounted to.

[4] The other exceptions which were pressed were that the defendant, while collecting taxes as deputy sheriff, drew from the bank money from the sheriff's account which he took in gold, and refused to tell the amount of money which had been paid over to the school fund. The charge is that the township totals were mutilated by the defendant to show about \$3,000 less than the true amount. It is contended that the motive was to settle by these reduced totals, which thus enabled the defendant to draw out the difference between the true amount collected and the amount shown by the addition of the altered township totals, and that the defendant drew this money in gold so that it might not be traced. This was simply a circumstance which was competent to go to the jury for what it was worth and tending to show that the act was done "illegally and fraudulently," as charged.

[5] A witness, who had testified as to the good character of the defendant, was permitted to state on cross-examination that he had threatened the defendant with Judge Council before he would show his books or state the amount he had paid over. It is true that it is not competent on cross-examination to attack evidence as to good character by proving specific acts of misconduct. *State v. Bullard*, 100 N. C. 486, 6 S. E. 420. But this the state did not attempt to do. The witness was put up by the defendant as a character witness; but the cross-examination is not restricted to that matter, and it was competent for the state on the cross-examination to bring out the fact as an incriminating circumstance that the defendant twice refused to show his books to proper authority or to disclose the amount of the tax fund he had paid over to the board of education until the witness threatened to appeal to the superior court judge to force him to do so. The evidence was submitted to the jury for that purpose only.

No error.

BROWN, J. (dissenting). I would not dissent in this case unless I thought a serious error had been committed. I believe in sustaining convictions of crime in the lower courts unless some *substantial* error has been committed. It may be that the error which I think has been committed in this case would not have changed the result; but I cannot give my approbation to the precedent the ruling of the court will establish.

The abstract referred to in the opinion of the court is as much a record as the tax lists. Such record was in existence and well known to the register of deeds and to the prosecutor. One was in the auditor's office and one in the corporation commission.

The sum totals of that abstract was a potent fact in the proof. The register of deeds made them out. The correctness of his recollection of those totals was a most pertinent and important matter. The state had the right under the statute to offer copies of the originals duly certified. Such copies are the best secondary evidence and far more reliable than the memory of the witness.

I think they should have been produced on the trial. *Kelly v. Craig*, 27 N. C. 129. In this case Chief Justice Ruffin says: "It is always a question of law whether the best evidence in the party's power has been produced, and inferior evidence is not admissible. If in this case the sheriff's copy of the tax list had been offered, it would have been competent, as there was sufficient proof of the destruction of the original. So, if it had appeared that the sheriff's copy had also been lost, then the parol evidence might have been given, since the paper of which the contents were proved was certainly lost—whether it was that in the clerk's office or in the sheriff's office." See, also, the remarks of same great judge in *Kello v. Maget*, 18 N. C. 425; *Nelson v. Whitfield*, 82 N. C. 46; 25 Am. & Eng. Ency. 162-167.

ALLEN, J., concurs in this dissent.

(157 N. C. 191)

COMMISSIONERS OF CLEVELAND  
COUNTY v. CITIZENS' NAT.  
BANK OF GASTONIA.

(Supreme Court of North Carolina. Nov. 27, 1911.)

1. MUNICIPAL CORPORATIONS (§ 938\*)—BONDS  
—NEGOTIABILITY—REQUISITES.

Bonds issued by Kings Mountain precinct under Pub. Loc. Laws 1911, c. 429, authorizing the precinct to issue bonds for the building of roads, and in section 4 providing for levy of a specified tax within the township to pay the interest on the bonds, and to create a sinking fund, are negotiable; the negotiable instruments act (Revisal 1905, § 2153), providing that an unqualified promise to pay is unconditional, though coupled with an indication of a particular fund out of which reimbursement



is to be made, and the bonds being general and unrestricted obligations of the precinct.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1955-1957; Dec. Dig. § 938.\*]

## 2. COUNTIES (§ 18\*)—PRECINCTS—PUBLIC CORPORATIONS.

Kings Mountain precinct, which, by Pub. Loc. Laws 1911, c. 429, is given a highway commission and authorized to issue bonds, is a quasi municipal corporation, being an arm of the state.

[Ed. Note.—For other cases, see *Counties*, Dec. Dig. § 18.\*]

## 3. MUNICIPAL CORPORATIONS (§ 915\*)—BONDS—VALIDITY—TAX LIMITATION.

The validity of municipal bonds is not affected by a limitation of the amount of the special tax which is provided to discharge them; such limitation being in no sense a restriction on the liability of the municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1906-1912; Dec. Dig. § 915.\*]

Appeal from Superior Court, Cleveland County; Webb, Judge.

Submitted controversy between the Commissioners of Cleveland County and the Citizens' National Bank of Gastonia. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jones & Timberlake, for appellant. Ryburn & Hoey, for appellees.

BROWN, J. [1, 2] By the act of Assembly (Chapter 429, Public Local Laws 1911) Kings Mountain precinct in No. 4 township, Cleveland, is authorized to issue bonds in the sum of \$25,000 for the purpose of building roads, repairing those in existence, and for other purposes named in the act. An election was held and the act adopted and approved by a large majority of the qualified voters of the precinct. Kings Mountain precinct in No. 4 township, Cleveland county, has existed under well-known boundary lines for more than 30 years, and comprises an area of over 22,000 acres of land; the town of Kings Mountain being also situate therein. The act also provides for a "highway commission of Kings Mountain precinct" and gives it appropriate powers as a body corporate and politic. Section 4 of the act provides for the levy within the township of a special tax to pay the interest on the bonds and eventually also to provide a sinking fund.

It is contended by defendant that the bonds are not negotiable, and are not a valid obligation of the precinct because of the proviso in Section 4 of the act. The entire section reads as follows: "Sec. 4. In order to pay the interest on said bonds, create a sinking fund for taking up said bonds at maturity, to compensate laborers employed on the roads in King Mountain precinct, in No. 4 township, and to establish, alter, repair, survey, lay out, grade, construct, maintain and build the public roads and highways of Kings Mountain precinct, in No. 4 township,

in Cleveland county, in good condition, the board of commissioners of the county of Cleveland, or other authorities vested with power of levying taxes for said county, shall annually compute and levy, at the time of levying other county taxes, a sufficient tax on all polls, real estate and all personal property and all other subjects of taxation in said Kings Mountain precinct which said commissioners or other authorities now or hereafter may be allowed to levy taxes upon for any purpose whatever, always observing the constitutional equation between taxes on property and the taxes on polls: Provided, there shall not at any time be levied in Kings Mountain precinct, in No. 4 township, in the county of Cleveland, for the purpose of road improvement, and including all expenditures made necessary by this act or any act or statute now existing, a tax greater than twenty-five (25) cents upon the one hundred dollars (\$100) worth of property and seventy-five (75) cents on each poll: Provided further, that no sinking fund shall be created by such levy within less time than ten years from the date of issuing said bonds, but the highway commission hereinafter created may use for the purpose of this act such sums of money remaining, after the interest on said bonds shall have been paid, for the purpose of carrying out the provisions of this act."

We see nothing in this proviso, or in the whole act, which destroys the negotiability of the bonds. They contain an unconditional promise to pay a sum certain in money at a fixed time, and are payable to bearer, and fulfill all the requirements of negotiability. They are not promises to pay out of any particular fund, and the act by virtue of which they are issued does not profess to restrict their payment out of a particular fund.

Kings Mountain precinct is a quasi municipal corporation created by the state and vested with certain corporate powers. *Smith v. School Trustees*, 141 N. C. 143, 53 S. E. 524; *Board Trustees, Youngsville Township, v. Webb*, 155 N. C. 379, 71 S. E. 520, and cases therein cited.

These bonds are the general and unrestricted obligation of that body corporate. They are not payable solely out of a particular fund, although a particular fund is provided for their payment. They therefore do not come within the description of the negotiable instrument act as nonnegotiable paper, for that instrument especially provides that "an unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount." *Revisal 1905*, § 2153.

[3] The fact that the special tax is limited to 25 cents on the property and 75 cents on the poll may affect the value of the bonds possibly, but does not affect the ultimate liability of the precinct for their payment in full.

As said by the Supreme Court of the United States in *U. S. v. County of Clark*, 96 U. S. 211, 24 L. Ed. 629: "Limitations upon a special fund provided to aid in the payment of a debt are in no sense restrictions of the liability of the debtors." 2 Daniel, Neg. Inst. (4th Ed.) § 1491c; *Red Springs Hotel v. Red Springs*, 72 S. E. 837, at this term, and cases therein cited.

As we have heretofore substantially said in above-cited case, in the event the special tax is insufficient to meet the demand upon it for interest and sinking fund requirements, the Legislature may authorize its increase, or the growth of the precinct and the increase in the taxable value of property render such increase unnecessary.

The judgment is affirmed.

(157 N. C. 194)

**NELSON v. ATLANTIC COAST LINE  
R. CO.**

(Supreme Court of North Carolina. Nov. 27, 1911.)

**MASTER AND SERVANT (§ 78\*)—PAYMENT OF  
BENEFITS—DECISION BY INTERNAL TRI-  
BUNAL—CONCLUSIVENESS.**

Under regulations of the relief department of a railroad company requiring controversies to be submitted to the superintendent and making his decision, or that on appeal therefrom to an advisory committee, conclusive, suit cannot be maintained to recover benefits covering a period during which such officers found the beneficiary to be no longer under disability, in the absence of fraud and undue influence.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 78.\*]

Appeal from Superior Court, Pitt County; Ferguson, Judge.

Action by W. C. Nelson against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. New trial ordered.

This is an action to recover benefits, which the plaintiff alleges he is entitled to, under the rules and regulations of the relief department of the defendant. The plaintiff, an employé of defendant, became a member of the relief department on the 28th of June, 1902, and paid his dues, amounting to \$6.15, up to the 6th day of September, 1902, when he was accidentally injured. After his injury he was paid, as benefits on account of his disability to work, \$1 per day for 12 months, and thereafter 50 cents per day up to May 15, 1905, making a total of \$673.50. On or about the last day, the superintendent of the department decided that the plaintiff was able to return to work, and he was noti-

fied to do so; but he refused, contending that he was still unable to work. The plaintiff appealed from the decision of the superintendent to the advisory committee, and employed counsel to represent him. He was given a hearing by the committee, and this tribunal held that he was no longer under disability. He then began this action, and the defendant pleads, as a defense, the rules and regulations of the department, and the decision of the advisory committee.

There is no evidence of fraud and no claim that the injury to the plaintiff was due to negligence. The regulations of the department are fully stated in *Barden v. Railroad*, 152 N. C. 318, 67 S. E. 971, and in *King v. Railroad*, 72 S. E. 801, at this term, and it is not necessary to do more than quote the part particularly relied on, which is as follows: "(85) All claims of members, or of their beneficiaries or other representatives, for benefits, and all questions or controversies of whatsoever character, arising in any manner or between any parties or persons, in connection with the relief department or the operation thereof, whether as to the construction of language or the meaning of the regulations or acts in connection with the operation of the department, shall be submitted to the determination of the superintendent, whose decision shall be final and conclusive thereof, unless a written appeal from his decision is made to the committee. If the party or parties so submitting any matter to the superintendent shall be dissatisfied with his decision, such party or parties shall appeal to the committee within thirty days after notice to the parties interested of the decision of the superintendent. When an appeal is taken to the committee it shall be heard by said committee without further notice at their next stated meeting, or at such future meeting or time as they may designate, and shall be determined by vote of the majority of a quorum, or if any other member not less than a quorum of the members present at such meeting, and the decision arrived at thereon by the committee shall be final and conclusive upon all parties without exception or approval."

There was evidence on the part of the plaintiff that he was unable to work on May 15, 1905, and that this disability continued up to the time of the trial, and evidence to the contrary by the defendant.

The defendant requested the following special instruction, which was refused, and defendant excepted: "That, if you believe the evidence in the case, the plaintiff was at the time of the alleged injury a member of the relief department of the Atlantic Coast Line Company, and agreed to be bound by the rules and regulations of said relief department, and accepted benefits therefrom in accordance with the said rules and regulations,

and that there is no evidence that any fraud or deceit of any character was practiced upon the plaintiff, either in signing the application for membership in said relief department, or in inducing him to accept the benefits in said department after his said injury, and that the plaintiff voluntarily accepted benefits and elected thereby to obtain his rights under said contract in accordance with the rules and regulations of said relief department; and the court therefore charges you that as the plaintiff has submitted the questions in controversy in this action to the tribunal provided for in the rules and regulations of said relief department, of which he was a member, and the same having been duly and orderly considered by said advisory committee of said relief department, the plaintiff under the terms of his contract, as a matter of law, is bound thereby, and he cannot maintain this action, no fraud or undue influence having been proven, you will answer the issue as to the right of recovery by plaintiff in this action, 'No.' "

There was a verdict and judgment in favor of the plaintiff, and defendant excepted and appealed.

Harry Skinner, for appellant. Julius Brown, for appellee.

ALLEN, J. (after stating the facts as above). The question involved in this case is of general importance, and the principle announced will determine, in this state, the right of all benefit societies and fraternal orders, which provide for the payment of benefits to sick or disabled members, to establish, within the society or order, some tribunal with power to investigate the fact, upon which the right to the benefit may depend, and whose decision shall be final, unless impeached for fraud.

We cannot declare that the decision of such a tribunal is binding upon a member who belongs to a fraternal order, and refuse to enforce it, on substantially the same facts, because it is invoked in behalf of the relief department of a railroad.

The principal contentions of the plaintiff, assailing the validity of the decision of the advisory committee, are that it is practically an arbitration; that on the facts developed a property right is involved; that an agreement to submit such a right to arbitration in advance of the controversy is invalid, because it is an agreement which ousts the courts of their jurisdiction, and that the advisory committee was not fairly constituted.

The defendant replies that, if the action of the advisory committee is to be governed by the strict rules of an arbitration, no property right was submitted to the committee, but only the ascertainment of a single fact that the committee was impartially constituted, and, if not, that the plaintiff submitted his claim with full knowledge of the facts, and that there has been an award,

which is final. The defendant further says that the principles relied on are not applied, without qualification, in behalf of a member of an organization, who acquires his property right, under and by virtue of its regulations.

There is some difference of opinion as to the motive behind the adoption of the rule that an agreement in advance of a controversy to submit all questions of law and fact to arbitration is not enforceable, some attributing it to the jealousy of the courts and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction, and others to an aversion, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizen is renounced (*Canal Co. v. Coal Co.*, 50 N. Y. 258); but the tendency of the later decisions is to relax the rule.

In the case from New York, the court says: "An agreement of this character induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly, or undue pressure, might well be refused a specific performance, or disregarded when set up as a defense to an action. But when the parties stand on an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign, at this day, any good reason why the contract should not stand, and the parties made to abide by it and the judgment of the tribunal of their choice. Were the question *res nova*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. \* \* \* The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties, and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law; and the rule is essentially modified and qualified."

This is in line with the statement of Chapman, J., in *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89, that "judicial tribunals are provided by the government to enable parties to enforce their rights when other means fail, but not to hinder them from adjusting their differences themselves, or by agents of their own selection." And with the remark of Pollock, B., in *Dawson v. Fitz-*

gerald, 1 Ex. D. 257, that "it has been shown, not only by decision, but by the legislation of late years, that the same pious reverence is not felt for litigation in an open court that was felt in the olden time."

There would appear to be some contradiction for the same court to say that "the settlement of controversies by arbitration is looked on with great favor by the courts" (*Hurdle v. Stallings*, 109 N. C. 6, 13 S. E. 720), and then refuse to permit the members of an organization to agree upon a plan for determining when a member is able to return to his work.

The rule as to agreements to arbitrate has been modified from time to time until now it is generally accepted that it is competent to contract that the amount of damages which may be recovered, or the existence of any fact, which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement.

In the leading English case of *Scott v. Avery*, 5 H. L. 811, it was held that a provision of a mutual insurance company was valid, "that the sum to be paid to any insurer for loss should, in the first instance, be ascertained by the committee, but if a difference should arise between the insurer and the committee, 'relative to the settling of any loss, or to a claim for average, or any other matter relating to the insurance,' the difference was to be referred to arbitration," and Lord Coleridge thus speaks of this provision: "The principle of law which is relied on by the plaintiff in error is agreed on. The difference between the parties is upon the question whether it governs the present case, and this must be decided by determining the true construction of the agreement. If two parties enter into a contract, for the breach of which in any particular an action lies, they cannot make it a binding term that in such event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. Whether this rests on a satisfactory principle or not may well be questioned; but it has been so long settled that it cannot be disturbed. The courts will not enforce or sanction an agreement which deprives the subject of that recourse to their jurisdiction, which has been considered a right inalienable even by the concurrent will of the parties. But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject-matter of decision by the courts."

Again, it is said in *Assurance Co. v. Hall*, 112 Ala. 323, 20 South. 448: "The principle is that when the agreement to arbitrate includes the whole subject-matter of difference, so that the right of the party to resort to the courts of his country for the determination of his suit or claim is absolutely and effec-

tually waived, such an agreement is against public policy and void. We adhere to that conclusion. The courts clearly distinguish between an agreement which refers to arbitration the extent or amount of damages to be recovered, but leaves the parties free to have the right to recover or liability of the other party determined by the courts, and those agreements which refer to arbitration the authority to determine the right of the one to recover, or the liability of the other. The former are upheld and enforced, while the latter are declared to be against public policy and not binding."

In *Holmes v. Richet*, 56 Cal. 313, 38 Am. Rep. 54, the case from New York (*Canal Co. v. Coal Co.*, supra) and *Scott v. Avery*, supra, are cited with approval, and particularly the statement in the latter case: "But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject-matter of decision by the courts."

The original doctrine, with its modifications, is well summed up by Justice Manning in *Kelly v. Trimont Lodge*, 154 N. C. 100, 69 S. E. 766: "Our court has uniformly held to the doctrine that, when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer"—citing *Mfg. Co. v. Assur. Co.*, 106 N. C. 28, 10 S. E. 1057. And in *Braddy v. Ins. Co.*, 115 N. C. 354, 20 S. E. 477, Justice Avery says the proposition is well settled that an agreement to submit to arbitration the single question of the amount of loss by fire is valid.

Under these authorities, and particularly under the declaration of our own court, and treating the agreement as one for arbitration pure and simple, the defendant might well contend that, its liability to pay benefits being admitted, when the plaintiff is under disability, it was competent for the parties to agree in advance that the single fact of disability should be determined by arbitration.

But the case is stronger for the defendant than this, as the plaintiff has voluntarily submitted his claim to the arbitrament of the advisory committee, and an award has been rendered against him.

The authorities seem to agree that, although an agreement to arbitrate the entire controversy is not enforceable, and that prior to the award either party may revoke

the agreement, if he fails to do so, and enters upon the arbitration, and an award is made, he is bound.

In *Tobey v. Bristol*, 23 Fed. Cas. 1321, Judge Story, after discussing the power of revocation, says: "But, where an award has been made before the revocation, it will be held obligatory, and the parties will not be allowed to revoke it, and the courts of law, as well as of equity, will enforce it."

The same principle is declared by Justice Walker at the last term, in *Williams v. Manf. Co.*, 154 N. C. 208, 70 S. E. 291, in which he says: "After the arbitrators have acted and rendered an award, the case is very different. Their decision (that of the arbitrators) is binding upon the parties, and can be successfully impeached only upon the grounds which would invalidate any other judgment. This distinction between a mere agreement to submit and a submission consummated by an award is uniformly recognized by the authorities."

Nor can the plaintiff now object that the members of the advisory committee were interested, or partial, if such is the fact, because he knew how it was constituted when he became a member of the department, and at the time he submitted his claim to them.

As was said by Justice Shepherd in *Pearson v. Barringer*, 109 N. C. 400, 18 S. E. 948: "It is well settled that parties 'knowing the facts may submit their differences to any person, whether he is interested in the matters involved (*Navigation Co. v. Fenlon*, 4 Watts & S. [Pa.] 205), or is related to one of the parties, and the award will be binding upon them.' 6 *Wait's Act. & Def.* 519; *Morse on Arbitration*, 105. But, if the submission is made in ignorance of such incompetency, the award may be avoided. No relief, however, will be granted unless objection is made as soon as the aggrieved party becomes aware of the facts, and, if after the submission he acquires such knowledge and permits the award to be made without objection, it is treated as a waiver, and the award will not be disturbed. *Davis v. Forshee*, 34 Ala. 107. 'A party,' says *Morse on Arbitration*, supra, 'will not be allowed to lie by after he has attained the knowledge and proceed with the hearing without objection, thereby accumulating expense and taking the chance of a decision in his favor, and then, at a later stage, or after a decision has been or seems likely to be rendered against him, for the first time produce and urge his objection.' From these and other authorities, it would seem clear that when one seeks to impeach an award, he must show that he made objection as soon as he discovered the disqualifying facts."

If, therefore, we applied the rules governing arbitration and awards, we would hold upon the facts in this record that it was competent for the parties to agree in advance to submit to arbitration the single question

of the ability of the plaintiff to return to his work, and that an award rendered on such an agreement would be valid, when free from oppression or fraud.

The rights of the parties cannot, however, be determined strictly upon the principle governing arbitrations, because the plaintiff acquires his right to the benefits he claims under the rules of the relief department, and he has by contract attached to the enjoyment of these benefits the condition that he will abide by all reasonable regulations.

There is no question of negligence involved, and the plaintiff does not say that the provisions of the relief department are against public policy and void. On the contrary, he demands relief because he is a member of the department and under its provisions. He says that having contributed dues amounting to \$6.15 before he was accidentally injured, and having received benefits amounting to \$673.50 on account of his injuries, when the department, upon an appeal by him, in accordance with the by-laws, decides that he is able to return to work, he may refuse to do so, and that the regulations providing for a tribunal to decide this single question has no binding force.

The authorities upon this question are in much conflict. All seem to agree that when the regulation of an organization relates to its internal policy, or to a question of membership, the action of the organization, according to the regulations, is, in the absence of fraud, conclusive; but there is a difference of opinion as to what is a property right and as to the effect of the regulation when a property right is involved. Some courts hold that, when a property right is involved, the member must first seek redress inside of the order, and that, having done so, he may then resort to the courts. Others hold that, if there is no inhibition against resorting to the courts, he may do so in the first instance. Others that he must resort to the order first, if the regulations so require, and then to the courts, although the regulations say that the decision by the tribunal in the order shall be final. And others that the decision rendered according to the regulations of the order is final and conclusive. *Vandyke's Case*, 2 Whart. (Pa.) 312, 30 Am. Dec. 263; *Barker v. Great Hive*, 135 Mich. 499, 98 N. W. 24; *Van Poucke v. St. Vincent*, 63 Mich. 381, 29 N. W. 863; *Ry. Ben. Ass'n v. Robinson*, 147 Ill. 159, 35 N. E. 168; *Cotter v. A. O. U. W.*, 23 Mont. 90, 57 Pac. 650; *Loeffler v. M. W. of Am.*, 100 Wis. 85, 75 N. W. 1012; *Rood v. Ry. Ben. Ass'n (C. C.)* 81 Fed. 62; *Osceola Tribe v. Schmidt*, 57 Md. 105; *Anacosta Tribe v. Murbach*, 13 Md. 91, 71 Am. Dec. 625; *Sanderson v. Railroad Trainmen*, 204 Pa. 183, 53 Atl. 767; *Robinson v. Templar Lodge*, 117 Cal. 371, 49 Pac. 170, 59 Am. St. Rep. 193; *Grand Central Lodge No. 297, A. O. U. W. v. Grogan*, 44 Ill. App. 111; *Knights of*

*Pythias v. Wilson*, 66 Fed. 785, 14 C. C. A. 264.

In *Vandyke's Case* the charter of a private corporation provided that, if any member should be found breaking the rules of the society, he should be served with a notice to attend to answer at the next stated meeting, after which a decision should be made by ballot, and, if two-thirds considered him guilty, he should be dealt with agreeably to the by-laws. The by-laws provided that no member should be entitled to receive any benefit from the society whose complaints are the result of intoxication, etc. A member having been expelled by the requisite majority, on the ground of intoxication, after due notice, etc., he brought an action in the court of common pleas to recover the allowance granted to disabled members, and it was held that the regularity of the proceedings to expel him could not be inquired into in that action, and that the court had no jurisdiction to compel payment of the allowance. Chief Justice Gibson, who wrote the opinion, says: "Into the regularity of these proceedings it is not permitted us to look. The sentence of the society, acting in a judicial capacity and with undoubted jurisdiction of the subject-matter, is not to be questioned collaterally, while it remains unreversed by superior authority." It will be noted that in this case the tribunal provided in the order decided the question of intoxication, and its decision was held to be conclusive, and upon it the right to benefits was denied.

In *Sanderson v. Brotherhood of Trainmen*, *supra*, speaking to the same question, the court says: "In the case at bar the plaintiff's statement clearly shows that the constitution of the order provides a tribunal to decide the very question now in controversy in this case, to wit, whether or not the plaintiff's claim amounted to total disability. In accepting the certificate the plaintiff agreed, with the other members of the beneficial order, that he would submit this question to the tribunal so constituted. It was a tribunal of his own choice. It was doubtless provided for the express purpose of preventing litigation and thereby to prevent the funds of the order from being taken and used in defending suits. It is to the interest of every member of the order that this regulation should be enforced. In our opinion, the decision of such tribunal is conclusive upon the plaintiff and the merits of the decision of such tribunal cannot be inquired into collaterally, either by action at law or any other mode."

In the case of *Anacosta Tribe of Red Men*, *supra*, the right of a member to sick benefits was involved, and after a decision against him in the order he brought action to recover the benefits. The court says: "The appellee, by becoming a member, as-

sent to be governed by the tribe and council, according to the regulations, and it follows that he was bound by their application and construction in his own case. It is provided that the tribe shall determine matters of this kind, and the decision, on appeal, made final. These are private beneficial institutions operating on the members only, who for reasons of policy and convenience, affecting their welfare and perhaps their existence, adopt laws for their government, to be administered by themselves, to which every person who joins them assents. They require the surrender of no right that a man may not waive, and are obligatory on him only as long as he chooses to recognize their authority. In the present instance, the party appears to have been subjected to the general laws and by-laws according to the usual course, and, if the tribunal of his own choice has decided against him, he ought not to complain. It would very much impair the usefulness of such institutions, if they are to be harassed by petty suits of this kind, and this, probably, was a controlling consideration in determining the manner of assessing benefits and passing upon the conduct of members. The very point arose in *Vandyke's Case*, 2 Whart. (Pa.) 309 [30 Am. Dec. 263], where (Gibson, Ch. J., delivering the opinion of the court) it was held that an action did not lie to recover benefits, upon grounds that we deem altogether satisfactory." This and *Vandyke's Case* were approved in the *Osceola Tribe v. Schmidt*, 57 Md. 105.

In *Van Ponce v. St. Vincent Society*, *supra*, plaintiff sued the defendant, a mutual benefit and co-operative insurance company of which he was a member, for money claimed to be due him for a "sick benefit." The by-laws of the company provided for a "sick committee," whose duty it should be to investigate and determine whether a member was entitled to such benefit, whose decision was to be final, and the committee to be the sole "deciders" of the question. After plaintiff had received assistance for a time, he was cited before the committee, and after a hearing they decided that he was not entitled to receive any further benefits on account of his injury, of which decision he was duly notified, and it was held that the action of the committee was final; the court saying: "It is necessary that there should be some mode of determining the question of when relief should be given and denied, and the method provided in the by-law seems well adapted to the circumstances and needs of such a society. There is nothing oppressive in the terms of the by-law, and it contains nothing which the policy of the law forbids. If it is enforced in good faith and with impartiality, which the members pledge themselves to do, it must result in benefit to sick members, and at the same time protect the funds of the society from depletion by the undeserving."

The same principle is declared in *Barker v. Great Hive*, 135 Mich. 502, 98 N. W. 24.

The question was considered by the Circuit Court of Appeals in *Knights of Pythias v. Wilson*, supra, and it was there declared: "The decided weight of authority is that a member of a mutual benefit society must resort, for the correction of an alleged wrong done to him as such member, to the tribunals of the society, and, when the proceedings are regular, the action of the society is conclusive, and cannot be inquired into collaterally."

We will not quote further from the cases cited, and there are others to the same effect, but they sustain fully the contention of the defendant that it was the duty of the plaintiff to seek redress inside the department, and that the decision of the advisory committee, upon his appeal, is conclusive upon him.

The doctrine seems to us to be reasonable and just, and necessary to the maintenance, in benefit societies and fraternal orders, of provisions conferring benefits on sick or disabled members.

If it should be held otherwise, such societies would be subjected to litigation each time a member was dissatisfied, and funds raised for wise and beneficent purposes would be wasted.

This is not in conflict with the opinion in *Kelly v. Trimont Lodge*, 154 N. C. 98, 69 S. E. 764. In that case it is stated that the plaintiffs were entitled, under the rules and regulations, to the sum demanded, and the defendant denied the right of action. It was held that an agreement to submit the whole controversy to arbitration was not binding; but it is distinctly stated that it was competent to agree that the decision of a single fact, such as we have here, could be submitted to a tribunal within the order.

When a member submits his claim to the committee, he is entitled to a hearing, and is not concluded by its action, if it is fraudulent or oppressive, of which the facts on this record furnish no evidence.

There was error in refusing to give the instruction requested by the defendant, and a new trial is ordered.

New trial.

CLARK, C. J. (concurring in result.) This is not the usual case in which this defendant is setting up its relief department as a defense in an action for damages for death or personal injuries caused by the negligence of the railroad company. But I cannot agree that the relief department of the defendant railroad in any particular resembles a fraternal order or a mutual benefit society. It is neither fraternal nor mutual.

In a fraternal order the members enter voluntarily, they prescribe the rules and

regulations, the funds are managed by committees and officers appointed by themselves, and the rules and officers can be changed at their will. In this railroad relief department the members are compelled to enter or lose their employment with the corporation. The committees are appointed and the rules and regulations are prescribed, not by the members, but by the employer, and can be changed by the latter only and at its will. The sole management is in the employer, who contributes none of the funds but has sole charge and disposal of them, without responsibility to those who create the fund.

The motive in organizing a relief department is therefore totally dissimilar from the reasons which cause the organization of fraternal or mutual benefit societies. There is nothing which makes the latter a violation of law. That the existence of this relief department is in violation of both state and federal statutes passed for the protection of railroad employes has already been stated in my opinion in *King v. Railroad* (at this term) 72 S. E. 801, with my reasons for so holding, which need not be repeated here.

(157 N. C. 277)

GULF REFINING CO. v. CHARLOTTE  
CONST. CO.

(Supreme Court of North Carolina. Nov. 27, 1911.)

1. CONTRACTS (§ 162\*) — CONSTRUCTION — REPUGNANT CLAUSES.

The rule that a subsequent clause of a contract irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be disregarded is subordinate to the rule that the intent of the parties, as embodied in the entire instrument, is to be given effect, and that every part of the contract must be given effect if that can be done by any fair or reasonable interpretation.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 162.\*]

2. SALES (§ 199\*) — CONTRACTS — CONSTRUCTION.

A contract for the sale of oil provided that the oil was to be delivered at defendant's plant, free on board tank cars; that five days' notice should be given before any delivery was required; and that the liability of plaintiffs should cease when shipment was delivered to the railroad company. Held, that the intent of the parties, as gathered from the entire instrument, must be given effect, and the provision that the liability of plaintiffs should cease when the shipment was delivered to the railroad company may not be disregarded as repugnant to the other provisions, for it was apparently the intent of the parties that the title to the oil should not pass until delivery, but that plaintiffs should not be liable for negligence of the railroad company in making delivery.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 516-523; Dec. Dig. § 199.\*]

Appeal from Superior Court, Mecklenburg County; Biggs, Judge.

Action by the Gulf Refining Company against the Charlotte Construction Company.

From a judgment for plaintiff and against defendant on its counterclaim, defendant appeals. Affirmed.

Plaintiff sued defendant for \$422.41, purchase price of oil sold and delivered to defendant as per contract, etc. Defendant admits owing plaintiff the amount stated, a balance due for oil sold and delivered, but sets up a counterclaim for something over \$400 arising by reason of plaintiff's wrongful failure to deliver two car loads of oil at the time and place required by the contract between them, whereby defendant was forced to buy a specified amount of oil on the local market at an increased cost, etc. The facts admitted as relevant to this counterclaim are very well stated in one of the briefs as follows: "That on the 25th day of November, 1906, plaintiff and defendant, Charlotte Consolidated Construction Company, entered into a contract whereby plaintiff agreed to sell and deliver to defendant, Charlotte Consolidated Construction Company, and the defendant, Charlotte Consolidated Construction Company, agreed to purchase from the plaintiff Solar gas oil for use in defendant's plant in the city of Charlotte. The price was to be 5½ cents per gallon f. o. b., Charlotte, N. C., in lots not less than 160 barrels, nor more than 320 barrels, unless otherwise agreed upon. Five days' written notice to be given plaintiff or its representatives, at 916 Harrison Building, Philadelphia, Pa., before each delivery was required; payment to be made on the 15th day of each month at plaintiff's Pittsburg office, for all oil delivered during the preceding month, and liability of plaintiff to cease when any shipment was delivered to the railroad. That said contract was carried out by the parties, until the 17th day of October, 1906, at which time defendant, Charlotte Consolidated Construction Company, telegraphed plaintiff to ship two cars of oil on the 20th day of said month, instead of one, which telegram was subsequently confirmed by letter from defendant, Charlotte Consolidated Construction Company, to plaintiff, and plaintiff in accordance with said telegram, on the 20th day of October, 1906, delivered to the Central Railroad of New Jersey the two tank cars of oil, consigned to defendant, Charlotte Consolidated Construction Company, Charlotte, N. C., and took bill of lading for the same and sent the bill of lading to the defendant, Charlotte Consolidated Construction Company, Charlotte, N. C. That, on account of an error committed by the railroad company, said oil was never delivered, but was carried to Courtland, N. Y., and discharged in the tanks of other persons; but the error was not made known to plaintiff till November 2, 1906, when defendant, Charlotte Consolidated Construction Company, by its president, E. D. Latta, wired plaintiff that the oil had not arrived, and ordered shipped at once two other cars of oil, which were shipped on

November 2, 1906, according to instructions of defendant, Charlotte Consolidated Construction Company. Before the second shipment of oil arrived at Charlotte, defendants' supply of oil gave out, and it was compelled to buy 11,429 gallons of kerosene oil from the Standard Oil Company, at the price of (\$1,108.78) eleven hundred and eight dollars and seventy-eight cents, which oil so used by the defendant railway company in the manufacture of its gas was worth only \$702.26, as compared with the value of the Solar gas oil for like purposes, incurring a loss to defendants of \$406.52. Defendants admit that there is due plaintiff the sum of \$422.41, with interest from the 19th day of January, 1907, subject to such set-off, or counterclaim (if any) as the defendants ought to have credit for by reason of the failure to deliver the two cars or tanks of oil, which were by error of the Central Railroad of New Jersey carried to Courtland, N. Y., and not delivered to defendants. The question of the amount sought to be recovered being eliminated by the defendants' admission, the inquiry before the court is whether or not the loss sustained by defendants, being the relative difference in the value of Solar oil and kerosene oil, is a proper counterclaim against the plaintiff." The court below, being of opinion that on the facts there was no counterclaim available to defendants, entered judgment for plaintiff, and defendants excepted and appealed.

E. T. Cansler, for appellant. Clarkson & Duls and W. F. Harding, for appellee.

HOKE, J. (after stating the facts as above). As the court understands the facts, there has been no charge made against defendant for the price of oil that was shipped to other parties by mistake of the railroad company and its agents. The defendant bases its counterclaim on the fact there was a failure to deliver the two car loads of oil at the time and place specified, that this failure was in breach of the contract between the parties, and the consequences are properly chargeable to plaintiff, and this by reason of certain clauses in the agreement as follows: "That plaintiff sold and agreed to deliver to defendant for use in defendant's plant at Charlotte, N. C., maximum 225,000—minimum 175,000 gallons Solar gas oil at 5½ cents per gallon, f. o. b., Charlotte, N. C., by Tank Car, at tank located at Charlotte, N. C., in lots of not less than 160 bbls. nor more than 320 bbls. unless otherwise agreed upon. \* \* \* Five days' written notice to be given representative of party of first part (plaintiff) at 916 Harrison Building, Phil., Pa., before each delivery is required. \* \* \* Liability of first party (plaintiff) ceases when shipment is delivered to railroad company."

The position that the last clause, "Liability of the first party ceases when shipment is delivered to railroad company," is entirely



irreconcilable with the two former clauses, is repugnant to the general purport and intent of the contract, and under the doctrine approved in *Jones v. Casualty Co.*, 140 N. C. 262, 52 S. E. 578, 5 L. R. A. (N. S.) 932, 111 Am. St. Rep. 843, and other cases of like import, the same should be set aside and not allowed to affect in any way the rights of the contracting parties. But, on the facts in evidence, the court is of opinion that defendants' counterclaim may not be brought within the principle. In *Railroad v. Railroad*, 147 N. C. 382, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, the court, speaking to the controlling rule in the interpretation of contracts, said: "It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract, and that in written contracts which permit of construction this intent is to be gathered from a perusal of the entire instrument." In *Paige on Contracts*, § 1112, we find it stated: "Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is, not what the separate parts mean, but what the contract means when considered as a whole."

And in *Davis v. Frazier*, 150 N. C. 451, 64 S. E. 201, the court, referring to the principle recognized in *Jones v. Casualty Co.* and other cases of like kind, said: "It is an undoubted principle that a 'subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside.' This was expressly held in *Jones v. Casualty Co.*, 140 N. C. 262 [52 S. E. 578, 5 L. R. A. (N. S.) 932, 111 Am. St. Rep. 843], and there are many decisions with us to like effect; but, as indicated in the case referred to and the authorities cited in its support, this principle is in subordination to another position, that the intent of the parties as embodied in the entire instrument is to the end to be attained, and that each and every part of the contract must be given effect, if this can be done by any fair or reasonable interpretation; and it is only after subjecting the instrument to this controlling principle of construction that a subsequent clause may be rejected as repugnant and irreconcilable. *Jones v. Casualty Co.*, supra; *Lawson on Contracts*, §§ 388, 389; *Bishop on Contracts*, §§ 386, 387." The opinion then quotes with approval from *Lawson on Contracts* as follows: "The third main rule is that that construction will be given which will best effectuate the intention of the parties, to be collected from the whole of the agreement; and, to ascertain the intention, regard must be had to the nature of the instrument, the condition of the parties executing it, and the objects which they had in view. \* \* \* Courts will examine the

whole of the contract and so construe each part with the others that all of them may, if possible, have some effect, for it is to be presumed that each part was inserted for a purpose and has its office to perform. So, where two clauses are inconsistent, they should be construed so as to give effect to the intention of the parties as gathered from the whole instrument. So every word will, if possible, be made to operate, if by law it may, according to the intention of the parties."

These cases and the principle upon which they rest were again stated with approval in a decision at the present term by Associate Justice Allen, in *Hendricks v. Furniture Co.*, 72 S. E. 592.

[1, 2] While the rules of interpretation insisted on by defendants' counsel are correct as general proposition, and the authorities cited in his learned argument are apt to support them in proper cases, they are subordinated to the general principle recognized in the decisions cited, and, correctly applying the same to the contract in question, there is no such conflict in the last clause of the agreement as requires or permits that it be rejected as meaningless. But, on perusal of the entire instrument, we think it clear: That the oil was to be delivered at the tank of defendant company at Charlotte, N. C. That title did not pass and no charge for the oil could be made till such delivery, but at the price agreed upon, 5¼ cents per gallon, the party of the first part was not willing to stand for delays in shipment on the part of the railroad company, and in that view the final clause was inserted, "Liability of first part ceases when shipment is delivered to railroad company." This construction gives reasonable significance to all parts of the contract, harmonizes the different clauses, and is in accord with the rules of interpretation which we have approved and hold to be controlling on the facts presented.

There is no error, and the judgment below is affirmed.

No error.

(157 N. C. 565)

#### CULVER v. JENNINGS.

(Supreme Court of North Carolina. Dec. 6, 1911.)

#### 1. APPEAL AND ERROR (§ 1022\*)—FINDINGS OF FACT—CONCLUSIVENESS.

A referee's findings of fact, supported by evidence, which are approved and adopted by the superior court, are conclusive on appeal therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.\*]

#### 2. COVENANTS (§ 132\*)—WARRANTY OF TITLE—DAMAGES FOR BREACH.

A warrantor of title is chargeable with costs and attorney's fees incurred by the purchaser of his land in an action in which the title to a portion of the land sold was lost and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the pendency of which such warrantor was notified.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 260-262; Dec. Dig. § 182.\*]

Appeal from Superior Court, Watauga County; Long, Judge.

Action by S. W. Culver against R. D. Jennings. From a judgment for defendant on report of referee, plaintiff appeals. Affirmed.

The reference was by consent. Exceptions were filed by plaintiff. His honor overruled all the exceptions, and affirmed and approved the findings of fact and rendered judgment against the defendant for \$70.78 and adjudged that to be a lien on the land described in pleading and also gave judgment against defendant for the additional sum of \$10.05 due on open account.

T. L. Lowe and T. A. Love, for appellant.  
L. D. Lowe, for appellee.

PER CURIAM. [1] All the exceptions to the referee's report except one are to his findings of fact. As such findings upon examination were approved and adopted by the judge of the superior court, and as there is some evidence to support them, the action of his honor will not be reviewed by this court.

[2] The only exception to any conclusion of law which we find in the record presents the question as to whether the plaintiff is chargeable with costs and attorney's fees as damages for the breach of warranty of title to land set up in his counterclaim.

This is expressly decided in *Wiggins v. Pender*, 132 N. C. 628, 44 S. E. 362, 61 L. R. A. 772; *Jones v. Balsley*, 154 N. C. 61, 69 S. E. 827.

Affirmed.

(157 N. C. 231)

#### PHIFER v. PHIFER et al.

(Supreme Court of North Carolina. Nov. 27, 1911.)

#### 1. DOWER (§ 14\*)—NATURE OF HUSBAND'S ESTATE—SEISIN.

Testatrix devised all her property to trustees, directing them to sell the same and after the payment of specified debts of decedent divide the proceeds equally among her five children. Held, that the trust was an active one, and the title to the property, including the real estate, remained in the trustees until the trusts were performed, and, prior to an exercise of the power of sale or a payment of the debts, a son of testatrix had no seisin in the real property of the estate which would support a claim of dower by his widow.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 45-56; Dec. Dig. § 14.\*]

#### 2. DOWER (§ 14\*)—TITLE OF HUSBAND—EQUITABLE ESTATE.

An equitable estate in the husband will not support dower in the absence of a seisin in the husband in law, conferring on him not only actual constructive possession, but the legal right to possess.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 45-56; Dec. Dig. § 14.\*]

#### 3. CONVERSION (§ 15\*)—PROVISIONS OF WILL—SALE OF LAND.

Where it was the intention of testatrix that her real estate should be sold by trustees and the proceeds divided among her children, the interest of the children in the estate is personality and not realty.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. §§ 28-37, 52; Dec. Dig. § 15.\*]

#### 4. DOWER (§ 78\*)—ESTATE OF HUSBAND—PETITION FOR ALLOTMENT.

Testatrix, possessing an estate valued at \$10,000, devised and bequeathed the same to trustees, with directions to sell the realty, and after the payment of certain debts to divide the proceeds equally among her five children. The will further provided that advancements made to the children should be deducted from their shares, and recited that her son R. had received by way of advancement the sum of \$2,000. Held, that a petition by the widow of R., filed before a sale of the property by the trustees, praying for an allotment of dower, but which failed to allege that there was anything, over and above the advancement, to which R. would have been entitled, was demurrable.

[Ed. Note.—For other cases, see *Dower*, Dec. Dig. § 78.\*]

Appeal from Superior Court, Mecklenburg County; W. J. Adams, Judge.

Action by Mrs. Belle McGhee Phifer against W. W. Phifer and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This is a proceeding for the allotment of dower; the petitioner claiming as the widow of R. S. Phifer, who was one of seven children of M. M. Phifer. The petitioner claims that her husband was seised of an estate of inheritance, legal or equitable, under the will of his mother, and her counsel says, in his brief, that her right depends on the construction of said will, and of two papers executed by the said R. S. Phifer, which are as follows:

"I, Mary Martha Phifer, wife of William F. Phifer, being the equitable owner of certain real estates acquired by me by virtue of a contract of purchase thereof Jos. H. Wilson, for which I hold his contracts in writing for the purchase of said property, which contracts are now in my possession, and upon which contracts of purchase a part of the purchase money has been paid and a part thereof is still owing to said Wilson, and being desirous of making disposition of my estate therein by last will and testament, do hereby make, publish and declare this instrument of writing to be and contain my last will and testament, hereby revoking and declaring void all wills and writings in the nature of a will heretofore made by me, as explanatory of my will hereinafter contained, I declare that I have received an estate under the last will and testament of my father, W. E. White, deceased, of the value of \$10,000.00, which estate by virtue of said will (which is on file in the office of the judge of probate of said county), was bequeathed to me for my sole, separate and exclusive use during the term of my life,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and at my death to be equally divided among my children, as will more fully appear by reference to said will. And whereas I have heretofore advanced to my sons, William W. Phifer and Robert S. Phifer, respectively, of said trust fund the following sums, to wit: To said William W. Phifer thirteen hundred (\$1,300) dollars, and to said Robert S. Phifer, two thousand (\$2,000) dollars, and, whereas, my remaining five children, to wit: George M., Maie W., Cordelia W., Josephine H. and Edward W. have received nothing from said source, and whereas, I have invested six thousand three hundred dollars of said trust estate, in part payment of the property purchased by me from Jos. H. Wilson, leaving four hundred dollars of said trust estate which is now in my hands invested in Rutherford county bonds. Now in view of the premises, I will and devise all my estate to my husband, William F. Phifer, and to my son, William W. Phifer, in trust for the purposes hereinafter declared, with power to sell said property, or any portion thereof, either at public or private sale, as in their discretion may seem most judicious, and the proceeds arising therefrom they shall apply:

"(1) To the payment of the residue of the purchase money due upon the purchase of said property.

"(2) To the payment of any debt I may owe.

"(3) The residue of my estate, I direct to be divided among all my children above named, subject nevertheless, to a charge in said division against my sons William W. Phifer of \$1,300 and a charge of \$2,000 against my son Robert S. Phifer, which said sums were advanced to them respectively out of the trust fund received by me from my deceased father; the whole of said residuary estate to be further subject to a charge for the support and maintenance of my husband, William F. Phifer, for and during his life.

"(4) I hereby constitute and appoint my husband, William F. Phifer, and my son, William W. Phifer, executors of this, my last will and testament.

"In witness whereof I have hereunto set my hand and seal the 11th day of August, 1875.

"M. M. Phifer. [Seal.]

"Witnesses: George E. Wilson. S. J. White.

"This indenture this day made between Robert S. Phifer of the county and state aforesaid, party of the first part, and George M. Phifer, of the county of Mecklenburg, state of North Carolina, party of the second part, witnesseth: That the party of the first part for and in consideration of the sum of four thousand (\$4,000.00) dollars heretofore paid him by Mrs. M. M. Phifer, and for the further consideration of one (\$1.00) dollar to him in hand paid, by the party of the second part, the receipt whereof is hereby acknowledged, has this day bargained and sold, aliened and conveyed and does by these

presents bargain and sell, alien and convey, remise and release unto the said party of the second part, all his right, title and interest, legal and equitable, in and to that certain tracts and parcels of land lying in the county and state aforesaid and described as follows:

"Lying on the eastern limits of the city of Charlotte and adjoining the lands of M. M. Orr, Baxter Moore, Hugh Grey, G. D. Parks, W. W. Phifer and the lands of the First National Bank, containing about one hundred (100) acres more or less. Also one other tract adjoining the lands of W. W. Phifer, Dr. M. M. Orr, Robert Gibbon, Mrs. Allen William McCarley, James Davis, George Dougherty, Mrs. C. Kyle, W. R. Burwell, and others, containing about one hundred and seventy (170) acres more or less, and being the tract formerly owned by W. F. Phifer and purchased by Joseph H. Wilson at sheriff's sale and by him conveyed to Mrs. M. M. Phifer.

"To have to hold to him the same party of the second part, his heirs and assigns forever, and the said party of the first part for and in consideration aforesaid does hereby assign and convey to the party of the second part, his heirs, executors and administrators all his right, title and interest in the money, property or estate bequeathed or devised to him by the will of his grandfather, William E. White, and in any property or funds in which said bequeathed money may have been invested upon the condition, nevertheless, that the said party of the second part shall hold the above property by this indenture conveyed in trust for Mary W. Phifer, Cordelia W. Phifer, Josephine H. Durant, George M. Phifer, Edward W. Phifer, and W. M. Phifer. The last named party will be charged in the distribution with the sum of \$1,300.00 so expressed and provided in the will of Mrs. M. M. Phifer.

"In testimony whereof, the party of the second part has hereunto set his hand and affixed his seal this the 17th day of February, 1881.

"Robert S. Phifer. [Seal.]"

"Whereas, my mother, Mrs. Mary Martha Phifer, received from the estate of her late father, Wm. E. White, as estate in the sum of about ten thousand dollars, which said estate was limited by the last will and testament of the said Wm. E. White to her for sole and separate use during her life, and at her death to be distributed equally among her children, which said will has been duly admitted to probate in Mecklenburg county,

"And whereas, my said mother has already advanced to me out of said estate so received by her the sum of about ——— dollars, which said sum so received by me and advanced by her, is far in excess of the amount to which I am entitled under said will and testament after the life estate of my mother is terminated,

"Now for and in consideration of the premises and for the further consideration of the

sum of ten dollars to me in hand paid, by the other children of my said mother, the receipt whereof is hereby acknowledged, I have renounced and released, and do hereby renounce and release all my right, interest, title and estate, in and to the estate thus bequeathed to me by the last will and testament of the said Wm. E. White, which, said estate was to come into possession after the death of my said mother.

"And I do hereby assign, transfer and set over all my right, title, interest and estate in and to the same, to my brothers, William W., George W., Edward White, and to my sisters, Mary W., Cordelia W., and Josephine H., to be divided among them equally, and in the event of the death of either or any of them, then the share of the one deceased to survive to the others.

"In testimony whereof I have hereunto set my hand and seal this the 14th day of February, 1879.

"[Signed] Robert S. Phifer. [Seal.]"

There is no allegation in the petition as to what has been done under said will, or that the trusts have been closed, or as to the value of the property bequeathed or devised, or that there is any surplus after paying the residue of the purchase price of the property referred to in the will, and the debts of the testatrix, and accounting for the charge of \$2,000 against R. S. Phifer. The defendants demurred to the petition, which was sustained, and the petitioner excepted and appealed.

W. F. Harding, for appellant. Burwell & Cansler, Tillett & Guthrie, Cameron Morrison, and Maxwell & Keerans, for appellees.

ALLEN, J. There is no error in the judgment sustaining the demurrer.

[1] If it is assumed that an equitable estate and not a mere right vested in R. S. Phifer under the will of his mother, and that his interest therein was realty, it was, in any event, subject to certain trusts and charges, and neither he nor his widow could have an estate in possession until these trusts and charges were satisfied.

There were seven children of M. M. Phifer, and it clearly appears from her will that, after the payment of certain debts, she desired an equal division among her children, and that R. S. Phifer should have nothing in such division until he had accounted for \$2,000 advanced to him.

He had, therefore, no interest in the land, nor in the proceeds of its sale, unless after the payment of the debts mentioned in the will, and providing for the support and maintenance of the husband of the testatrix, there was a surplus fund of at least \$14,000, being \$2,000 to each of the seven children, and there is nothing in the petition suggesting that this condition exists. On the contrary, the deed to his mother in 1879, and to his brothers and sisters in 1881, and the fact that thereafter he made no further claim for

a period of 30 years, indicate that he had been advanced beyond his proportionate share under the will.

Nor is there any allegation in the petition that any part of the trusts declared in the will have been executed, and that parts of the land remain unsold, or that it was unnecessary to sell to perform the trusts. If, however, these allegations were made, we would be inclined to adopt the construction of the will contended for by the defendants, and, if so, the relief prayed for would be denied.

An analysis of the will of Mrs. M. M. Phifer shows:

(1) That she received, under the will of her father, William E. White, a trust fund of the value of \$10,000, and by the terms thereof she had the use of same during her life, and at her death said fund was to be equally divided among her children.

(2) That out of said fund she advanced to her son Robert S. Phifer, the husband of the petitioner, \$2,000; that she invested \$6,300 of said trust estate in part payment of the lands devised in her will; that she held certain contracts for the purchase of the lands devised, and at her death all the purchase money had not been paid.

(3) That she bequeathed and devised her estate, both real and personal, to her husband, William F. Phifer, and to her son William W. Phifer, in trust, with power to sell said property or any portion thereof, either at public or private sale, as in their discretion might seem most judicious, and directed that they should apply the proceeds therefrom as follows: (a) to the payment of the residue of the purchase money due upon the purchase of said property; (b) to the payment of her debts; (c) the residue of her estate to be divided among all her children named in the will, subject to a charge in said division against her sons, William W. Phifer of \$1,300 and R. S. Phifer of \$2,000, advanced to them, respectively, out of the said trust fund of \$10,000 which she received from her father's estate, as set forth in her will; (d) she further provided that the whole of her residuary estate was subject to a charge for the support and maintenance of her husband, William F. Phifer, for and during his life.

The estate of the testatrix is devised to her husband and son in trust for certain purposes, and the purposes are declared. This created an active trust, and the title remained in the trustees until the trusts were performed. The children of the testatrix had an interest in the property, but they were not entitled to possession of any part of it, and could not know what they would get until the trusts were closed. If so, it may well be contended that they had no estate, but a mere right to have the trusts executed, and an account stated, and in that event there would be no seisin in the husband. *Thompson v. Thompson*, 46 N. C. 431.

[2] It is true that a widow may be endowed of an equitable estate, but the husband must be seised of an estate, whether legal or equitable.

"The seisin of the husband, in order to support the dower, must be seisin in law; not only actual constructive possession, but the legal right to possess." *Haire v. Haire*, 141 N. C. 88-90, 53 S. E. 340, 341.

"The right to dower does not attach to the lands of the husband unless he was seised during coverture, and the husband must have an estate of inheritance. The word 'seisin' is said to have a technical meaning when used in this connection, and at common law it imported a feudal investiture of title by actual possession, and with us it is the force of possession under some title or right to hold the same; it is either a seisin in deed or a seisin in law, the former being actual possession of a freehold estate, and the latter the right to the immediate possession or enjoyment of a freehold estate. Seisin applies only to freehold estates or to the possession of land of a freehold tenure. Seisin in fact and in deed has also been defined to be possession with intent on the part of him who holds it to claim a freehold interest, and seisin in law as the right of immediate possession according to the nature of the estate." *Redding v. Vogt*, 140 N. C. 566, 53 S. E. 338.

It is also not unreasonable to conclude from an inspection of the whole will that it was the purpose of the testatrix that all of her estate should be sold and the proceeds divided.

[3] If this was her intention—to have the real estate sold and converted into personalty—the interest of the children in the estate would be personal property. *Benbow v. Moore*, 114 N. C. 269, 19 S. E. 156.

[4] The testatrix received, under her father's will, \$10,000, which belonged to her children at her death, and she had advanced to the husband of the petitioner more than his share of the fund.

She had invested \$6,300 of this fund in land, and owed a part of the purchase money, and she knew that she must account to the five children, who had received nothing.

Under these facts appearing on the face of the will, and knowing that the children could follow the trust fund in the land, she devises the land to her executors in trust to sell, and, after the payment of certain claims, to divide the proceeds among her children.

If this construction is permissible, the case of *Patton v. Patton*, 60 N. C. 574, 86 Am. Dec. 448, is an authority against the petitioner.

The language used in providing for the support of her husband seems to support this view. If she did not intend for the land to be sold and the proceeds divided,

why did she not give him a life estate in the land?

If either of these contentions can be maintained, there was no seisin in the husband, and the petitioner would not be entitled to dower; but we refrain from passing on them finally in the condition of the pleadings.

Affirmed.

(157 N. C. 566)

JOHN CHURCH CO. v. DAWSON et al.  
(Supreme Court of North Carolina. Dec. 6, 1911.)

1. APPEAL AND ERROR (§ 1022\*)—REVIEW—QUESTIONS OF FACT—FINDINGS BY COURT.

The trial court's findings of fact on the hearing of exceptions to the report of a referee, being supported by sufficient evidence, are binding on the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.\*]

2. APPEAL AND ERROR (§§ 275, 719\*)—PRESENTATION OF QUESTIONS IN LOWER COURT—RULINGS ON REPORT OF REFEREE.

The Supreme Court will not review exceptions of law to a referee's report, unless they are passed upon by the judge and his rulings are especially assigned as errors in the transcript of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §§ 275, 719.\*]

3. APPEAL AND ERROR (§ 959\*)—REVIEW—DISCRETION OF COURT.

Permission to defendants to file an amended answer setting up a counterclaim, being within the discretion of the trial court, is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.\*]

4. JURY (§ 28\*)—RIGHT TO TRIAL BY JURY—WAIVER.

Though, on exceptions to the report of a referee on a compulsory reference, the plaintiff was entitled to a jury trial of the issues of fact raised by the exceptions, plaintiff abandoned that right when a jury trial was waived in open court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 176-196; Dec. Dig. § 28.\*]

5. APPEAL AND ERROR (§ 733\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error that the court on the hearing on the referee's report signed the judgment as set out in the record presents no question of law for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025-3027; Dec. Dig. § 733.\*]

Appeal from Superior Court, Beaufort County; O. H. Allen, Judge.

Action by the John Church Company against E. L. Dawson and another, trading as E. L. Dawson & Company. From a judgment for defendants, plaintiff appeals. Affirmed.

The original reference was compulsory as to plaintiff; but on the hearing before the superior court a trial by jury was waived,

and by consent the judge passed upon the exceptions to the findings of fact by referee as well as upon his conclusions of law. His honor adopted all the findings of fact of the referee except in respect to the fourth and eleventh findings. In these the court made some changes in the figures and amounts as stated by the referee. His honor overruled all other exceptions to findings of fact. His honor affirmed the third, fourth, and fifth conclusions of law of the referee and modified the first and second conclusions of law. The court rendered judgment against plaintiff in favor of the defendants for \$1,144.96 and costs. The plaintiff appealed.

Wiley C. Rodman, for appellant. Small, MacLean & McMullan and Ward & Grimes, for appellees.

**PER CURIAM.** We have examined this record with care and find that the controversy involves a statement of account between plaintiff and its former agents in regard to the sale of pianos.

[1] The controversy is one over facts almost exclusively, and his honor's findings of fact are binding upon us; there being sufficient evidence to support them. The conclusions of law necessarily follow from the facts as found.

[2] There are six assignments of error set out at end of case on appeal. This court does not review exceptions of law to a referee's report unless they are passed upon by the judge and unless the judge's rulings are especially assigned as errors in the transcript of appeal sent to this court.

[3] 1. The defendants were allowed to file an amended answer setting up a counterclaim. This was a matter within the discretion of the court and is not reviewable. The counterclaim is a proper one because it not only grew out of and related to the dealings in pianos between plaintiff and defendants, but it arises out of contract also. Rev. 1905, § 481, subd. 2.

[4] 2. The court ordered a compulsory reference. This would have entitled plaintiff to a jury trial of the issues of fact raised by exceptions to the report, but it was plaintiff's duty to tender the issues arising and attach them to his exceptions to the report, but plaintiff abandoned that right when in open court a jury trial was waived.

Assignments of error Nos. 3, 4, and 5 relate to evidence, which we think was properly admitted, and that it is useless to discuss.

[5] The sixth assignment of error is in these words: "The court, on the hearing upon the referee's report, signed the judgment as set out in the record."

This is a broadside exception to the judgment and presents no question of law for our review.

The judgment is affirmed.

(157 N. C. 170)

# WELLMAN v. HORN.

(Supreme Court of North Carolina. Nov. 22, 1911.)

## 1. FRAUDS, STATUTE OF (§ 116\*)—MEMORANDUM—SUFFICIENCY—"SIGNED."

Under the statute of frauds (Revisal 1905, § 979), requiring contracts to convey, etc., to be evidenced in writing and signed by the party to be charged therewith, or by some one authorized by him, a contract need not be subscribed, and a memorandum reduced to writing by a third person under authority of the parties thereto reading, "\$5,000 Jan. 2, 1911, \$5,000 Jan. 2, 1912. J. A. Horn to pay the above to E. A. Wellman, when he makes deed to Horn for Wellman's home place 3 Oct. 1910," is sufficient to charge Horn as purchaser.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 251-260; Dec. Dig. § 116.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6508-6512.]

## 2. FRAUDS, STATUTE OF (§ 116\*)—SIGNATURE OF MEMORANDUM—SUFFICIENCY.

Authority to sign the name of one to be charged by a contract within the statute of frauds (Revisal 1905, § 979) need not be in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 251-260; Dec. Dig. § 116.\*]

Appeal from Superior Court, Cleveland County; Adams, Judge.

Action by E. A. Wellman against J. A. Horn. Judgment for plaintiff, and defendant appeals. Affirmed.

O. Max Gardner and O. F. Mason, for appellant. Ryburn & Hoey and Burwell & Cansler, for appellee.

CLARK, C. J. [1, 2] This was an action for the specific performance of a contract to convey land, and to recover the balance of the purchase price. On October 3, 1910, the plaintiff contracted orally to sell his home place to the defendant for \$10,000, one half payable January 2, 1911, and the other January 2, 1912. It was in evidence that soon afterwards the parties by agreement went to the First National Bank to get C. C. Blanton to witness the trade, and the defendant stated to Blanton in plaintiff's presence that he had bought plaintiff's home place for \$10,000, and wanted Blanton to witness the trade, and wanted to make a payment to bind the trade, and suggested \$50, but, upon the plaintiff objecting, the defendant then and there gave his note for \$500 due January 2, 1911, to bind the trade. Blanton wrote the note, which defendant signed, and it was also witnessed by Blanton. It was also in evidence that thereupon the defendant asked the plaintiff for something to bind him; that the plaintiff gave a receipt for the \$500 note, Blanton writing and witnessing it, and that, after the receipt was given, the defendant said: "Now, we had better call over the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

amount to be paid, and when it is to be paid"; and said, "I am to pay the remaining part of \$5,000 outside of this note on January 2, 1911, and I am to pay Wellman the remaining \$5,000 on January 2, 1912."

It was further in evidence "that Blanton drew a bank deposit slip near him and wrote down what defendant said, as he stated it, the defendant standing on the right of Blanton and the plaintiff on the left, where both could see what he was doing, that, after Blanton wrote the memorandum, he said, 'Boys, let's see if we understand this trade.' Then Blanton read over the following memorandum, which both parties agreed was correct: "\$5,000 Jan. 2, 1911, \$5,000 Jan. 2, 1912. J. A. Horn to pay the above to E. A. Wellman, when he makes deed to Horn for Wellman's home place 3 Oct. 1910."

There was evidence in corroboration and evidence contradictory of the above. The judge recited the above and the other evidence, and told the jury that if they should find that Blanton in the presence of the defendant wrote the memorandum at the request of the defendant embracing therein the terms of the contract, and thereafter read it to the parties, and that the defendant then agreed that the memorandum was a correct statement of the contract, they would find that Blanton was lawfully authorized by the defendant to make the memorandum, and would answer the first issue, "Yes"; and, unless they so found, to answer the first issue, "No." The jury responded, "Yes."

The statute of frauds was pleaded, but this memorandum complies with that statute because as the jury find the facts there was sufficient signing. The memorandum embraced all the essential elements of the contract, it was sufficiently definite, and contained all the terms of the agreement. Under the statute of frauds it is not necessary that the contract should be subscribed. It is sufficient if it is signed by the parties to be charged, or by some one duly authorized by him. If the name "J. A. Horn" in the memorandum had been signed by the defendant, it would have been sufficient. It is equally sufficient if "J. A. Horn" was written therein by some one authorized by him. It is not necessary that such authority should be in writing. There was evidence that Blanton wrote the memorandum, including the name "J. A. Horn," in his presence, and by his authority, and that the defendant could see him while he was writing. The defendant subsequently, on October 5th, wrote the plaintiff a letter in which he said, "I would like to git out of our land trade if it would suit you. I can not rent my plase so it will pay," and went on to give other reasons why he wished to be released. The jury found all the other issues also in favor of the plaintiff, to wit,

that the plaintiff had tendered a good and sufficient deed which the defendant refused to accept, and that plaintiff had not made any fraudulent representations in regard to the matter. The case was fully argued below and here. But the above presents the real point in controversy, and we find no error in the record of the trial below. The statute of frauds (Rev. § 978) provides: "All contracts to sell or convey any lands \* \* \* shall be void unless the *said contract* or some memorandum or note thereof be put in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized."

Speaking for myself only, the statute does not require the agreement to pay the purchase money to be in writing, but only the contract "to sell or convey land." The decisions on this point have been conflicting, and are fully stated on both sides in *Brown v. Hobbs*, 154 N. C. 546, and 547-556, 70 S. E. 906, in the two concurring opinions therein set out. The point is not made in this case, and for the purpose of this decision the case has been tried and decided both below and in this court as if it were conceded by the plaintiff that the contract of the defendant to pay the purchase money was required to be in writing. The oral contract to pay the purchase money is not controverted, nor the sufficiency of the description "the Wellman Home Place."

No error.

(158 N. C. 65)

EDDLEMAN et al. v. LENTZ et ux.

(Supreme Court of North Carolina. Nov. 27, 1911.)

1. PLEADING (§ 48\*) — COMPLAINT — SUFFICIENCY.

The Code, requiring pleadings to be construed favorably to the pleader to effectuate his main purpose, and providing that a cause of action shall be plainly and concisely stated, does not permit a pleader to disregard the rule requiring pleadings to be so drawn as to present clearly the issues in the case; and the facts going to make up a cause of action must be stated as concisely as is consistent with accuracy, and no material allegation may be omitted.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 48.\*]

2. PLEADING (§ 406\*)—COMPLAINT—DEFECTS—WAIVER.

A defect in a complaint which may be cured by an amendment is waived by answer to the merits, and a demurrer *ore tenus* comes too late.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1374; Dec. Dig. § 406.\*]

3. PLEADING (§ 406\*)—COMPLAINT—DEFECTS—WAIVER.

A defect in the complaint to set aside a conveyance as fraudulent against creditors of the grantor, which alleges the failure of the grantor to pay a note signed by him and sureties, and the recovery of judgment thereon, and the assignment of the judgment to a trustee for the sureties, etc., arising from a failure to allege that the sureties had paid the judgment,

is waived by answer to the merits; but before final judgment the complaint should be amended so as to allege that fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1365; Dec. Dig. § 406.\*]

**4. PARTIES (§ 6\*) — SURETIES OF FRAUDULENT GRANTOR.**

Where a principal debtor conveyed his property in fraud of his sureties, the sureties were the real parties in interest, in an action to set aside the conveyance, brought after judgment against the sureties and the principal debtor, though the judgment creditor had assigned the judgment to a trustee for the sureties, notwithstanding Revisal 1905, § 404, authorizing an action by a trustee of an express trust.

[Ed. Note.—For other cases, see Parties, Dec. Dig. § 6.\*]

**5. FRAUDULENT CONVEYANCES (§ 218\*) — RIGHT TO SUE.**

That a creditor, obtaining a judgment against the principal debtor and his sureties, assigned the judgment to a surety as trustee for the benefit of the sureties did not prevent the sureties from suing to set aside a conveyance by the principal debtor as fraudulent as to creditors, on the theory that the sureties had satisfied the judgment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 643-650; Dec. Dig. § 218.\*]

**6. FRAUDULENT CONVEYANCES (§ 218\*) — RIGHT TO SUE.**

A surety may sue on an implied promise of his principal to reimburse him for money paid on a judgment rendered against the principal and surety; and a fresh judgment against the principal is not necessary to enable the surety to maintain an action to set aside a conveyance by the principal as fraudulent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 643-650; Dec. Dig. § 218.\*]

**7. FRAUDULENT CONVEYANCES (§ 298\*) — FRAUDULENT INTENT OF GRANTOR — EVIDENCE—SUFFICIENCY.**

In a suit to set aside a conveyance by a debtor to his wife as fraudulent as to creditors, evidence held to show the fraudulent intent of the grantor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 892-895; Dec. Dig. § 298.\*]

**8. EVIDENCE (§§ 230, 265\*)—ADMISSIBILITY.**

In a suit to set aside a conveyance by a debtor to his wife as fraudulent as to creditors, a declaration, made by the debtor in the absence of the wife, disclosing a dishonest purpose to convey his property, so that it could not be reached by his creditors, was competent as to the debtor's intent, but was not binding on the wife, unless she participated in the fraud, or accepted the conveyance with knowledge thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-851, 1029-1050; Dec. Dig. §§ 230, 265.\*]

**9. FRAUDULENT CONVEYANCES (§ 301\*) — FRAUDULENT INTENT OF GRANTEE — EVIDENCE—SUFFICIENCY.**

In a suit to set aside a conveyance by a debtor to his wife as fraudulent as to creditors, evidence held to justify a finding that the wife participated in the debtor's fraud, justifying relief.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 904-907; Dec. Dig. § 301.\*]

**10. FRAUDULENT CONVEYANCES (§ 277\*) — HUSBAND AND WIFE—PRE-EXISTING CREDITORS—BURDEN OF PROOF.**

Where an insolvent debtor conveyed property to his wife, the wife, in a suit by a pre-existing creditor to set aside the deed for fraud, has the burden of showing that a consideration actually passed in the shape of money paid, something of value delivered, or the discharge of a debt due from the husband to her; and when she offers testimony sufficient to satisfy the jury that the deed was founded on a valuable consideration the burden shifts to the creditors to show the fraud alleged as ground for relief.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 809-814; Dec. Dig. § 277.\*]

**11. WITNESSES (§ 37\*) — FACTS WITHIN KNOWLEDGE OF WITNESS.**

The cashier and receiving teller of a bank may testify that a judgment in favor of the bank has been paid by the sureties of the principal debtor.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.\*]

**12. FRAUDULENT CONVEYANCES (§ 289\*)—EVIDENCE—ADMISSIBILITY.**

In a suit to set aside a conveyance of real estate as fraudulent as to creditors of the grantor, evidence of a bill of sale, executed by the grantor to a third person at the time of the execution of the deed, was admissible to show a fraudulent purpose to defeat creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 838-848; Dec. Dig. § 289.\*]

Appeal from Superior Court, Rowan County; Lyon, Judge.

Action by J. M. Eddleman and another against H. C. Lentz and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

This action was brought to set aside certain conveyances of real estate, executed by the insolvent defendant, H. C. Lentz, to his wife, Mary A. Lentz, on the ground that they were made in fraud of creditors. On May 7, 1904, defendant H. C. Lentz, as principal, with H. T. Graeber, J. L. Rendleman, J. M. Eddleman, W. G. Patterson, J. C. Lingle, F. E. Corriber, J. L. Holshouser, and G. A. Ramseur, as sureties, executed a note to the Davis & Wiley Bank of Salisbury, N. C., in the sum of \$2,000, for value received. H. C. Lentz failing to pay said note, action was commenced by the bank, summons served February 2, 1907, and judgment rendered in favor of the bank against Lentz and his sureties at May term, 1907, of Rowan superior court. Execution was issued July 6, 1907, against H. C. Lentz and returned nulla bona. On November 6, 1909, the bank, for value and without recourse, assigned said judgment, on the record, to one J. M. Eddleman, as trustee for the sureties, who had paid the indebtedness. Defendant H. C. Lentz, having also been sued by the First National Bank of Salisbury, January 31, 1907, on a note for \$5,000, upon which judgment was obtained, executed the deeds for all his real estate to his wife, the feme defendant, Mary A. Lentz,



dated February 2, 1907, and on the same day executed a bill of sale to one Fesperman for a certain stock of goods, including all his personal property. The deeds to Mary A. Lentz and the bill of sale to Fesperman were recorded the day of their execution. The wife, Mary A. Lentz, grantee, had no separate estate, and no money or property of any kind, except what her husband, defendant H. C. Lentz, gave her, and when the deeds were made to her, she knew of the existence of the note to the bank, and that it had not been paid. The \$1,229 note alleged to have been executed to her by her husband, which was a part of the consideration for the deeds, was given for stock in the J. A. Rose Company, which her husband had theretofore bought and paid for, and the certificate of stock was made to her without consideration. The \$1,000 mortgage, which it is alleged she assumed, and upon which it is alleged she paid \$750, the proceeds from the sale of a house and lot in China Grove, was a valid incumbrance, but the \$750 was indirectly paid by the husband, H. C. Lentz, who had bought and paid for the house and lot at China Grove, and had the title made to her, without consideration.

The jury returned the following verdict:

"(1) Did the defendant H. C. Lentz execute and deliver the deeds mentioned in the complaint with intent to hinder, delay, and defraud his creditors, as alleged in the complaint? Answer: Yes.

"(2) If so, did the defendant Mrs. Mary A. Lentz have knowledge of and participate in such fraudulent intent? Answer: Yes."

There was no objection to the issues by either party. Judgment, declaring the deeds void, was entered upon the verdict, and defendants appealed.

Jerome & Price and T. F. Hudson, for appellants. F. T. Kluttz & Son and John L. Rendleman, for appellees.

WALKER, J. [1] The defendants demurred *ore tenus* to the complaint, upon the ground that the complaint did not state a good cause of action; plaintiffs having failed to allege therein that the judgment against H. C. Lentz and his sureties had been paid by the latter and assigned to a trustee for them. The pleading, it is true, was not drawn with that regard for technical precision and accuracy which even the liberal provisions of the Code required. It must not be supposed that because pleadings are now under the Code construed favorably to the pleader, to effectuate the main purpose of having cases tried upon their real merits, that it permits the pleader to disregard the ordinary and familiar rule requiring pleadings to be so drawn as to present clearly the issues in the case. The Code provides that the cause of action shall be plainly and concisely stated; but this does not mean that

essential fullness of statement shall be sacrificed to conciseness, but that all the facts going to make up the cause of action must be stated as plainly and concisely as is consistent with perfect accuracy, and that no material allegation should be omitted. *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874; *Banking & Trust Co. v. Duffy* (at this term) 156 N. C. —, 72 S. E. 96. Looseness in pleading and inadequacy of allegation are as much condemned by the present Code of Procedure as they were under the former strict and exacting system of the common law. It is form and fiction that have been abolished, but the essential principles of good pleading have been retained.

[2] The defendants' demurrer comes too late. They passed the defective pleading by themselves answering to the merits, and thereby waived the defect, which is not a fatal one, but can be cured by amendment. It is the defective statement of a good cause of action, and not the statement of a defective cause. When the defect appears in the cause of action itself, no amendment can cure it, for it has no existence in fact; it is otherwise where the defect is merely in the statement, for in such a case it can be removed by amendment, and the cause of action will thus be perfected. *Garrett v. Trotter*, 65 N. C. 430; *Warner v. Railroad*, 94 N. C. 251; *Johnson v. Finch*, 93 N. C. 205; *McElwee v. Blackwell*, 94 N. C. 261, and cases *supra*.

[3] While the complaint does not allege, as good pleading perhaps required, that the sureties had paid the judgment, it does state that the judgment had been assigned "for value and without recourse" to a trustee for the sureties, which subrogated them in law and equity to the rights of the creditor, or plaintiff in the judgment, to whom they had advanced the consideration, for the use and benefit of the debtor, H. C. Lentz, one of the defendants. In any view of the complaint and the proceedings below, the demurrer *ore tenus* was properly overruled; but before final judgment is entered in the case the complaint should be amended by inserting the omitted allegation as to the payment by the sureties.

[4] The sureties should also be made parties, as plaintiffs, in their own right, and not merely as beneficiaries under the assignment of the judgment to the trustee, as they are the real parties in interest, within the meaning of the Code; the trustee merely holding the naked legal title for them, and not being beneficially interested in the recovery. They are certainly proper parties, in a case like this one, notwithstanding *Revisal*, § 404, and it is best that they should be brought in by amendment, and joined as parties with the trustee.

[5, 6] It is contended by the defendants that the sureties satisfied the judgment by the payment; but this is not so, as it ap-

pears that it was assigned to a trustee for their benefit, if that was necessary, and the fact that he may be one of the sureties, which does not clearly appear, can make no difference, as he holds, at least, for the other sureties under the assignment, if, as to himself, the judgment is canceled by the payment of his share. Besides, the sureties can maintain the action upon the implied promise of their principal, H. C. Lentz, to reimburse them for the money paid on the judgment to his use; and a fresh judgment against him is not necessary for the purpose, as we have recently held in *Silk Co. v. Spinning Co.*, 154 N. C. 421, 70 S. E. 820. See, also, *Bank v. Harris*, 84 N. C. 206; *Mebane v. Layton*, 86 N. C. 574; *McLendon v. Commissioners*, 71 N. C. 38. As to the rights and remedies of sureties, under such circumstances, the following authorities may further be consulted: 27 Am. & Eng. Enc. (2d Ed.) 213; *Stearns on Suretyship*, 470, 474, 478; *Brandt on Suretyship & Guaranty* (3d Ed.) §§ 342, 343, and 346; *Leightbown v. McMyn*, L. R. 33 Ch. Div. 575; *Gerber v. Shrak*, 72 Ind. 553; *Neal v. Nash*, 23 Ohio St. 483; *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82; *Bragg v. Patterson*, 85 Ala. 233, 4 South. 716; *Harris v. Frank*, 29 Kan. 200. We do not see how the defendants are now interested in the question as to the sureties' rights under the judgment. The proceeds of the property fraudulently conveyed must be applied to the payment of H. C. Lentz's creditors, and the right of the sureties to the lien of the judgment is not at present involved.

[7, 8] Having disposed of these preliminary matters, we will now proceed to consider the remaining question as to the fraud. It seems to us, after carefully reading the evidence, that there is plenary proof of the intent in the mind of H. C. Lentz to defeat his creditors when he made the conveyances to his wife and Fesperman. He was utterly and hopelessly insolvent at the time. The circumstances, not disputed, tend to show his unlawful purpose to divest himself of his property, and put it away, so that it could not be reached by his creditors, who were justly entitled to have it applied to the payment of their debts. Not only this, but he declared his dishonest purpose to the witness J. L. Holshouser on the very eve of his impending financial disaster, telling him that he intended to save himself, and advising Holshouser to do the same. The feme defendant objected to this testimony, but it was competent, as to his intent, but not binding upon her, or affecting her interest in the property, unless she participated in the fraud, or accepted the deed with knowledge of it. As to H. C. Lentz, the proof discloses a bald and transparent fraud.

[8] Did she avail herself of it with such notice? This is really the only practical question in the case. It would seem that the fraud was so palpable—so visible to the

naked eye—if she had notice of the circumstances, which appears more than probable, that she could not have overlooked it, or misunderstood the true nature of the transaction. She knew that he was insolvent, or should have known it, which is the same in law; that her husband was heavily involved, and was transferring all he had to her without any adequate consideration, and upon the sole pretense of benefiting her, without any regard for the just rights of his creditors. She had paid nothing for the property, real or personal, that he had given her, but was really, and to all intents and purposes, a mere volunteer. Such a transaction should not be allowed to stand in the way of creditors so as to defeat their rights.

The presiding judge (Hon. C. C. Lyon) stated the case with unusual clearness and with impartiality, and most favorably for the defendant, in his charge to the jury, following closely the decisions of this court upon the subject, as we understand and interpret them. He instructed them substantially that, notwithstanding all the suspicious circumstances relied on to condemn the transfer of the property, if they found that the feme defendant paid value for the property, it would shift the burden to the plaintiffs, and require of them to prove that there was an actual intent on the part of H. C. Lentz to defraud; and, moreover, that the feme defendant either participated in the fraudulent alienation of her husband's property, or took the deeds from him with actual notice of his covinous purpose. He even told the jury that if, before her husband became insolvent, he had transferred to her the stock in the Rose Company it was a valid gift, and should be treated by them as her property in passing upon the question as to the consideration for the conveyances; she having testified that her husband had transferred the stock to her as a gift, and afterwards had bought it back, giving her his note for \$1,229 for it; and that this debt of his to her, and a previous mortgage on the land, which she assumed, constituted the consideration of the deed to her for the property. There was ample evidence that the feme defendant was fully cognizant of the wrongful intent of her husband in making the transfers to her. It was all done at a time when he was being hotly pursued by his creditors, and it had every appearance of an effort on his part to better prepare himself for the race he was running with his creditors "to save himself," and to outstrip them. No one could hardly fail to discover his motive.

[10] In order to sustain the charge of the court, it is only necessary that we should refer to what is said by Justice Avery, in the learned and valuable opinion he delivered for the court in *Peeler v. Peeler*, 109 N. C. 623, 14 S. E. 59, as follows: "Where an insolvent husband has conveyed land to his

wife, and a pre-existing creditor brings an action to impeach the deed for fraud, the onus is upon her to show that a consideration actually passed in the shape of money paid, something of value delivered, or the discharge of a debt due from the husband to her. *Brown v. Mitchell*, 102 N. C. 373, [9 S. E. 702, 11 Am. St. Rep. 748]; *Bump, Fraud*, Con. pp. 6, 318; *Stephenson v. Felton*, 106 N. C. 120 [11 S. E. 255]; *Osborne v. Wilkes*, 108 N. C. 668 [13 S. E. 235]; *Woodruff v. Bowles*, 104 N. C. 213 [10 S. E. 482]; *Bigelow on Frauds*, 136. To this extent she is required to assume a burden not placed upon other grantees. *Helms v. Green*, 105 N. C. 257 [11 S. E. 470, 18 Am. St. Rep. 893]. When she offers testimony sufficient to satisfy the jury of the existence, validity, and discharge of such previous debt by the conveyance, or shows in some other way that the deed was founded upon a valuable consideration, the burden shifts again, and rests upon the plaintiff to show, to the satisfaction of the jury, the fraud which he has alleged as the ground of the relief demanded. *Brown v. Mitchell*, supra; *McLeod v. Bullard*, 84 N. C. 515. But if, after turning the laboring oar over to the creditor, the jury are satisfied, upon a review of the testimony, that the husband executed the deed to her to hinder, delay, or defeat a creditor in the collection of his debt, and that she participated in his purpose, or knew of his intent at the time, though the consideration may have been a valid, pre-existing debt to her, it is their duty to find that the conveyance was made to defraud creditors. In the last clause of the statute (Code, § 1545, 13 Eliz. c. 5, § 2), it is provided that as against a person whose debt, etc., 'shall or might be in any wise disturbed, hindered, delayed or defrauded' by the covinous and fraudulent practices previously mentioned in the same section, viz., by conveyances executed 'with the purpose and intent to delay, hinder and defraud creditors,' such a conveyance shall be void." If there was the least departure by the learned trial judge from this statement of the law, it was decidedly in favor of the feme defendant, and therefore she cannot complain; but we think the law was given to the jury with perfect accuracy. *Redmond v. Chandley*, 119 N. C. 575, 28 S. E. 255; *Graeber v. Sides*, 151 N. C. 596, 66 S. E. 600; *Crockett v. Bray*, 151 N. C. 615, 66 S. E. 666.

Speaking for himself, and not in the least committing the court to his view, the writer of this opinion thinks that the law is not, and should not be, so favorable to the married woman as stated by this court in the cases cited. Our statute (Revisal, § 964) requires the purchaser of property, where the fraud of the vendor is shown, to take the burden and prove that he (or she) acquired

it for value, or upon good consideration, and without notice of the fraud. *Cox v. Wall*, 132 N. C. 734, 44 S. E. 635. Pell's Revisal, § 964, and notes. But this court seems to have made an exception to that statutory rule in the case of the wife taking a conveyance from her husband, though there would seem to be no real and convincing reason for it. The presumption, it seems, should be stronger against her than it is when the conveyance is made to one not so closely connected with the vendor, or sustaining such an intimate and confidential relation towards him; for in the case of husband and wife, with his strong influence over her, there is a greater temptation to commit fraud, and a better opportunity afforded for its consummation. The position of the feme defendant would not be improved, but made worse, should the law be thus declared. She would have to take all, instead of only a part, of the burden to rebut the presumption against her. But the law, as it now stands, is more favorable to her, as we have shown, and we follow the decisions. The jury have found the facts against the defendants upon evidence which fully warrants the verdict, and under instructions wholly free from error.

[11] It was competent to prove by O. D. Davis that the sureties had paid the judgment of the Davis & Wiley Bank against H. C. Lentz. He knew the facts, as its cashier and receiving teller, and why should he not be permitted to speak of it?

[12] The evidence as to the bill of sale to Fesperman was also competent, as showing a contemporary transaction, indicating the fraudulent purpose of Lentz and the preparation he was making at the time to put away his property, in order to defeat his creditors. It was but forging one of the links in the chain of circumstances going to establish the essential fact of intent. It can make no difference that the conveyance was made to a third party, for still it bears upon the issue as to the covinous purpose. *Brink v. Black*, 77 N. C. 59. The evidence as to a fraudulent intent usually is permitted to take a wide range, as it may be inferred from many circumstances, each one by itself being apparently of small importance, but together producing an absolute conviction.

The court might, in this case, have gone further than it did in the judgment, and ordered a sale of the land for the payment of the judgment debt evidenced by it; but there was no request for it to do so, and we merely refer to it for the purpose of calling attention to the advisability of deciding all controversies, relating to the same subject-matter, in one action, as contemplated by the Code.

No error.

(157 N. C. 373)

**SOUTHWEST NAT. BANK v. JUSTICE.**

(Supreme Court of North Carolina. Dec. 6, 1911.)

**1. COMPROMISE AND SETTLEMENT (§ 18\*)—ACCEPTANCE OF TENDER—EFFECT.**

Plaintiff's bank, holding a note against defendant for \$1,400, on which there was a credit of \$168, sent the same to the M. bank for collection. On presentation, defendant maker claimed that the note should only have been for \$500, and offered to pay \$432 as the balance due on that basis, deducting a credit of \$168, giving that amount to the cashier of the M. bank, to be tendered in full settlement of the note. The cashier, having entered the same as a credit, sent the amount of the payment and the note to plaintiff, accompanied by a letter, explaining defendant's claim, and stating that the \$432 was delivered to be tendered to plaintiff to cover the \$500 and interest, and that if plaintiff did not care to accept the remittance could be returned to the M. bank; that the drawers stated they would stand suit before making any further settlement. Plaintiff bank made no reply, and without returning the \$432 sued to recover the balance of \$1,400. *Held*, that the letter showed that the money was tendered in full settlement of the claim, and that plaintiff bank could not retain the same and still claim a balance due on the note.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 75-82; Dec. Dig. § 18.\*]

**2. PRINCIPAL AND AGENT (§ 171\*)—AUTHORITY—RATIFICATION OF ACTS—RETENTION OF BENEFITS.**

Where plaintiff bank sent a note to another bank for collection, and the latter received less than the face of the note, to be tendered plaintiff in full settlement, plaintiff could not accept and retain the money so paid to his agent, and repudiate the condition on which it was paid in full settlement of the claim.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 644-655; Dec. Dig. § 171.\*]

Appeal from Superior Court, Mitchell County; Biggs, Judge.

Action by Southwest National Bank against J. G. Justice to recover an alleged balance on a note for \$1,400. On the court's intimation that he would direct a verdict for defendant, plaintiff excepted, submitted to a nonsuit, and appealed. Affirmed.

S. J. Ervin, W. C. Newland, and Chas. E. Greene, for appellant. J. W. Ragland, for appellee.

HOKE, J. [1] Plaintiff bank, holding a note for \$1,400 on defendant, purporting to be due August 1, 1909, with interest from April 23, 1906, payable annually, and on which there was a credit of \$168, of date August 11, 1908, sent the same for collection to the Mitchell County Bank of Bakersville, N. C., about two weeks before same was due. At maturity the cashier of the latter bank presented same for payment, which was refused, and the note was duly protested and returned to plaintiff. Thereupon the note was again sent by plaintiff to the Mitchell County Bank for collection, was

again presented, when defendant claimed that the note should have been for only \$500, and not \$1,400, and offered to pay \$432 as the balance due on that basis, deducting the credit of \$168 by reason of the former payment, and gave that amount to the cashier, to be tendered in full settlement of the note. The cashier, having entered this as a credit on the note, sent the amount of the payment and this note to plaintiff, accompanied by the following letter: "Gentlemen: We are returning herewith P. M. Brown et al.'s note for 1,400 dollars and interest enclosed to us in your letter of August 5th and hand you herewith remittance of \$432.00 which we have collected and credited on the back of note. The drawers of this paper claim that the note should have been for \$500.00 instead of \$1,400.00 and the \$432.00, which they ask that we tender you is to cover the \$500.00 and interest for three years and four months, making \$600.00 less the \$68 credit which appears on the back of the note. If you do not care to accept enclosed remittance, you can return same to us. We would suggest the name of Mr. Charles E. Greene as being a reliable and capable attorney. Yours very truly, [Signed] E. C. Guy, Cashier. The drawers of the note tell me they will stand to be sued on the paper before making any further settlement." The plaintiff made no reply to this communication, and without returning or offering to return the \$432, claiming that same shall be considered only as a credit for that amount, instituted the present suit to recover the balance of the \$1,400. In our opinion this letter gave clear intimation to plaintiff that if the money was retained it was to be in settlement of the claim, and under our decisions further recovery may not be allowed. *Aydlett v. Brown*, 153 N. C. 334, 69 S. E. 243; *Armstrong v. Lonon*, 149 N. C. 434, 63 S. E. 101; *Cline & Welkie v. Kudsill*, 126 N. C. 523, 36 S. E. 36.

[2] And if there was doubt as to the meaning of the letter there can be none as to the fact that the money was turned over to the cashier of the Mitchell Bank as a tender in full settlement of the claim, and it is well established that a plaintiff cannot accept and hold onto the benefits of the transaction between the cashier and defendant, and repudiate the conditions attached to it. The general principle was applied in a suit at the present term—*Sprunt & Sons v. May*, 72 S. E. 821, citing, among other cases, *Corbett v. Clute*, 137 N. C. 546, 50 S. E. 216; *Harris v. Delamar*, 38 N. C. 219; *Manufacturing Co. v. Cotton & Long*, 126 Ky. 750, 104 S. W. 758, 12 L. R. A. (N. S.) 427. It is urged that plaintiff did not know the positive character of the tender when the letter was received, transmitting the payment, but he knows it now, and insists on retaining the money. The principle applicable is very well

stated in 30 Cyc. p. 1267, as follows: "It is a well-settled principle of ratification that the principal must ratify the whole of an agent's unauthorized act, or not at all, and cannot accept its beneficial results and repudiate its burdens. It follows that, as a general rule, if a principal, with full knowledge of all the material facts, takes and retains the benefits of the unauthorized act of his agent, he thereby ratifies such act, and with the benefits accepts the burdens resulting therefrom." *Railroad v. Railroad*, 147 N. C. 385, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550.

There is no error in the ruling of the court, and the judgment is affirmed.

Affirmed.

(90 S. C. 150)

GIBBES et al. v. CLEMENT.

(Supreme Court of South Carolina. Dec. 8, 1911.)

INJUNCTION (§ 35\*)—RIGHT TO RELIEF.

Plaintiffs were in possession and claimed certain real estate owned by their ancestor prior to his death, except for a conveyance thereof, absolute in form, to defendant. Plaintiffs sued to set aside the deed. On an application to dissolve a temporary injunction, restraining defendant from ejecting plaintiffs from the land, defendant denied the fraud, and it was shown that the deed was executed in settlement of several mortgages, made by the grantor to defendant, and that the amount due on them was more than the value of the land. *Held*, that the injunction was properly vacated, since, if the conveyance was either a deed or mortgage, plaintiffs had no beneficial interest in the land.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 77; Dec. Dig. § 35.\*]

Appeal from Common Pleas Circuit Court of Charleston County; S. W. G. Shipp, Judge.

"To be officially reported."

Action by James O. Gibbes and others against R. Leiby Clement. From an order dissolving a temporary injunction, plaintiffs appeal. Affirmed.

Frank F. Herndon, for appellants. Wm. Henry Parker, for respondent.

WOODS, J. This is an appeal from an order of Judge Shipp, dissolving a temporary order of injunction, granted at the instance of the plaintiffs, restraining the defendant from interfering with the plaintiffs, or disturbing their possession of a tract of farm land situated in Berkeley county.

The complaint upon which the temporary order was granted alleged that the plaintiffs were the heirs of Robert Gibbes, deceased, who at the time of his death was the owner in fee of the land, and that they were in possession; that the defendant R. Leiby Clement claimed title through a deed from Robert Gibbes to himself; and that he "will undertake to have plaintiffs vacate said premises the first part of the coming year,

unless he is enjoined and restrained from doing so." The complaint further alleged that the deed had been secured by imposition and undue influence exercised by the defendant over Gibbes, and prayed that it should be canceled on this ground. Affidavits from Robert Gibbes, Jr., and from Darcus Brown, widow of Robert Gibbes, Sr., were also submitted, supporting the allegations of the complaint, and alleging that if the plaintiffs should be ejected from their home they would have no other place in which to seek shelter.

Upon the hearing of the motion to dissolve the temporary injunction, affidavits were submitted on behalf of the defendant, denying that the deed had been procured by fraud or undue influence, and alleging that it had been executed by Robert Gibbes with full knowledge of its meaning, and upon full consideration, consisting of the payment and cancellation of several mortgages previously made by the grantor, which were held by the grantee. Upon this showing, Judge Shipp dissolved the temporary order of injunction, holding that the plaintiffs had not alleged sufficient grounds to warrant equitable interference.

In deciding whether the plaintiffs had rights which required for their protection an order of injunction, the showing made by both sides must be considered. The plaintiffs claim as the heirs of Robert Gibbes. On the question whether the paper held by the defendant was intended as a conveyance of the land, or only a mortgage to secure a debt, there was a direct conflict in the affidavits. But the paper is in form an absolute conveyance from Robert Gibbes to the defendant; and the affidavit of one of the witnesses to the deed, that he saw it duly executed by the grantor, was not controverted. The important statement is made in the affidavits submitted by the defendant that the mortgage debts owed by Robert Gibbes to the defendant greatly exceeded the value of the land. The plaintiffs did not deny this indebtedness; nor did they make any offer to pay it.

This, then, is the case as presented: If the defendant's affidavits be true, the plaintiffs have no interest in the land, and an injunction against the defendant taking legal proceedings to obtain the possession would be a hardship upon him; on the other hand, if the plaintiffs' affidavits be true, that the deed was intended as a mortgage, the utmost that they could demand would be a sale of the land to pay the mortgage debt of the defendant, and, as it is undisputed that the debt is far beyond the value of the land, the entire proceeds of the sale would go to the defendant. In any event, therefore, the plaintiffs' interest is unsubstantial. In such a case, it seems obvious that a court of equity is not warranted in enjoining the defendant from the exercise of his legal right to insti-

tute ejectment proceedings under the statute. This conclusion, of course, does not affect the right of the plaintiffs to test before the magistrate the right of the defendant to have them ejected, or their right to bring an action for damages for wrongful ejection.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, C. J., GARY, A. J., and HYDRICK, J., concur.

(90 S. C. 168)

**ROWE v. UNITED STATES INDUSTRIAL LIFE INS. CO. OF CHARLESTON.**

(Supreme Court of South Carolina. Dec. 13, 1911.)

**1. INSURANCE (§ 135\*)—RULES—ADOPTION—EFFECT.**

An insurance company is entitled to adopt reasonable rules for the conduct of its business, and these, when brought to the notice of the insured, are binding on him to the same extent as if declared in express terms to be a part of the contract, and, when printed in a receipt book given to insured, in which weekly premiums were entered as paid, became a part of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 218; Dec. Dig. § 135.\*]

**2. INSURANCE (§ 668\*)—FORFEITURE—WAIVER OF REQUIREMENTS—QUESTION FOR JURY.**

Where, in an action on an industrial policy, it was shown that defendant had failed to insist on compliance with its rules and regulations concerning forfeiture for nonpayment of premiums for a certain number of weeks, whether such failure amounted to a waiver was for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.\*]

Appeal from Common Pleas Circuit Court of Charleston County; Ernest Gary, Judge.

Action by Ella Rowe against United States Industrial Life Insurance Company of Charleston. Judgment for plaintiff, and defendant appeals. Affirmed.

Nathans & Sinkler, for appellant. Wm. H. Grimbail, for respondent.

GARY, A. J. This is an action to recover the sum of \$140, alleged to be due the plaintiff on a policy of insurance, issued by the defendant on the life of her husband; John G. Rowe, wherein she was named as the beneficiary.

The defendant interposed the following as a defense to the complaint: "That under and by virtue of the conditions of said policy it was provided as follows:

"7. Should the payment of weekly premiums upon this policy be due four Mondays or longer, this policy shall be void, and all payments hereunder shall be forfeited, said insured shall be out of benefit, and the company shall be freed from its liabilities hereunder.

"8. Policyholders out of benefits, as per clause 7, may be reinstated upon payment

of back premiums in full, and upon passing a satisfactory medical examination (but such an examination may be waived by the company if it desires to do so), but the insured will not be entitled to any benefit under this policy, unless in sound health and free from any disease at the time of such reinstatement, and in case death should occur from any cause whatever, within five weeks from the date of such reinstatement, the company shall not be liable to any extent whatever, on account of such death."

"That the insured, John G. Rowe, on the 27th of August, 1910, under the terms of said policy, was 7½ weeks in arrears of weekly payments under the said contract agreed to be paid, and under the terms of said contract the policy was void, and all payments thereunder forfeited, and the insured, John G. Rowe, was out of benefit, and this defendant freed from its liabilities under said contract. That on the 27th day of August, 1910, the said John G. Rowe paid to the agent of the defendant, under the terms of condition eight (8), above set forth, the sum of one dollar and forty (\$1.40) cents, being weekly premium for seven weeks, and thereafter, on the 21st day of September, 1910, the day of the death of the said John G. Rowe, his wife paid to the agent of this defendant the further sum of eighty (80) cents under the terms of condition eight (8) aforesaid, being weekly premiums for four weeks. That the said John G. Rowe died on the said 21st day of September, 1910, of a disease from which he was suffering on the said 27th day of August, 1910, and death occurred within five weeks from said 27th day of August, 1910, whereby, as set forth in said conditions seven and eight, this defendant was not liable to any extent whatever, on account of said death. That upon being informed of the death of said John G. Rowe this defendant tendered to the representative of said John G. Rowe the sum of two dollars and twenty (\$2.20) cents, being premiums paid on the 27th day of August, 1910, and the 21st day of September, 1910, but said representative refused to accept the same, and this defendant alleges that it is now and has always been ready and willing, to return the said two dollars and twenty (\$2.20) cents paid as aforesaid."

On the trial of the case, the receipt book delivered to John G. Rowe was introduced in evidence, without objection, which, under the head of "Extracts from the rules, regulations, etc., of the company," contained the following: "*Policies in arrears more than five Mondays become lapsed.* No money paid to an agent after that time, will effect a revival or continuance of the policy, and any agent collecting money after such time, is committing a fraud upon both the company and the insured, except he does it in accordance

with the following plan, which is the only mode of revival: A written application upon the company's regular form must be made, and with it a deposit of all premiums in arrears. A receipt must be given for this deposit, which deposit is not sent to company, but is retained at the local office to be returned if the applicant be rejected, and to be sent to the company if the applicant be accepted. In no case must premiums in arrears more than five weeks be entered upon this book, until after a revival form has been sent to and approved by the home office, when the revival receipt is to be returned to the agent, and the amount of the same receipted in this book. All other entries will be in fraud of the company, and not recognized by it. *In all cases of revival the old policy must be surrendered and the form of policy in use at the time of revival accepted in its stead.*"

J. S. Thompson, defendant's secretary, testified on cross-examination as follows: "Q. In the first part of your book, where it speaks of revival, does not it say before any revival the person who is insured shall first make out an application for a revival and get a receipt, and turn in his old policy and get a new policy? A. He turns in his old policy, and has it revived. Q. You said it was not the custom of the company to collect on a policy which was lapsed without a regular form of renewal? A. Yes, sir. Q. Don't your books show that you violated that rule in this very instance? Didn't you collect these 7½ premiums after the policy was lapsed? That was in violation of the rule, was not it? A. It should have been lapsed after four weeks. Q. Should not there have been a renewal under your rule? A. Yes, sir; a revival form should have been made out, and the policy reinstated. Q. If the policy was lapsed, the rule to get in again was to issue a new policy? A. Yes, sir. Q. Didn't your company violate that rule when it accepted these 7½ premiums in the lifetime of the insured? A. A revival should have been made out."

The jury rendered a verdict in favor of the plaintiff for the sum of \$140, and the defendant appealed upon exceptions which will be reported. It will not be necessary to consider the exceptions in detail, as the practical question raised by them is whether there was error on the part of his honor, the presiding judge, in submitting the question of waiver to the jury.

[1] It is unnecessary to cite authorities to sustain the proposition that it is the right and duty of a corporation to formulate reasonable rules and regulations for the conduct of its business; and that they are as binding upon the corporation and those dealing with it after notice thereof as if such rules and regulations had been declared, in express terms, to be a part of the contract. Therefore, when the insured accepted the

receipt book delivered to him by the insurance company, with extracts from certain rules and regulations therein printed, they became a part of the contract, and of course were binding on both parties.

[2] There was a failure on the part of the defendant to insist upon the rules and regulations hereinbefore mentioned, and the question whether this was a waiver was properly submitted to the jury. *Heustess v. Insurance Co.*, 88 S. C. 31, 70 S. E. 403.

Furthermore, the court could not have construed the policy of insurance in the manner for which the appellant contended, as the provisions thereof and the rules and regulations were in some respects contradictory, especially since there were other facts in the case with which they were to be considered. *Holliday v. Pegram*, 89 S. C. 73, 71 S. E. 367. It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, C. J., and WOODS, J., concur.  
HYDRICK, J., did not sit in this case.

(90 S. C. 128)

#### WILKINS & BROWN v. CURRY.

(Supreme Court of South Carolina. Nov. 25, 1911.)

#### CHattel Mortgages (§ 235\*)—PAYMENT OF DEBT—TRANSFER OF PROPERTY TO MORTGAGEE.

Defendant, in an action to recover possession of mules, answered that he had purchased the mules and given his own mule in exchange, and his note for the balance, secured by a chattel mortgage; that at the time of the purchase plaintiffs warranted the mules to be sound, and agreed that if they were not defendant might return them, and would not have to pay for them; that one of the mules was returned as defective; and that defendant had paid the balance due on the mule he retained. *Held*, on demurrer, that the matters set up in the answer were not a mere set-off, but constituted a payment or discharge of the debt, so as to defeat plaintiff's recovery.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 496-499, 507; Dec. Dig. § 235.\*]

Appeal from Common Pleas Circuit Court of Cherokee County; John S. Wilson, Judge. "To be officially reported."

Action by Wilkins & Brown against J. H. Curry. Judgment for plaintiffs, and defendant appeals. Reversed.

Butler & Hall, for appellant. Otts & Dobson, for respondents.

JONES, C. J. This is an action to recover possession of personal property, and the appeal is from an order of Judge Wilson, sustaining a demurrer of plaintiff to certain parts of defendant's answer.

The complaint alleged that on February 14, 1910, defendant executed to plaintiff a promissory note for \$385, payable six months thereafter, and to secure same executed a chattel mortgage on two mules described. That on June 23, 1910, defendant paid plain-

tiffs \$150, and on August 18, 1910, \$98.25, which had been duly credited on the note, that the condition of the mortgage has been broken, and that plaintiffs are entitled to the possession of one of the mules described, and alleged to be of the value of \$166.70, and demands possession, with damages.

The answer, after admitting the execution of the note and chattel mortgage, the payment of \$98.25, and refusal to surrender the mule, denied the other allegation of the complaint, and as a further defense alleged the following matters, as to which demurrer was sustained, on the ground that they do not state facts sufficient to constitute a counterclaim or defense:

"(3) That, on or about March 10, 1910, the defendant purchased from the plaintiff a pair of mules at the agreed price of \$600, each of said mules being valued at \$300; that defendant exchanged therefor his own mule at the agreed price of \$215, which left a balance of \$385, for which the note and mortgage was executed, as set out in the complaint.

"(4) That at the time of said purchase, and as a part of the transaction, the plaintiff guaranteed and warranted said pair of mules as being sound and all right, and the plaintiff agreed with the defendant that if said mules were not as represented and guaranteed and warranted, as aforesaid, that the defendant should return said mules, or either of them, and would not have to pay for same.

"(5) That one of the said mules was distempered and wind-broken which was known to the plaintiff, which defects were covered expressly by the aforesaid warranty and guaranty, which defect rendered said mule unfit for ordinary work, and made it wholly unsuitable for use, so that the defendant was much hindered and delayed in his work, and complained to the plaintiff, whereupon the plaintiff himself came to Gaffney and inspected said mule, and admitted that said mule was wind-broken, and promised to make good the defendant's damage. Defendant thereupon elected to rely on the contract made with the plaintiff, and pursuant thereto returned said defective mule to the plaintiff, who, as defendant is informed and believes, received said mule, and thereafter disposed of the same in some way.

"(6) That, by reason of the foregoing facts, the defendant owes plaintiff nothing on the mule so returned and accepted by the plaintiff.

"(7) Further answering, and as further defense, the defendant alleges: That after the return of the mules, as above stated, the defendant paid to the plaintiff the sum \$98.25, which was the balance due to the plaintiff on the mule retained by the defendant, including interest up to the date of the payment, made on August 18, 1910, so that the mule retained, and which is the mule seized in this action by the plaintiff, has been fully

paid for, and there is nothing due thereon by the defendant to the plaintiff."

Further answering, the defendant alleges:

"(8) That on account of the breach of the plaintiff's warranty and guaranty, and the defective condition of the mule, the defendant was caused much loss of time and labor, losing the hire of the team of mules for a period of seven days, at \$3 per day, making a loss to defendant of \$21; also on said account defendant was forced to spend money going to Spartanburg to purchase another mule in the place of the defective mule, as aforesaid, at an expense of \$6, all which the defendant pleads as a counterclaim to the amount claimed by the plaintiff."

We think the court was clearly in error. With reference to the third, fourth, fifth, sixth, and seventh paragraphs of the answer above quoted, it may be said that they do not undertake to set up a counterclaim strictly, but matters which, if established as true, would constitute payment or discharge of the mortgage debt, and defeat recovery, because it is essential to plaintiffs' recovery that they establish a mortgage debt which remains due, in breach of the condition of the mortgage. No debt, no mortgage. *Spears v. Fields*, 72 S. O. 397, 52 S. E. 44.

It is unnecessary to consider whether there was error in sustaining the demurrer as to paragraph 8 of the answer, purporting to set up a counterclaim, as an examination of the exceptions fails to disclose any specification of error with respect to that paragraph, beyond the general contention that the answer held demurrable was sufficient to show payment or discharge of the mortgage debt.

After the submission of the case to this court, notice of a motion was given to stay action until points and authorities could be filed, for the purpose of sustaining the order of the circuit court, on the ground that the act of 1909 (26 St. at Large, p. 161) relates to action for recovery of personal property, and not to actions in claim and delivery, under section 227, Code of Civil Procedure 1902. The act of February 25, 1909, provides: "In every action for the recovery of personal property which has been pledged in any way to secure credit or debt, the defendant may plead his counterclaim arising out of the same transaction, and the jury in such case may find, in addition to the verdicts now provided by law, the amount due to plaintiff if any; and in such case the defendant shall have the right to pay said amount and costs and the property shall thereafter be free from the encumbrance." Since, under the view we take, it is unnecessary to consider the appeal as it may be affected by the act quoted, we do not deem it proper to delay the decision for the motion.

The judgment of the circuit court is reversed.

GARY, A. J., and WOODS and HYDRICK, JJ., concur.



(137 Ga. 153)

HENRY et al. v. MEANS.

(Supreme Court of Georgia. Nov. 16, 1911.)

*(Syllabus by the Court.)***1. RECORDS (§ 17\*)—SUPPLYING OR RESTORING RECORDS—CONTRACTS BY COUNTY—AUTHORITY OF COMMISSIONERS.**

Under the general powers of the county commissioners of Pulaski county (Acts 1896, p. 279), they have authority to provide for the safe-keeping and preservation of the records of deeds in the office of the clerk of the superior court. They may have the books containing such records rebound, when necessary, may provide a safe for their keeping, or may take steps looking to their preservation. But there is no authority of law in such county commissioners, at the expense of the county, to employ an unofficial person to make a copy of certain deed books, on the ground that they are old and becoming somewhat dilapidated, and the ink on some of the pages is becoming faded. Such copies, when made, would have no official character, and import no verity. They could not be substituted by the commissioners in lieu of the official books, and would have no higher standing than private copies or memoranda.

(a) The transaction here involved was not a proceeding seeking to establish records, under Civil Code 1910, § 5810 et seq.

(b) In so far as it was sought to justify the contract of the county commissioners with an individual to make a copy of certain deed books because of the recommendation of the grand jury, that body recommended that some of the old books in the clerk's office be rebound and put in condition, not that they be copied.

(c) Whether or not, construing the provision in Civil Code 1910, § 4892, par. 9, in reference to the transcribing by the clerk of the contents of any books of record which may be in a dilapidated condition in connection with its context, in which certain books are enumerated, such provision contemplates the copying of deed books, it would not avail the defendant commissioners in this case.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 17.\*]

**2. COUNTIES (§ 196\*)—REMEDIES OF TAXPAYERS—INJUNCTION.**

Though the contribution of a taxpayer to the public fund of a county may be small in proportion to the aggregate, he has such a pecuniary interest in the sum made up from taxes, of which his forms a part, as to authorize him to prevent an illegal diversion of such sum. Accordingly he may file an equitable petition to enjoin county commissioners from paying out public funds upon an unlawful contract. *Koger v. Hunter*, 102 Ga. 76, 29 S. E. 141; *Mitchell v. Lasseter*, 114 Ga. 275 (4), 40 S. E. 287; *Clark v. Cline*, 123 Ga. 856, 864, 51 S. E. 617.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.\*]

**3. COUNTIES (§ 196\*)—REMEDIES OF TAXPAYERS—INJUNCTION.**

The legal title to funds in the county treasury is in the county. If some of them have been unlawfully paid out upon a contract which the county commissioners were not authorized to make, a suit to recover them must be brought in the name of the county. An individual taxpayer has no right to bring an action in his own name against the county commissioners for the purpose of recovering from them the amount so paid out by them, or to require them to repay it to the county treasurer. Civil Code 1910, § 6594; *Bennett v. Walker*, 64 Ga. 326; *Arnett v. Board of Commissioners of Decatur County*, 75 Ga. 782; *Cook v. Board of Commissioners of Houston County*, 62 Ga. 223.

(a) This is true, although the county commis-

sioners may be the persons who would ordinarily institute suits in the name of the county.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.\*]

**4. APPEAL AND ERROR (§ 1176\*)—DISPOSITION OF CAUSE—NECESSITY FOR NEW TRIAL.**

Inasmuch as, under the undisputed evidence, the legal principles above announced are controlling of the final result, it is unnecessary to discuss the rulings of the court in detail, or to remand the case for a new trial, if any of the rulings are inaccurate. Accordingly, the judgment is affirmed in so far as it enjoins further unauthorized payments from the county treasury; but direction is given that the verdict and judgment be set aside, in so far as they provide for the recovery of a sum of money by the plaintiff against the county commissioners.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4588-4596; Dec. Dig. § 1176.\*]

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Action by M. S. Means against E. J. Henry and others. Judgment for plaintiff, and defendants bring error. Affirmed in part, and reversed in part, with direction.

Howard El Coates, for plaintiffs in error. Herbert L. Grice, for defendant in error.

LUMPKIN, J. Judgment affirmed in part, and reversed in part, with direction. All the Justices concur, except BECK, J., absent, and HILL, J., not presiding.

(66 W. Va. 713)

**MUSTARD v. BIG CREEK DEVELOPMENT CO.**

(Supreme Court of Appeals of West Virginia. Nov. 14, 1911.)

*(Syllabus by the Court.)***1. QUIETING TITLE (§ 12\*)—PLEADING—POSSESSION OF PLAINTIFF.**

A bill to remove a cloud, by one claiming under a deed subsequent in date to that of a lease for oil and gas, covering the same land, and under which defendant claims, but alleging superior equitable title under a contract or title bond, prior in date to such lease, presents a good case, on demurrer, for equitable cognizance, regardless of the question of actual possession by complainant.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. §§ 8-12, 44, 45; Dec. Dig. § 12.\*]

**2. PRINCIPAL AND AGENT (§ 171\*)—RATIFICATION OF CONTRACT—ACCEPTANCE OF BENEFITS.**

Where the owner of the equitable title to land by an executory contract or title bond, authorizes his vendor, to renew a prior lease for oil and gas covering the larger tract, of which his land is a part, he thereby constitutes his vendor his agent to contract for such lease, and by accepting, through his agent, his share of rental or commutation money, accruing under such lease, he thereby ratifies the same, concluding and estopping him from thereafter setting up title to his land in hostility to that of such lessee, and the statute of frauds is no defense to the rights and claims of such lessee.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.\*]

### 3. BROKERS (§ 43\*)—EMPLOYMENT—NECESSITY FOR WRITING.

The authority of an agent to sell or lease land need not be in writing.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43;\* Frauds, Statute of, Cent. Dig. § 131.]

### 4. FRAUDS, STATUTE OF (§ 116\*)—SUFFICIENCY OF MEMORANDUM—LEASE BY AGENT.

If an agent verbally authorized to lease land, execute a lease thereon, such lease if not good under the statute of frauds, as the deed of his principal, will be treated as a good memorandum or contract for a lease, binding the principal, and the statute of frauds is no defense to the rights of such lessee under the contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 251-260; Dec. Dig. § 116.\*]

Appeal from Circuit Court, Cabell County.

Bill in equity by W. L. Mustard against the Big Creek Development Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Neal & Strickling, for appellant. W. R. Thompson and F. C. Leftwich, for appellee.

MILLER, J. On grounds alleged, and according to the prayer of his bill, plaintiff and appellant, sought to have cancelled and annulled, as a cloud on his right and title to the oil and gas, in and under 51.8 acres, within the boundary thereof, a certain lease of 253 acres, dated September 8, 1906, from Oliver Hill and wife to C. H. Freeman.

The demurrer to the bill was overruled; but on final hearing on bill, answer and proofs taken, the plaintiff was denied relief, and his bill dismissed.

Plaintiff claims title to the oil and gas under the 51.8 acres, under a deed from W. J. Vickers and wife, to the Hyman Gas and Oil Co., a corporation. This deed in consideration of \$6,000.00, in hand paid, purports to convey unto the grantee, with general warranty, all the oil and gas in and under said 51.8 acres; with the further provision, that whenever the settled production from said land shall reach seventy-five barrels per day of twenty-four hours, the grantee shall pay to Vickers, an additional sum of \$6,000.00, and that until then said company shall pay to him, every three months, a sum equal to six per cent on said \$6,000.00, a vendor's lien being retained on said property to secure the payment of said six thousand dollars. This deed refers for description of the land to a deed from Oliver Hill and wife to said Vickers, dated May 4, 1908, reciting that it is the same tract described in an agreement, between said Hill and Vickers, to convey said land to the latter, of April 2, 1906, and pursuant to which the deed of May 4, 1908, had been made and executed. Mustard obtained his title to the property by deed from the Hyman Gas and Oil Co., of March 22, 1909.

[1] On the demurrer appellees contend that actual possession by the appellant, necessary to maintain a bill to remove cloud, is not al-

leged, and that plaintiff's remedy, if any, is complete at law. Regardless of the question of possession, we are of opinion that a court of equity has jurisdiction to grant the relief prayed for. It is alleged that the deed under which the plaintiff claims is subsequent in date to that of the lease under which the Big Creek Development Company claims, and the equitable grounds of relief alleged against the Big Creek Development Co. would not be available in a court of law. The bill alleges, in effect, that although the lease under which said Development Company claims, is prior in date to the deed from Vickers to the Hyman Gas & Oil Co., it is nevertheless subsequent in date to the contract or title bond from Hill and wife to Vickers, referred to, and of which, it is also alleged, both Freeman, the immediate lessee, and his grantee or assignee, the Big Creek Development Co., at the time Freeman took said lease, had due notice; and that they took said lease subject to the prior and superior rights of Vickers, and of his grantee, under the title bond. The allegations of these facts we think presents a case clearly cognizable in a court of equity.

[2] On the merits, it is sufficiently alleged in the answer of appellee, the Big Creek Development Company, by way of defense, and fully proven, that in July, 1906, at the time of, and before the execution by Hill and wife to Freeman, of the lease dated September 8, 1906, Vickers, who held the title bond from Hill, for the 51.8 acres, was called in and consulted in relation to the execution of said lease, and as he admits in his testimony, although he says he was not asked to sign the lease, that he then knew Freeman had a prior lease, not expired, on the same property, and prior in time to his title bond, and that he then and there agreed, that Hill who still held the legal title to the land, should make and execute the new lease to Freeman, covering the whole tract, and he admits also to have received, through Hill, his share of the rental or commutation money, for the first year, provided for in the lease.

On this state of the pleadings and proofs the question is, is Vickers, or Mustard, with notice of the part Vickers took in the execution of the lease to Freeman, bound by that lease, and concluded or estopped from setting up title in hostility to that of the Big Creek Development Company?

[3] Mustard, in his bill, pleads and relies on the statute of frauds, in denial of the rights of appellee, under the lease of September 8, 1906. Many authorities are cited by counsel for the proposition, that the statute of frauds is available to one having only equitable title to land. We hold, however, that by the part Vickers took in the transaction he made Hill, his father-in-law, holding the legal title, his agent, to lease the land as a whole tract for and on behalf of himself

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and Vickers, and that he afterwards ratified the act of his agent, by accepting, through him, his share of the rentals or commutation money, thereby taking the case from under the ban of the statute. Numerous decisions of this and other courts unite in holding, that the authority of an agent to sell or lease land need not be in writing, and that the agent may bind his principal, either by signing his own name or that of the principal. *Kennedy v. Ehlen*, 31 W. Va. 540, 8 S. E. 398; *Conaway & Smith v. Sweeney*, 24 W. Va. 643; *Campbell v. Fetterman*, 20 W. Va. 399; *Smith v. Tate*, 82 Va. 684; *Minor on Real Property*, § 1289, p. 1422; *Davis v. Gordon*, 87 Va. 579, 580, 13 S. E. 35; *Brown v. Brown*, 77 Va. 619; *Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Johnson v. Somers*, 1 Humph. (Tenn.) 269; *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 69 S. E. 195.

[4] True, power can not be conferred on an agent to execute a deed conveying land, except by a writing of the same dignity; but there is high authority for holding, as we do, that where an agent, though verbally empowered to sell, attempts to convey land by deed, such deed will be treated as a good memorandum or contract, binding the vendor to convey the land. *Hersey v. Lambert*, 50 Minn. 373, 52 N. W. 963; *Henry v. Root*, 33 N. Y. 526, 550; *Blacknall v. Parish*, 59 N. C. 70, 78 Am. Dec. 239. So, whether or not we regard the deed of lease from Hill to Freeman a good conveyance of the equitable title of Vickers, it is good as a contract of sale by Vickers' agent, under the statute of frauds, for his equitable title, binding him and his grantees, and supporting the decree below, denying relief, and which decree we are of opinion should be affirmed.

(69 W. Va. 704)

#### DARNELL v. WILMOTH et al.

(Supreme Court of Appeals of West Virginia.  
Nov. 14, 1911.)

#### (Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 553\*)—RECORD—VACATION ORDER OF JUDGE.

A vacation order made by the trial judge, under his signature and seal, within the time fixed by law for saving and certifying bills of exceptions, which order is in itself a veritable bill of exceptions, specifically pointing out and identifying by certain and sure references the stenographer's transcript of evidence and other papers pertaining to the trial, and declaring that they are thereby made a part of the record, operates to bring into the record the evidence and papers referred to, though not embraced in formal bills of exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 553.\*]

#### 2. LOGS AND LOGGING (§ 3\*)—DEED OF STANDING TIMBER—CONSTRUCTION.

A particular enumeration of the kinds of standing timber meant to be conveyed, contained in the granting clause of a deed, will not be enlarged by a separate and subsequent general clause stating that the intention of the par-

ties is to convey all the timber included in the bounds named in the deed, but the general words used in the latter clause will be held to apply to timber ejusdem generis with that specifically named.

[Ed. Note.—For other cases, see *Logs and Logging*, Dec. Dig. § 3.\*]

#### 3. TRESPASS (§ 52\*)—CUTTING GROWING TIMBER—MEASURE OF DAMAGES.

For the cutting of growing timber having no more than ordinary commercial value, a proper measure of damages is the market value on the stump.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 137-138; Dec. Dig. § 52.\*]

#### 4. TRESPASS (§ 56\*)—CUTTING TIMBER—EXEMPLARY DAMAGES.

Exemplary damages are not awardable for the cutting of timber when it appears that the trespass was not wanton but was committed under a bona fide claim of right.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 144; Dec. Dig. § 56.\*]

Error to Circuit Court, Pocahontas County.

Action by W. S. Darnell against H. J. Wilmoth and others. Judgment for plaintiff, and defendants bring error. Reversed.

N. C. McNeill and F. R. Hill, for plaintiffs in error. L. M. McClintic and Price, Oseinton & McPeak, for defendant in error.

ROBINSON, J. In this action seeking damages for cutting growing timber, plaintiff has judgment, by the verdict of a jury, and defendants challenge the regularity and propriety of the same by writ of error.

[1] A preliminary question is raised: Are the papers and testimony submitted as evidence before the jury, and the instructions given and refused, made a part of the record by proper bills of exceptions? If they are not made a part of the record, we cannot consider the assignments of error, for the assignments all relate to these matters pertaining to the trial. We hold, however, that the evidence and instructions are properly before us as record of the court below. It is true that they have been made so by a method somewhat novel, but, we think, none the less substantial and effective. The trial judge has certified the stenographer's transcript by his signature and seal under a declaration that it contains all the evidence adduced at the trial. The vacation order which the judge has made pursuant to the statute, directed to the clerk for entry, particularly identifies this transcript and recites the name of each witness whose testimony it contains. It also points out the written papers offered in evidence and the instructions given and refused, by references which leave no uncertainty as to the identification of the very papers and instructions meant. Then that order, a veritable bill of exceptions itself, under the seal and signature of the judge, declares that all the evidence, papers, and instructions referred to and identified therein are "made a part of the record as fully and completely and to have the same effect as

if entered in term time." This act of the trial judge, in vacation, within the time fixed by statute, clearly suffices to bring the papers, evidence and instructions into the record. The identification is as completely set out as it ordinarily is in separate and formal bills of exceptions. The documents referred to are so plainly pointed out that there can be no mistake in referring to them in connection with the vacation order of the trial judge. The mere fact that the judge makes the vacation order to have the force of a bill of exceptions itself is no argument against the validity of the procedure. The judge has simply done by the one order what is generally done by separate bills of exceptions referred to, and certified, by an order. The old method of formal bills of exceptions tends to more certainty, and we hope that there will be no general departure therefrom. It is at least more judicial. But where there is the substantiality for the purpose of making evidence and papers a part of the record that is disclosed in the order of the trial judge in this case, we cannot say that it does not serve the purpose. Old forms, however, have arguments in their favor.

The controversy arises from the terms of the deed by which plaintiff conveyed standing timber on his land to one Arbogast. The timber conveyed to Arbogast, by intermediate conveyances, became vested in defendants. Plaintiff claims that his deed did not convey the chestnut and maple timber. Defendants insist that it conveyed timber of all kinds, and that the timber for which plaintiff claims damages was their own. So the case turns on a construction of the deed.

[2] The granting clause of the deed, omitting the statement of consideration, is as follows: " \* \* \* The parties of the first part sell and convey with general warranty unto the said Arbogast all the oak timber of all kinds, all the spruce and hemlock, the ash and poplar, the hickory, except for farm use, and the white and yellow lynn, timber on a tract of 196 acres lying on both sides of Deer Creek, a tributary of Brush run, adjoining the lands of Peter Yeager and others, and bounded as follows, to wit." The bounds of the tract are set forth by definite calls and distances. Following these there is a stipulation as to the time "said timber is to stand" on the land. Then comes the last paragraph of the deed—a separate one: "It is the intention of the parties of the first part to convey unto the said Arbogast all the timber included in said bounds and the parties of the first part give a free right of way for cutting and removing said timber or any adjoining timber over their land by tram road or otherwise."

Does the deed convey the maple and chestnut timber? It is not properly susceptible of a construction that makes it say that it does. There is a particular description of the timber meant to be conveyed, in the

granting clause of the deed. Was that particularity, in the very clause that was intended to grant the estate, entered into for naught? Why particularize so specifically as to certain kinds of timber, if all this was to be wiped out at the end of the deed? Can we reasonably say that the grantor meant nothing by this definite and carefully stated enumeration of species of timber? His words in this particular must be given effect if it is possible to do so. We cannot erase them from the deed lightly. There must be clear intent expressed by the deed as a whole that the particularization was for no purpose before we can ignore it. Because of the very particularity, and its position in the deed in connection with the words of grant, it is entitled to more consideration than to be lightly annihilated. For what purpose was this particularization entered into? The answer naturally is: To show what kinds of timber the grantor conveyed. Why name specific kinds of timber as carried by this conveyance if it was not to distinguish those named from those not named and not intended to pass by the deed?

It is by no means a new rule to give such a particular description as we have in this deed great weight as indicating the intention of the grantor. "A particular description which is clear and explicit and is a complete identification of the property intended to be conveyed will not be varied or enlarged by a more general and less definite description, as in such a case the former will be considered as expressing the intent of the parties rather than the latter." 13 Cyc. 631. Yet defendants contend that the last paragraph of the deed made by plaintiff, notwithstanding the general terms used therein, strikes down all the defined enumeration and studied identification of the granting clause. It does not do so. If it did the words of identification in the granting clause would be wholly ineffectual. By an admitted rule of construction every part of a deed must be given effect if that can be done. In the deed before us, the general clause can stand and have a purpose consistent with the force of the particular identification in the granting clause, but the words used in the granting clause cannot stand as they do if the general clause is taken as the description of the property conveyed. Therefore we must hold that the particular description of the granting clause is that which names the property passed by the deed. But what office do the words in the general clause perform? In view of the particularity of the granting clause, they must have been intended to refer to the bounds of the land from which the particularly stated timber could be taken. It must be observed that the general clause does not say "all timber on said land." That clause says, "all the timber included in said bounds." The words "included in said bounds" are indeed more full of meaning in the connection in which they are used

than the words "all the timber," for the latter words are qualified by the identification of timber in the granting clause. The latter words, "all the timber," are general ones, and apply to things of the same kind as those specifically named. The timber meant in this general clause is timber of the kind specifically named and dealt with in the deed. "General words apply prima facie only to things ejusdem generis with those specifically enumerated." *Crompton v. Jarratt*, 30 C. H. Div. 298; *In the Matter of Wright*, 15 Beav. 367.

When the deed was introduced at the trial by defendants, in support of their contention that they owned the chestnut and maple as well as the other timber, plaintiff sought to show that the deed had been altered after its due execution and delivery by an erasure of the words "above named." He claims that these words were interlined immediately after the word "bounds" in the last paragraph of the deed when he and his wife signed and acknowledged the instrument. He introduced evidence tending to show the alleged erasure, and defendants offered some in rebuttal thereof. It seems unnecessary, however, to deal with the matter of this alleged alteration. Since the deed when properly construed means the same without the words alleged to have been erased as it would with them, the whole matter was an immaterial issue in the case. The trial court should have construed the deed and directed the jury accordingly. Instead of so doing, the court improperly submitted to the jury the question as to what the deed meant on its face, allowed improper parol testimony in relation thereto, and, at plaintiff's request, gave an erroneous instruction in the premises. An instruction for plaintiff relative to the alleged alteration was also erroneously given. However, as the finding of the jury is in accord with the true meaning of the deed in any event, all this erroneous procedure is indeed harmless to defendants. Errors committed in relation to the immaterial issue about the alleged alteration, or in relation to the method of interpreting the deed, do not injure defendants, for the same finding that was reached against them irregularly must have been reached by proper procedure. This view eliminates all the assignments of error but the one in relation to the refusal of the instruction which we shall now consider.

[3, 4] Defendants requested an instruction to the jury that the measure of damages plaintiff was entitled to recover, if entitled at all, was the actual market value of the timber on the stump at the time it was cut and removed, and that plaintiff was not entitled to recover punitive or exemplary damages in the case. The court refused so to instruct. The refused instruction correctly propounded law applicable to the case made.

The refusal to give it was error. The market value of the timber was a proper measure of damages under the circumstances appearing as to the trespass and in view of the character of the timber. There is no showing that it was growing timber of peculiar or special value. In this jurisdiction, market value of growing timber destroyed has usually been sanctioned as a measure of the damages suffered by its destruction. *Stewart v. Railroad Co.*, 33 W. Va. 88, 10 S. E. 26. Whether that measure should apply to all cases we need not inquire. The measure of the market value on the stump seems justly applicable to the case at hand. The part of the instruction relating to punitive or exemplary damages was warranted. No wanton or wilful trespass, was proved, and the case was clearly one for compensatory damages only. Plaintiff introduced no evidence in relation to the market value. Defendants proved a sum much less than that which the jury found. So it is evident that the jury either applied an inappropriate measure of damages or awarded exemplary damages. The judgment must be reversed, the verdict set aside, and a new trial awarded.

(69 W. Va. 717)

#### STATE v. COOK.

(Supreme Court of Appeals of West Virginia.  
Nov. 14, 1911.)

#### (Syllabus by the Court.)

#### 1. ADMISSIBILITY OF EVIDENCE—REPUTATION OF ACCUSED.

On a trial for murder, is the bad general reputation of deceased, as a man of unchaste and lecherous habits toward women admissible, upon the issue whether the accused believed the information received from his wife and acted thereon? Discussed but not decided.

#### 2. WITNESSES (§ 387\*)—EXAMINATION—CROSS-EXAMINATION OF ACCUSED.

Section 20, chapter 152, Code 1906, providing that, "In a criminal prosecution other than for perjury, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination," does not preclude the state, on cross-examination of the prisoner, for the purpose of impeachment, from showing by him that he testified differently on a former trial of the same indictment.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 387.\*]

#### 3. HOMICIDE (§§ 151, 237\*)—EVIDENCE—BURDEN OF PROOF—INSANITY.

Where insanity is interposed as a defense to an indictment for murder, the fact of such insanity must, from all the evidence, be proved to the satisfaction of the jury, and the burden is not cast upon the state to prove the prisoner sane beyond a reasonable doubt, immediately that some evidence, however slight, is offered by the accused, tending to rebut the presumption of sanity. The jury before acquitting the prisoner, should be satisfied, from all the evidence in the case, that the prisoner was in fact insane, at the time of the homicide. A reasonable preponderance of the evidence in favor of the insanity of the prisoner ought to acquit him.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 500; Dec. Dig. §§ 151, 237.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**4. CRIMINAL LAW (§ 814\*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO CASE.**

An instruction propounding the rules respecting circumstantial evidence, as laid down in *State v. Flanagan*, 26 W. Va. 122, was rightly rejected by the court below, as being inapplicable to any evidence in the case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1979; Dec. Dig. § 814.\*]

**5. HOMICIDE (§ 294\*)—INSTRUCTIONS—DEFENSES—INSANITY.**

An instruction propounding the "right and wrong test," where the defense is insanity, and the rules respecting the defense of "irresistible impulse" was not wholly inapplicable to the evidence, and the court below did not err in giving the same to the jury, at the instance of the state.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 294.\*]

**6. CRIMINAL LAW (§ 485\*)—EVIDENCE—EXPERT WITNESSES—HYPOTHETICAL QUESTIONS.**

In propounding hypothetical questions to expert witnesses, counsel may without error, assume facts fairly inferable from the evidence, in accordance with their theory of them.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 485.\*]

**7. SEPARATION OF JURORS—PREJUDICE TO DEFENDANT.**

A case in which the alleged misconduct and separation of the jury was not shown to have been prejudicial to the defendant, justifying a new trial.

*(Additional Syllabus by Editorial Staff.)*

**8. CRIMINAL LAW (§ 48\*)—"INSANITY."**

Mere frenzy, or ungovernable passion, however furious, is not "insanity," within the meaning of the criminal law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 53-58; Dec. Dig. § 48.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3635-3644; vol. 8, p. 7688.]

**Error to Circuit Court, Wyoming County.**

Hayes Cook was convicted of voluntary manslaughter, and brings error. Affirmed.

W. R. Thompson, John M. McGrath, and Sanders & Crockett, for plaintiff in error. Wm. G. Conley, Atty. Gen., for the State.

**MILLER, J.** On an indictment for the murder of Alonzo M. Stewart, the defense was temporary or emotional insanity. The verdict of the jury was, guilty of voluntary manslaughter, acquitting the defendant of murder, as charged in the indictment; and the judgment of the court was that defendant be imprisoned in the penitentiary for the period of three years.

In this court the prisoner relies on numerous assignments of error. Some of the errors assigned in his petition for writ have apparently been abandoned. We will consider those only which have been argued. We think they are the only points calling for decision.

First, it is claimed the court erred, to the prejudice of the prisoner, (a) in excluding proposed evidence of the general reputation of the deceased, in the county and commu-

nity in which he lived prior to his death, for lasciviousness, and for making indecent and lascivious proposals to married and unmarried women; and, (b) proposed evidence of numerous witnesses of specific acts of adultery by deceased. On the trial, the theory of the defense was, that the prisoner, on the night of the homicide, on hearing from his wife, her confessions of adultery with deceased, and her account of the manner in which, by his alleged indecent and lascivious proposals, deceased had finally accomplished his purposes with her, became so enraged, and so mentally unhorsed, that he immediately arose from his bed, saddled his horse, and started for the home of deceased in Pineville, some fourteen miles distant, where on arriving about three o'clock in the morning, he called him out of his house, charged him with breaking up his home, and shot him dead. Much evidence, including that of the prisoner and his wife, was admitted, showing how and when she made her alleged confession to him, and her story told him of the conduct of the deceased towards her, and its alleged effect upon the prisoner's mental condition, evidenced by his anger, his conduct in leaving his bed, and his preparations to go after deceased; but it is claimed, nevertheless, that if the proposed evidence of the reputation of deceased for lasciviousness, and of the specific acts of adultery had been admitted, as it is earnestly insisted it should have been, the prisoner would undoubtedly have been wholly acquitted of any crime, wherefore he was greatly prejudiced. It is insisted, particularly with reference to the alleged reputation of deceased for lascivious conduct, that it must be assumed that such reputation was known to the prisoner, and that if the evidence had been admitted it would have strengthened his belief in the story told him by his wife, and which intensified his already inflamed passion and resentment against the deceased; and besides would have corroborated the evidence of both before the jury, that deceased was in fact guilty of the conduct with the wife, as she had confessed.

[1] That evidence of such reputation and conduct of the deceased is admissible, in cases of homicide, upon the issue whether the accused believed the information received from his wife, and acted thereon, the prisoner relies mainly on *Jones v. State*, 38 Tex. Cr. R. 87, 40 S. W. 807, 41 S. W. 638, 70 Am. St. Rep. 719, *Orange v. State*, 47 Tex. Cr. R. 337, 83 S. W. 385, and 1 *Wigmore on Ev.* § 63, citing and quoting from *Williams v. Fambro*, 30 Ga. 233, 235. In *Jones v. State*, Jones was convicted of murder in the second degree. In that case the court remarked, that if the jury believed the testimony of Jones and wife, the theory of the defendant that his offense was nothing great-

er than manslaughter was clearly presented, and if they did not believe this testimony, then manslaughter, so far as the jury was concerned, was not in the case. So we see, that if reputation evidence of this character is admissible, how important it may have been in that case, in aid of the prisoner's defense, in reducing the offense from murder to manslaughter. The Texas Court, in that case, was of opinion that the evidence of specific acts of adultery was rightly rejected by the trial court, that such evidence would involve too many issues, and that the court could not turn aside to try a vast number of such collateral matters; but was of opinion that evidence of the deceased's bad reputation, in the particular mentioned, was admissible for the purpose of determining whether the prisoner believed the story told him by his wife, and to add to the probability that he acted on this belief. According to the Texas cases, the only possible effect of such evidence would have been to reduce the crime from murder to manslaughter, not to wholly acquit the prisoner. In the case at bar, we must conclude the jury believed the prisoner's story, and that of his wife, for the verdict was manslaughter; so that the result of the trial, so far as the prisoner's guilt or innocence was concerned, was the same as if this character evidence had been admitted. Moreover, the prisoner proved by his own evidence confessions by the deceased to him long before the homicide, of his lascivious character, of his ravishings of the wives and daughters of brother Odd Fellows and Masons, so that, if the prisoner is to be believed, he needed no proof of the lascivious character of deceased, and of the probability of his guilt, as confessed by the wife on the night of the homicide; wherefore he could not have been prejudiced before the jury on his trial. We need not decide, therefore, and do not decide, whether this class of character evidence is ever admissible in cases of homicide. The rule of the Texas Court did not receive the sanction of the Supreme Court of Kansas. *State v. Murray*, 83 Kan. 148, 110 Pac. 103. In that case as in this case, the prisoner had been permitted to testify as to information received from the deceased and others, as to the licentious character of the deceased, and the court observes: "The testimony he was allowed to give accounted fully for the state of his mind, the only matter at issue."

[2] Another point is that the court below, in contravention of section 20, chapter 152, Code 1906, permitted the state, on cross-examination of the prisoner, to interrogate him, for the purpose of impeachment, as to what he had testified on a former trial. *State v. May*, 62 W. Va. 129, 57 S. E. 366, is relied on. The statute is: "In a criminal prosecution other than for perjury, evidence shall not be given against the accused of any statement made by him as a

witness upon a legal examination." Clearly this statute does not apply to a cross-examination of the prisoner, when offered as witness in his own behalf on a subsequent trial. *State v. May* is inapplicable therefore. The very language of the statute seems to preclude the construction put upon it by prisoner's counsel. The Attorney General argues that our statute applies only to the "statement," which a prisoner was allowed to make, prior to the statute of 1881, which removed his disability to testify in his own behalf. He cites *State v. Woodrow*, 58 W. Va. 527, 536, 52 S. E. 545, 2 L. R. A. (N. S.) 862, 112 Am. St. Rep. 1001, and *State v. Legg*, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152. He also alludes to the fact that the Legislature of Virginia, because of a contrary construction of the same statute in that state, in *Kirby v. Com.*, 77 Va. 681, 689, 46 Am. Rep. 747, was, as he argues, forced to amend the statute. But we need not decide this question. It is not involved. All we do decide is that the statute does not preclude the state on cross-examination of the prisoner, when offered as a witness in his own behalf, for the purpose of impeachment, from showing that on a former trial he told a different story. Moreover, the evidence of the prisoner hardly amounted to proof of what he had testified to on the former trial. In the first instance the court refused to permit him to answer; in the second instance, his answer was not responsive to the question, was for the most part voluntary, and rather unimportant.

[3] The third point made relates to the action of the court below in giving and refusing certain instructions proposed on behalf of the state and the prisoner, relating to the defense of insanity, those particularly relating to the burden of proof, where insanity is interposed as a defense.

In our opinion the evidence was wholly inadequate to even rebut the presumption of sanity, justifying any instructions on the subject. There is no evidence that the frenzy or ungovernable passion, the irresistible impulse of the prisoner, on the night of the homicide, on hearing the confessions of his wife, was the result of mental disease, as distinguished from weakness or passion.

[8] "Mere frenzy, or ungovernable passion, however furious, is not insanity within the meaning of the criminal law." 1 Wharton and Stille's Med. Jur. § 163. This proposition is stated in practically the same language in *Buswell on Insanity*, section 442. This writer adds: "That although one sane in his normal condition lose, for the moment, his reason, through excess of passion, yet he is responsible for acts committed while his reason is thus in abeyance." The doctrine of Wharton and *Buswell* is stated in practically the same language in *Clark on Criminal Law*, at page 68. Such also is the doctrine of our case of *State v. Harrison*, 36

W. Va. 729, 15 S. E. 982, 18 L. R. A. 224, where the "right and wrong test" is held to be the true test. In the case at bar there is no substantial evidence of any mental disease of the prisoner, before or after the homicide. Days, and even weeks before he determined to slay Stewart, he had what he evidently regarded as proof positive of the adulterous conduct of the deceased with his wife, resulting in an agreement of separation; so that the confession of his wife, on the night of the homicide, could not have been a surprise, however much his passions may have been inflamed thereby. There is nothing in the evidence to establish more than the frenzy of passion, and nothing, in our opinion, justifying the theory of insanity.

But assuming, as counsel, and the court below seem to have done, that there was some evidence justifying the instructions, did the court err in the instructions given and refused? At the instance of the prisoner the court did tell the jury: "That the law presumes that every person is sane, and that in a prosecution for murder, it is not necessary for the State to introduce evidence of the sanity of the prisoner, in the first instance. When, however, *any* evidence has been introduced which *satisfies* the jury of the insanity of the prisoner, the burden is then upon the State to establish beyond a reasonable doubt the fact of the guilt of the accused, and if, from all the evidence introduced in this case, you have a reasonable doubt of the sanity of the defendant at the time he committed the act, with which he is charged, then you shall find him not guilty." Objection is made to the words, "which satisfies the jury of the insanity of the prisoner." It is insisted that the burden was not upon the prisoner to satisfy the jury of his sanity, in order to shift the burden of proof to the state, and that he was entitled to have the jury instructed that when "any evidence has been introduced tending to prove insanity," as propounded in instruction number two; or, as proposed by instruction number four, "when any evidence is given which tends to overthrow" the presumption of sanity, the burden is then cast upon the state to prove the sanity of the prisoner, and that if there remains a reasonable doubt of such sanity, the prisoner is entitled to an acquittal; also that he was entitled to have the jury instructed, as proposed in his instruction number fourteen, "that in every prosecution for murder, the state must establish beyond a reasonable doubt, the affirmative facts that the homicide has been committed, that the prisoner did the deed, that he intended to do it, that he was of sound mind, and not afflicted with insanity when the act was done, and that the act was done with malice aforethought, express or implied"; and also to have the jury told, as further proposed by this in-

struction, that if a reasonable doubt of his sanity remained he should be found not guilty. These three instructions were rejected.

It is conceded that the proposed instructions are opposed to our cases of *State v. Strauder*, 11 W. Va. 745, 27 Am. Rep. 606; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; and *State v. Robinson*, 20 W. Va. 740, 43 Am. Rep. 799; and that the state's instruction number five, objected to, to the effect that the presumption of sanity remains until the contrary be proved, and that the defense of insanity must be proven to the satisfaction of the jury to entitle the prisoner to an acquittal on that ground propounds the law of our cases. It is insisted, however, that our decisions do not propound the law respecting the burden of proof correctly, and are opposed to, and do violence to established principles of criminal law. On the authority of *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499, and we may add decisions of other courts of the same class, it is earnestly insisted, that when *any* evidence tending in any degree, to prove insanity, and to overthrow the presumption of sanity, is introduced, from that time, the burden is cast upon the state to establish the fact of the sanity of the prisoner beyond a reasonable doubt, as it is required to establish every other fact essential to show the guilt of the accused. *Davis v. United States* is among that class of cases which has adopted what is called the modern doctrine on this subject. The language of Justice Harlan in that case is: "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not include beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged." As interpreted by the prisoner's counsel, this decision holds, that *any* evidence tending to show insanity, however slight, immediately shifts the burden to the state to prove the sanity of the prisoner, as an independent fact, whether or not such evidence be sufficient to overcome, in the minds of the jury, the presumption of sanity. The language of



the court may possibly be susceptible of that interpretation. But note the language already quoted; "the vital question from the time a plea of not guilty is entered until the return of the verdict is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt." True this case does hold that if the jury have reasonable doubt of the sanity of the accused he is entitled to an acquittal. Our cases, beginning with *State v. Strauder*, are opposed to this "reasonable doubt" rule. Our cases say the insanity must be proved to the satisfaction of the jury, looking not alone to the evidence of the prisoner, but to the whole evidence in the case, including that of the state. In the brief of Assistant Attorney General Dickinson, in *Davis v. United States*, reported in 160 U. S. page 470, 40 Lawyers' Edition, United States Supreme Court Reports, page 500, he has collated practically all of the decisions, English and American, as well as the text writers, on both sides of this question. He there classifies our cases, and the Virginia decisions, along with those adhering to the old and well settled doctrine in England, that the burden is on the defendant to establish his insanity to the reasonable satisfaction of the jury; and concludes, that the preponderance of authority is against the contention that it is only necessary to raise a reasonable doubt. Clark on Criminal Law, page 68, referring to this conflict of authority, says: "They are agreed, however, to this extent, namely, that all men are presumed to be sane until the contrary appears, and that a defendant who sets up the plea of insanity must introduce some evidence to rebut the presumption. When we get to this point, the courts begin to differ." Some courts, as this writer says, hold that the burden is on the defendant to establish his insanity beyond a reasonable doubt; others that the burden is on the defendant to prove insanity by a preponderance of the evidence; still others, that the burden is on the defendant to introduce some evidence to rebut the presumption of sanity, and that if this evidence raises a reasonable doubt, he is entitled to an acquittal. Underhill on Criminal Evidence, discussing the same subject, and the conflict of the authorities, section 157, says: "But the prevailing rule seems to be that an allegation that the defendant is insane is a statement of an independent fact, and is, in its nature, a plea of confession and avoidance. Hence, if insanity is pleaded as a defense, the burden of proof is on the defendant, in conformity with the general rule that he who asserts any affirmative fact has the burden of proof." In the following section this writer says: "If it be granted that the defendant has the burden of proving his insanity, it remains to be considered what amount or degree of proof is sufficient. The safest rule,

and one that is sustained by a large majority of the cases, is that a reasonable preponderance of evidence upon this particular point should acquit the defendant." Bishop says: "By all opinions, the defendant must prove the insanity on which he relies,—a proposition not necessarily the same as that the burden of proof shifts to him. The difference, not stated in quite uniform terms in the cases, is, on the whole, this: when the burden is said to shift to the defendant, the meaning is, that he must prove the insanity as an issue distinct from not guilty, and as a separate question; the jury, to acquit, being obliged to find affirmatively that the defendant was insane, though it is admitted the finding need not appear thus formally in the verdict." 2 Bishop, Cr. Proc. 672.

Counsel for the prisoner are therefore clearly in error, in their contention that our decisions do violence to established principles of criminal law. True they are not in harmony with the decisions of some courts, but they are in accord with the weight of authority, in this country and in England. If the question were one of first impression in this state, it is unnecessary for us to say on which side of the controversy we might align ourselves; but we are not disposed at this time to depart from the old rule in whose favor many and strong arguments may be made. That rule, as stated in our decisions, and in the instructions given and objected to by the prisoner, is, that where the defense of insanity is relied upon, the presumption of sanity remains until the jury, from the whole evidence, whether of the state or of the prisoner, is satisfied that the accused, at the time of the homicide, was insane. This, of course, excludes the propositions covered by the prisoner's instructions rejected, and the court committed no error in rejecting them, or in giving the state's instruction number five, or the prisoner's instruction number 2a. Indeed the latter is more favorable to the prisoner than our decisions fairly warrant, for it would seem to warrant a verdict of not guilty if they should have a reasonable doubt of his sanity.

[4] Next, complaint is made of the rejection of prisoner's instruction number sixteen, relating to the degree of proof required, where the evidence is circumstantial. It is not claimed that this instruction was applicable to any evidence of that character, necessary to connect the prisoner with the fact of the killing of the deceased; but it is claimed that it was applicable to the facts and circumstances tending to show insanity. The instruction substantially states the rules, respecting circumstantial evidence, announced in *State v. Flanagan*, 26 W. Va. 122. As an abstract proposition it no doubt states the law correctly; but we do not see its pertinency to any evidence showing or tending to show insanity of the prisoner. The only facts and circumstances to which it could

possibly be said to have any application are those relating to the conduct of the prisoner on the night of the homicide. In our opinion there was nothing in these actions, or the circumstances of them, to show insanity. They did show anger and passion, but they were not such as to indicate a diseased mind, such as would excuse the crime. We perceive no error in rejecting the instruction.

[5] Instruction number three, given for the state, the subject of another point of error, relied on, was approved in *State v. Harrison*, supra. It simply propounded the "right from wrong test," and told the jury, that mere irresistible impulse would not exempt the accused from criminal responsibility for his act. It is claimed the instruction was irrelevant, because "irresistible impulse" was not relied upon by the defense. We do not agree with counsel on this proposition. We think the instruction was particularly applicable to that part of the prisoner's testimony in which he swore, that after hearing the confession of his wife on the night of the homicide, that there was something in him or around him that said, "Kill Lon Stewart, avenge your family," and that that was the only thought in his mind. This was at least some evidence of irresistible impulse. We see no error in giving the instruction.

[6] The state over the objection of the prisoner was permitted to propound hypothetical questions to Drs. Sparks and Chafin, assuming as proven all the facts shown in the evidence of the state, and of the prisoner, and upon which the prisoner relied to establish his theory of insanity. The particular criticism of these questions is that they assume as facts, matters which were not proven, for example, that the prisoner, because of certain things that were proven, became suspicious and jealous of Stewart and the prisoner's wife. We see little merit, if any, in the criticism. It is conceded, as was held in *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668, that in propounding hypothetical questions to expert witnesses, counsel may assume the facts, in accordance with their theory of them. The theory of the state was, from the facts proven, that the prisoner had in fact become jealous of Stewart and his wife. Other facts proven certainly tend to establish the fact of jealousy, the theory of the state, in the questions propounded the witnesses.

[7] The last, and only other point relied upon is, alleged misconduct and separation of the jury. We have read and considered the evidence relating to this subject. Measured by the rules of *State v. Harrison*, supra, and *State v. Cottrill*, 52 W. Va. 363, 43 S. E. 244, and *State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176, we see nothing in the alleged misconduct or separation of the jury prejudicial to the prisoner, and we must overrule the point.

Upon the whole case we find no substantial error in the trial below, of which the prisoner can reasonably complain. The crime of which he was convicted was slight, considering the nature of the offense. He owes much to the efforts of the able counsel who defended him. If he had been convicted of the graver offense of murder, we do not see upon what principle the verdict could have been disturbed. The judgment below must therefore be affirmed.

(99 W. Va. 741)

DAVIS v. MABSCOT COAL & COKE CO.  
(Supreme Court of Appeals of West Virginia.  
Nov. 14, 1911.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 190\*)—INJURY TO MINER—NEGLIGENCE OF MINE BOSS.

The principles of nonliability of a mine owner for neglect of the mine boss, laid down in *Williams v. Thacker Coal Co.*, 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812, *McMillan v. Coal Co.*, 61 W. Va. 531, 57 S. E. 129, 11 L. R. A. (N. S.) 840, *Squillace v. Coal & Coke Co.*, 64 W. Va. 337, 62 S. E. 446, and *Bralley v. Tidewater Co.*, 66 W. Va. 278, 66 S. E. 684, approved and applied to this case.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 449-474; Dec. Dig. § 190.\*]

2. MASTER AND SERVANT (§ 190\*)—INJURY TO MINER—FALLING SLATE.

Though the mine owner have notice of a defect in safety from slate in the roof of a mine, yet if the mine boss inspect it and pronounce it safe, the mine owner is not liable to a worker in the mine for injury to him from slate falling from overhead.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 463, 465; Dec. Dig. § 190.\*]

Error to Circuit Court, Raleigh County.

Action by Lucien H. Davis against the Mabscot Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. E. Allen and J. Lewis Bumgardner, for plaintiff in error. McGinnis & Hatcher, for defendant in error.

BRANNON, J. Bowman, an employé of the Mabscot Coal & Coke Company operating a coal mine, was killed while at work laying track by slate falling from the roof of an air course, and Davis, administrator, sued the company for damages, and the court struck out the plaintiff's evidence and directed a verdict for the defendant.

[1] The mine operator employed a competent mine boss as required by our statute, and as the duty of watching overhead slate rests on this boss, the mine owner is not responsible for the negligence of this boss. A number of decisions have established this rule. *Williams v. Thacker Coal Co.*, 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812; *McMillan v. Coal Co.*, 61 W. Va. 531, 57 S. E. 129, 11

L. R. A. (N. S.) 840; Bralley v. Tidewater Co., 66 W. Va. 278, 66 S. E. 684; Squillache v. Coal & Coke Co., 64 W. Va. 337, 62 S. E. 446. It is frankly admitted by counsel that unless this case can be differentiated from those cases the plaintiff cannot recover, and to do so the plaintiff alleges that the proof shows that the defendant's superintendent had notice of the unsafety of the roof of the air course a month before the accident, and did not remedy it. We do not say whether, if a mine owner has notice of a defect, he must take steps to render it safe, or may remain inactive, leaving the matter to the mine boss.

[2] In the first place I do not think the evidence adequate to fix notice. A miner simply gave an opinion, in casual conversation with the superintendent, that the roof was in unsafe condition, specifying no particular place or portion of slate, pointing out nothing, a mere accidental remark or opinion. Indeed, hardly that. While one Griffith was driving the air course, one Lewis remarked to the superintendent that Griffith was not paying attention to the roof while at work, and was in danger of being killed. But if this were not so, we say that all that could be required would be that the superintendent call the mine boss to inspect. It is not shown that he did so; but it is shown that the mine boss did go to this particular place, and inspect the roof, and pronounce it safe. As the boss knew all that he would have known had the operator given him notice, no notice was required.

We do not think the facts take this case out of the principles established in the cases cited, and we affirm the judgment.

(69 W. Va. 720)

### CARPER v. CHENOWETH.

(Supreme Court of Appeals of West Virginia.  
Nov. 14, 1911.)

(Syllabus by the Court.)

#### 1. PARTITION (§ 60\*)—ACTIONS—AMENDMENT OF PLEADING.

Objection to the filing of an amended bill in a suit for partition, after appearance by the defendant, showing nothing more than a pendent lite purchase of a tract of land adjoining the land involved, retraction of an offer of choice of lots to the defendant, and a proposition to exchange the lots assigned to the plaintiff and a certain sum of money for those assigned to the defendant, should be sustained.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 166-173; Dec. Dig. § 60.\*]

#### 2. APPEAL AND ERROR (§ 1041\*)—REVIEW—HARMLESS ERROR—RULINGS ON PLEADING.

Error against the defendant in overruling such objection and allowing the amended bill to be filed is corrected by proceeding with the cause as if it had not been filed, and, as the plaintiff is not prejudiced thereby, he cannot complain.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1041.\*]

#### 3. PARTITION (§ 94\*)—ACTIONS—SUFFICIENCY OF EVIDENCE—OPINIONS.

A charge of inequality of value in lots assigned by commissioners in a partition suit is not sustained by mere opinions of witnesses based upon no data and contradicted by the opinions of other witnesses equally credible.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 94.\*]

#### 4. PARTITION (§ 94\*)—ACTIONS—SUFFICIENCY OF EVIDENCE—OFFER OF EXCHANGE.

Nor is such charge sustained by an offer of one of two parties to a partition to exchange a certain sum of money and the land assigned to him, less a cemetery lot and a right of way to it, for the land assigned to the other; the location of the cemetery and right of way and length of the latter not being shown.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 94.\*]

#### 5. PARTITION (§ 78\*)—ACTIONS—MODE OF DIVISION.

A party to a partition suit in equity has no absolute right to have his share laid off adjacent to other land owned by him in severalty, and the equity arising from proximity of such other land may be denied, if attended by another and opposing equitable consideration.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 265-273; Dec. Dig. § 78.\*]

#### 6. PARTITION (§ 78\*)—ACTIONS—MODE OF DIVISION.

Such an equity will not be enforced to the detriment of another party to the partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 265-273; Dec. Dig. § 78.\*]

Appeal from Circuit Court, Randolph County.

Bill in equity by Abigail Carper against Maggie B. Chenoweth. From a decree for defendant, plaintiff appeals. Affirmed.

W. B. Maxwell and W. W. Brannon, for appellant. Jared L. Wamsley, for appellee.

POFFENBARGER, J. The appellant here, a tenant in common with the appellee, her daughter, in a tract of 600 acres of land, brought this suit for partition thereof, offering the latter her choice of equal lots into which she regarded the land as susceptible of division, but asking an assignment to herself of the part on which an old family cemetery should happen to be.

After an unsuccessful demurrer, the defendant answered, expressing willingness to accept the plaintiff's offer and averring an agreement between the parties that E. E. Taylor, A. J. Long, and M. J. Coberly should be appointed by the court to divide the land and make allotments of equal portions thereof to the parties in the event of failure of a mutual agreement. A decree was thereupon entered, appointing Taylor, Long, and Coberly commissioners, and providing for assignment to the plaintiff of that portion on which the cemetery is located, if consistent with the best interests of both parties. They went upon the land, consisting of a long strip running back into the hills from the Tygart's Valley river, and ran a line through it from one end to the other, so as to give each party

a part of the river bottom land, a part of the cleared hill land, if any, a part of the timber, and also water for agricultural and domestic purposes. Back from the river some distance a county road crosses the land, and another line was run along it, making four lots. Two of these on the southern or upper side, containing, respectively, 100.69 acres between the road and the river and 243 acres back of the road, on one of which the cemetery is located, were assigned to the plaintiff, and the other two, containing, respectively, 90.69 acres, lying between the road and the river, and 212 acres, lying back of the road, were assigned to the defendant. One of the commissioners, Long, refused to concur in or sign the report.

The plaintiff excepted to the report, charging discrimination against her in the value of the land amounting to \$1,000, and complaining of failure of the commissioners to assign to her the lower part of the land instead of the upper, in view of her having purchased other land adjacent to that portion, while the suit was pending. To sustain this exception, she filed the affidavits of two men who say the lower part is worth more than the upper by at least \$800, and the affidavit of Commissioner Long, stating, in his opinion, a difference of \$600. The two commissioners who joined in the report deny by their affidavits any inequality of value and assert that the two parts of the land are equal in value. Affidavits of two other persons to the same effect are filed. The exception says failure to assign to the plaintiff the lower tract of land will cut her other land off from access by public road; but this portion of the exception is not sustained by any proof.

At a special term of the court, the parties again appeared, and the plaintiff tendered and asked leave to file an amended bill, to the filing of which the defendant objected; but the court overruled the objection and permitted it to be filed. Then the latter demurred to it, and, the demurrer having been overruled, an answer to the amended bill was immediately filed and replied to generally, and thereupon, over the objection of the plaintiff, the court heard the cause and rendered a final decree, confirming the report of the commissioners and appointing a special commissioner to convey the lots to the parties respectively, in accordance with the report and the decree thereon.

[1] The refusal of the court to allow time to take proof in support of the amended bill is a subject of lengthy and earnest complaint. If the subject-matter of the amended bill bore materially on the main issue, this complaint might be well founded; but we are of the opinion that the matter set up in it amounts to nothing more than evidence which ought to have been presented to the commissioners and passed upon by them, or which it was proper to introduce as evidence to sustain the exception to their report. It

says nothing more than that the plaintiff, pending the suit, had purchased a tract of land, adjoining that portion of the land here involved which she now desires the court to assign to her; that, having purchased it and so produced a condition which makes it undesirable to adhere to her offer to the defendant of a choice of lots, she withdraws that offer or declines to be bound by the acceptance thereof; and that she is willing to exchange the part assigned her for the other, provided she is allowed the cemetery with a right of way to it, and pay \$500 difference. The newly purchased land is not in any way involved in this suit. No relief is asked respecting it, and none could be, for the defendant has no interest in it. The plaintiff's ownership in that land is a mere circumstance for consideration by the commissioners or the court in connection with the assignment of lots. Nor was a bill necessary to signify her desire to withdraw her offer or repudiation of the agreement made by the acceptance thereof, or to make an offer of exchange. These things could have been done in court in an informal way. In view of the character of the proposed amendment, the court below should have sustained the objection to the filing of the amended bill and proceeded to pass upon the commissioners' report and the exceptions thereto.

[2] The error in permitting this injection into the pleadings of matter already in evidence, and not constituting proper subject-matter for a pleading, did not, however, deprive the court of power to hear and dispose of the cause in the condition in which it then was. The amended bill and answer raised no issue that had not already been raised by the report and the exception thereto. Denial to the plaintiff of time to take proof upon that issue was not prejudicial, because she had already introduced evidence to sustain her contention and did not indicate ability to furnish any additional evidence. We are of the opinion, therefore, that the court erred in permitting the amended bill to be filed, and also that the plaintiff was not prejudiced by the action of the court in hearing the cause as if it had not been filed. By hearing the cause and entering its decree, the court substantially, though informally, corrected its error in permitting the amended bill to be filed.

[3] Upon consideration of all the evidence, we are also of the opinion that the court did not err in confirming the report of the commissioners and decreeing partition in accordance therewith. Upon the question of difference in value, we have nothing against the report except the opinions of three witnesses, controverted by the opinions of four, and the plaintiff's offer to take the lower tract of land and the cemetery with a right of way to it and pay a difference of \$500. No fact or circumstance, indicating difference in

value, has been stated. We have opinions without data constituting a basis therefor. In the evidence contradicting these opinions, some facts indicating the fairness and equity of the partition are stated, among others, that each party is given a portion of the river bottom land, a portion of the cleared land, a portion of the timbered land, water for agricultural and domestic purposes, and an equal value. The plaintiff gets about 10 acres more of the land between the road and the river than the defendant and about 31 acres more of the land back of the road than the defendant. [4] Fairness of the offer to exchange and pay a difference of \$500, as above stated, is not shown. We have no indication of the length or character of the proposed right of way to the cemetery, nor its effect upon the land over which it would have to go. To say this proves a difference in value would be the expression of a mere guess. In this state of the evidence, we are unable to disturb the decree upon the theory of a difference in value between the tracts.

[5] Only one circumstance is shown constituting a plausible claim of an equity ignored by the court, namely, ownership of land adjacent to the part assigned to the defendant. There is no absolute right in a party to a partition of land to have his share so laid off as to adjoin his other lands. Ownership of adjacent land is a mere circumstance to be considered and may be counteracted by other considerations. The authorities relied upon (Hall v. Piddock, 21 N. J. Eq. 311, Cox v. McMullin, 14 Grat. [Va.] 82, and 2 Dan. Ch. Pr. p. 1158) treat it as only an equitable circumstance, not as an absolute right. In this instance, the plaintiff tenaciously holds to her desire to have the cemetery assigned to her. At the same time, she wants her portion of the land laid off next to her other land. It does not appear that she can obtain these two objects without detriment to the defendant. If the land should be so divided as to accomplish both results, the plaintiff would probably get all of the improved land. The form of her demand indicates impracticability of accomplishing the two results without giving a right of way over defendant's land to the cemetery and the right to forever maintain a cemetery within the midst of the defendant's land, or division in a manner different from that adopted by the commissioners. [6] We think the impossibility of laying off the plaintiff's share of this land so as to adjoin her other land and give her the cemetery, without imposing the burden of a road to it upon the lands of the defendant, amply justifies the court in refusing to do so. The right here claimed is given only when it can be

done without injustice to the other party. The principle is stated in Hall v. Piddock in the following terms: "The peculiarities of an equitable partition are that such part of the land as may be more advantageous to any party on account of its proximity to his other land, or for any other reason, will be directed to be set off to him if it can be done without injury to the others." We see nothing in the principle as stated here, or in the other authorities, imposing upon the court or the commissioners duty to recognize and enforce inconsistent claims by one of the parties to a partition to the extent of working injury to another. In other words, we are unable to see any equity in a claim of two advantages by one party which cannot be allowed without detriment to the other.

For the reasons stated, we affirm the decree.

Affirmed.

(60 W. Va. 743)

BLUE, Tax Com'r. v. TETRICK, County Clerk.

(Supreme Court of Appeals of West Virginia.  
Nov. 14, 1911.)

(Syllabus by the Court.)

1. STATES (§ 44\*)—CREATION OF OFFICE—CONSTITUTIONAL PROVISIONS.

Chapter 4, Acts 1904, Ex. Sess., found in Code, edition 1906, c. 29, is not unconstitutional in its provision creating the office of tax commissioner. He is a lawful state executive officer.

[Ed. Note.—For other cases, see States, Dec. Dig. § 44.\*]

2. STATES (§ 44\*)—CREATION OF OFFICE—CONSTITUTIONAL PROVISIONS.

The Legislature has power under the Constitution to create subordinate executive state offices in addition to those specified in section 1 of article 7 of the Constitution (Code 1906, p. lxiv).

[Ed. Note.—For other cases, see States, Dec. Dig. § 44.\*]

3. STATES (§ 44\*)—DUTIES OF OFFICERS—STATUTORY PROVISIONS.

Chapter 33, Acts of 1908, Ex. Sess. (Code Supp. 1909, c. 10b), is not unconstitutional in its provisions requiring public officers in keeping accounts of public moneys to conform to the system and forms prescribed by the State Tax Commissioner and board of public works.

[Ed. Note.—For other cases, see States, Dec. Dig. § 44.\*]

(Additional Syllabus by Editorial Staff.)

4. OFFICERS (§ 3\*)—CREATION OF APPOINTMENT—CONSTITUTIONAL PROVISIONS—"CREATE."

In Const. art. 7, § 8 (Code 1906, p. lxv), providing for the appointment of officers whose offices "shall be created by law," the word "create" means to bring into existence that which did not exist, and gives to the Legislature power to originate an office.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1708-1709.]

**5. STATES (§ 44\*)—OFFICERS—CONSTITUTIONAL PROVISIONS—"OFFICE."**

In Const. art. 7, § 8 (Code 1906, p. lxxv), providing for the appointment of officers whose offices shall be created by law, the word "office" differs in its legal signification from "employé," an employé being a mere agent, and the State Tax Commissioner holds an office which the Legislature is authorized to create.

[Ed. Note.—For other cases, see States, Dec. Dig. § 44.\*

For other definitions, see Words and Phrases, vol. 6, pp. 4921-4931; vol. 8, p. 7736.]

Original proceeding by Fred O. Blue, State Tax Commissioner, for mandamus to W. Guy Tetrick, Clerk of the County Court of Harrison County. Motion to quash and demurrer to alternative writ overruled.

L. S. Echols, E. R. Kingsley, and Fred O. Blue, for petitioner. Philip P. Steptoe, for respondent.

BRANNON, J. Fred O. Blue, State Tax Commissioner, and as such chief inspector of public offices, filed in this court a petition, alleging that W. Guy Tetrick, clerk of the county court of Harrison county, had failed to keep his accounts conformably to the system of accounting by public officers prescribed by chapter 33 of the Acts of the Extra Session of the Legislature in 1908 (Supplement Code of 1909, c. 10b), and praying for a mandamus to compel said clerk to so keep his accounts. The defendant moved the court to quash the alternative writ and demurrer to it, and we hear the case on that motion and demurrer, not on any facts not in that writ stated.

[1] One defense against the issuance of the mandamus is that the act found in Code of 1906, ch. 29, creating the office of tax commissioner is unconstitutional, and that in law there is no such office as tax commissionership, and that the plaintiff is no officer at all, and has no power as such. This position rests on the theory that the act establishes another executive officer in addition to those specified in the Constitution; indeed, that the act creates another executive department. The provision of the Constitution relied upon for this contention is section 1, art. 7 (Code 1906, p. lxxiv), reading as follows: "The executive department shall consist of a governor, secretary of state, state superintendent of free schools, auditor, treasurer and attorney general." The claim is that the Tax Commissioner is a state officer, of the same nature and character as the Governor and other officers named in the clause of the Constitution just quoted, and that that clause contains all the executive officers to fill and execute the duties of the state executive department, and no more can be added. We cannot concur in this contention. In the first place, we must remember the well-known rule that, as the Legislature is the supreme lawmaking power, it can enact any law,

where it is not prohibited by state or federal Constitution. 3 Encyclo. Digest, 161. Our Constitution has no prohibition in this matter.

[2] We cannot think that it was the intention of the framers of the Constitution to limit the power of the Legislature, so as to prohibit it from creating new offices to aid in state executive administration. It was not the intention to say that the Legislature, the lawmaking power, should be restrained from doing this, however necessary, as population and business has increased in future. We must not give such a construction to the Constitution as would so far militate against the public welfare and necessity. The Constitution of the United States provides that: "The executive power shall be vested in a president of the United States of America." It cannot be possible that it was intended that all the multifarious executive duties should rest on the President alone, without power in Congress to create offices and officers of great power, to carry on executive administrations. Congress has never taken that view, as it has created, during the whole history of the government, numerous officers to carry on high functions of government, cabinet officers, and others of high dignity and great powers. If that proposition be true, we have been a long time finding it out. To so hold would turn back the tide of time. And we may say the same as to state. We cannot think that the statutes establishing a state board of health, commissioner of banking, chief inspector of mines, state board of control, state archivist, board of pharmacy, and state game and fish warden, besides others, are unconstitutional and void. All along the road during the life of this state and the life of Virginia the Legislature has provided additional offices and officers to perform executive functions. In Colorado was the same provision as that in our Constitution. The court said that: "In declaring that offices should constitute the executive department, it was not intended that the Legislature should not create new executive offices. Such a presumption would do violence to the intelligence of the framers of that instrument. It is, we think, the purpose of this section to provide for such offices of the executive department as the members of the constitutional convention deemed absolutely indispensable, leaving it to the Legislature to create new offices as the growth of the state and experience might suggest, and to abolish the same, but without authority to abolish any of those enumerated. The Constitution of the United States provides that the executive power of the nation shall be vested in the President; but it will certainly not be contended that it was intended by this that the President was to be the sole and exclusive executive officer of the nation."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

State v. Womack, 4 Wash. 19, 29 Pac. 939, also so holds. The text of 36 Cyc. p. 854, reads thus: "The enumeration by the Constitution of certain officers as constituting the executive department of the state does not necessarily deprive the Legislature of the power of creating other executive offices, although it cannot abolish any of those created by the Constitution." The same rule is found in 23 Am. & Eng. Ency. of Law, 328. Such, I would say, would be the true construction of the above-quoted extract from article 7, § 1, of the Constitution, if the case rested upon that alone. But there are other clauses in the Constitution which clearly contemplate power in the Legislature to create additional offices, and authorize it to do so. Take section 8, article 7 (Code 1906, p. lxxv). It says the Governor shall nominate, and by and with the advice and consent of the Senate appoint, all officers whose offices are established by the Constitution, "*or shall be created by law*, and whose appointment or election is not otherwise provided for." Section 8, art. 4 (Code 1906, p. liv) says: "The Legislature, in cases not provided for in this Constitution, shall prescribe by general laws the terms of offices, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed." These sections clearly recognize the power of the Legislature to create additional offices in the executive department. I do not say that the Legislature could create an office with power in it incumbent to oust the Governor of his constitutional functions, though I think it could deprive him of powers given by statute, and transfer them to another officer; but I do say that it is very clear that the Legislature may create an additional office, and provide for filling it, as an auxiliary or aid in the executive department. It cannot be said that chapter 33, Acts of 1906 (extra session), makes the Tax Commissioner coequal with the Governor, since it provides that the Governor shall appoint him, and may remove him, and the Tax Commissioner shall report to the Governor. The Tax Commissioner is thus not the coequal of the Governor, but is a subordinate in the executive department.

[4, 5] It is virtually contended that the power to create additional officers applies only to subordinates, to employés, or inferior officers, but not to an officer like that of the Tax Commissioner, vested, as he is, with great and important supervision over the conduct of officers as to monetary matters; but the language of the Constitution above quoted is, "officers whose offices are established by this Constitution, or shall be created by law." The word "create" means to bring into existence that which did not exist. It gives to the Legislature power to originate an office. And it uses the word "office." Its legal signification is different from "employé." An employé is a mere agent. In

Hartigan v. Board of Regents, 49 W. Va. 14, 38 S. E. 698, we discuss this difference, and under principles there stated it is clear that a tax commissioner holds an office, and the Constitution authorizes the Legislature to create an office. The Constitution goes further than merely to authorize the Legislature to create an employment; it authorizes it to create an office. The Tax Commissioner is an officer, paid out of the public treasury, and exercises some great powers pertaining to sovereignty, and is therefore an officer, not an employé. Under principles stated in that case, and in full note to Shelby v. Alcorn, 72 Am. Dec. 169, he is an officer. Though he is an officer, the Constitution authorizes the Legislature to create "officers"; the Constitution must mean this, as there would be no need of a provision in it to authorize the Legislature to provide for mere employment.

[3] Another defense against the award of a mandamus is that chapter 33, Acts of 1906, is unconstitutional, because it deprives the county court of superintendence and administration of the fiscal affairs of the county, contrary to section 24 of article 8 of the Constitution (Code 1906, p. lxxiv), giving such jurisdiction to the county court. The act provides that the State Tax Commissioner shall be ex officio the chief inspector and supervisor of public offices, and he shall have power to perform the duties specified in the act. It provides that he shall formulate, prescribe, and install a system of accounting and reporting in conformity with the provision of the act, which shall be uniform for all public offices and to all public accounts of the same class, which system shall exhibit true accounts and statements of all public funds collected, received, and expended for any purpose by all public officers, employés or other persons. The accounts must show the receipts, use, and disposition of all money and public property, the income therefrom, and of all sources of public income, and the amounts received and due from each source. The act provides that separate accounts be kept for every appropriation or fund made or levied by a taxing body, and payments made thereout, and various other provisions, calculated to show and account for all public moneys in the hands of public officers, and exhibit the state of the various funds. We do not realize how it can be said that the keeping of such accounts takes away the jurisdiction or superintendence of the county court over the fiscal affairs of the county. The act does not make such account conclusive either on the county or the officer. They are only exhibits or statements of the public money, and, instead of taking away the superintendence of the county court, are helpful to it as basis, guide, or light, helpful to the county court in its regulation or administration of such affairs. It is an aid to the county court; it is to further the exercise of its jurisdiction. But, aside from this,

the Constitution, whilst it gives the county court superintendence and administration of the fiscal affairs of the county, yet gives it "under such regulation as may be prescribed by law," thus giving the Legislature large power to direct, regulate, and control the exercise of the jurisdiction of the county court. It is quite difficult to say what is the limit of the legislative power herein, and yet more difficult to say that an act of the Legislature, simply providing a system of book-keeping by the public officers handling public money, in order to show the receipts and disbursement thereof, deprives the county court of its lawful jurisdiction in the matter. This act is only in furtherance of the Constitution, art. 6, § 27 (Code 1906, p. 1x), which requires the Legislature to enact and enforce laws requiring sheriffs and other officers collecting or receiving public money to make accounts and settlements therefor. That is the mandate of the Constitution. What does this act do but provide for systematic accounts for public money? This act answers a great public need, and is of vital importance to the people to secure accountability for, and the lawful disposition of, public money. We can hardly conceive of any legislation in this line more salutary in the interest of the public. We can hardly conceive of functions more valuable and necessary and prudential than those of the Tax Commissioner under this act. We can hardly conceive of an officer whose services, well performed, will more redound to the public benefit. It will save to the people thousands and thousands of dollars of their money from misappropriation and embezzlement.

Further, as to the claim that the mandamus asked by the Tax Commissioner invades the jurisdiction of the county court, I remark that this mandamus is asked under sections 2 and 5 of chapter 33; that is, to require officers to keep accounts according to the system and forms presented by the Tax Commissioner under section 2. It is not under section 7, which authorizes the Commissioner to require an audit or investigation of the financial affairs of public office. We express no opinion as to such audit. *Martin v. Tyler*, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 833, and *Bryant v. Robbins*, 70 Wis. 259, 35 N. W. 545, are cited by Tetrick's counsel. So far as they go, they sustain the position above taken; but I confess they are not authority for us. But they are not authority against us. They hold that acts establishing a county board of drainage were not repugnant to the Constitution, giving county commissioners superintendence of the fiscal county affairs. They so hold because drainage was held not a fiscal matter. The court did not decide the acts void. It is said that if the acts had concerned fiscal affairs the court would have held them void. How do we know? The cases are not in point here. No pointed authority is shown to uphold the position that chapter 33 takes from the county court its

powers. We do not think so, at least as to this mandamus.

It is argued that chapter 33 is unconstitutional, as delegating to the Tax Commissioner and the board of public works legislative power, and thus violates that well-known principle of law that the Legislature alone can enact laws, and cannot refer it to any officer to do so. In the first place, I will say that it is useless in this case to enter upon a discussion of the intricate question of when an act is open to this objection, for the reason is plain that this act is clearly not within that principle. The argument of counsel is that this act does not take effect without the action of the Tax Commissioner and board of public works. This argument rests on the fact that the act directs the Tax Commissioner, called "Chief Inspector," to formulate, prescribe, and install a system of accounting and reporting in conformity with the provisions of the act as to public funds in the hands of officers, and provides that the system formulated by the inspector, before it becomes effective, must be approved by the board of public works. From that provision is built the argument of invalidity of the act. It is at once sufficient to reply that the act by no means depends on the assent or discretion of the inspector or board of public works. On the contrary, the chapter is a positive enactment that its provisions, directions, and requirements shall be executed, shall be law. There is no shadow to justify the claim that the operation of the law shall be dependent on the will of the inspector or board. Under its own provisions, it went into effect January 1, 1909, without any reservation or condition that the inspector or board should approve or put it in force. It is true that it provides that the inspector shall make forms of accounting with the approval of the board of public works; but it leaves no discretion with them to say whether they will or will not make those forms, or adopt the system of accounting prescribed by the act, but, on the contrary, commands them to do so. If they do not do so, they disobey the command of the act, and I doubt not that the Governor, or some one, could compel the inspector to comply with the act.

Is it possible to say that when an act fixes duties to be performed by public officers it is unconstitutional as a delegation of legislative power? If so, how many laws would fall? That is all that is contained in the question. So the question of when an act is void, because it refers its going into effect to some other officer or body, really does not arise in this case.

If the taking effect of this act were dependent on the volition or action of the inspector, then such question would arise, and then we would meet with a legion of decisions "every which way." It is not always the case that such a provision makes the act void. Each instance stands on its own



legs. In *State v. Butler*, 105 Me. 91, 73 Atl. 560, 24 L. R. A. (N. S.) 744, 18 Am. & Eng. Ann. Cas. 484, and note, 489, will be found the cases on this subject. In *Haigh v. Bell*, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131, was involved an act, authorizing the county court, upon petition of voters, to put in operation in its county an act to prevent hogs from running at large. The act was held constitutional. In *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, was presented an act of Congress, providing that upon the ascertainment by the President that certain articles exported from the United States were charged by another country tariff, not reciprocal, but unequal, he could suspend a provision of the tariff act, allowing articles from that country to come in free. The provision of the act was held not void as delegating legislative power to the President. We have a later case in that eminent court, the United States Supreme Court—*Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523. The act involved conferred on the Secretary of War power to say when a bridge over a navigable stream constituted an obstruction, and the question was whether that feature of the act made it obnoxious to the claim that it delegated legislative function to the President, and it was held that it did not do so. The court said that: "The true distinction is between the delegation of power to make the law, which involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised in a pursuance of the law. The first cannot be done; to the latter there can be no objections." The court said that half the statutes on our books are in the alternative, depending on discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them; but that it would not be said that the exercise of such discretion is the making of the law. That is going much further than we have to go in this case, because there is not a shade of discretion left by this act in the inspector to say whether or not the act shall operate; but he is commanded to execute it. Are the various acts creating railroad commissions to fix rates, or enforce rates fixed by law, unconstitutional? In fact, as I have said above, the contention in this case would almost nullify the Code, on the ground that it commits duties to be performed by officers. That is all this act does as to the inspector and board of public works. It simply directs them to execute it. I refer here to the well-considered case of *State v. Railway Co.*, 76 Kan. 467, 92 Pac. 606. There we find it laid down that the power of a Legislature to delegate merely administrative functions is thoroughly established, citing *Atlantic Coast Line v. N. Car. Corp.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933. There we find it laid down under a host of authorities that the Legislature

may not delegate its strictly legislative powers, but it may delegate authority to perform certain functions which are administrative in character, and cannot well be performed by the Legislature itself. Our act simply leaves it to those officers to execute the act, as many other statutes do. If they do not perform the functions which the act prescribes, the act is a dead letter until compliance with it shall be enforced; but they must execute it; the act gives them no discretion; the act is a law, no matter what they do. But I need not have gone outside of our own authority. I have just met with the cases of *Rutter v. Sullivan*, 25 W. Va. 427, and *Bull v. Read*, 13 Grat. (Va.) 78. In the former case, an act, creating a municipal court for Huntington, and providing that the act should be suspended until approved by the voters, was not invalid as delegating legislative power. In the second case, it was held likewise as to an act establishing a system of free schools in a district, not to be carried into effect until the people should approve it.

The Constitution (article 6, § 27) requires the Legislature to enact laws requiring officers receiving public money to make annual accounts and settlements. Laws have always existed to that end. The Code 1906, § 33, c. 39, has long provided that clerks of the county court shall keep proper accounts to show the money and claims due to the county, which are to be accounted for to the court, showing all claims placed in the hands of an officer. It requires him to keep a record touching the money of a county. For what purpose? In order that the county may be able to make settlements, and get its dues from sheriff and other officers. The clerk is the keeper of the books and accounts of the county, to show its right. The Code, in section 32a, III, provides that when any money is paid to the treasurer, except taxes, the treasurer shall give to the person paying duplicate receipts, one of which shall be deposited with the clerk, who shall, in a well-bound book, charge the treasurer therewith, and file the receipts in his office. This new act (chapter 33) is nothing more, in substance, than an act to carry out more effectually that old legislation. It is only an act to assure the accounting for public money. The statutes always made provisions for settlement and accounting for public money. This is only another act to more efficiently effectuate that end. It goes along with the old legislation. It contains no new idea. It simply provides new means to secure accountability in the fact that it sets up a new officer, and directs him to prescribe a system of accounts, to ascertain the public right as to money in the hands of officers. It simply directs a certain officer to act in the matter to attain the end sought by the statute. It cannot be said that it does more than simply authorize a public officer to perform certain duties to carry this

and other statutes in *pari materia* into execution. The Legislature could not formulate a system of accounts, and of necessity had to commit it to a public officer. That is all the act does, so far as it is involved in this case.

Chapter 33 is attacked as unconstitutional, on the theory that it lessens the salary of the clerk during his term of office. We do not deem it requisite to discuss this matter. We simply say that the act does not pretend to deal in any wise with salary. It may be said to impose more duties on the clerk; but the Legislature often does that, and surely can do so. But I do not say that it does impose additional duties, since the old law required him to keep practically the same accounts required by the new act. Doubtless the system directed by this act is more methodical than the former process, and is less laborious, and surely will facilitate settlement. If kept as the inspector directs it, there will *per se* be settlement.

Counsel for Tetrick says that this suit cannot be sustained, as there is no warrant for it. He says that the Tax Commissioner cannot sue to enforce the act until audit of an office has been made, and a report of the investigation has been filed with the Commissioner and the taxing body; and that only when such reports shall show misfeasance, malfeasance, or nonfeasance, and only when the proper legal authority of the court, the prosecuting attorney, fails to take steps to enforce the public right, can the Tax Commissioner sue to do so. That provision is found in section 7; that applies to an audit of the office. We are not dealing with that section or that audit. The plaintiff in this case does not allege anything crooked in the discharge of duty by the clerk, save his failure to keep his accounts according to the formula prescribed and sent to him by the Tax Commissioner. Section 7 provides a suit by the Commissioner after an audit. But we have the case before us of a failure to keep the accounts according to the system which the Commissioner prescribes. Suppose an officer refuses to conform to the system dictated by the Tax Commissioner under the act. Is there no remedy? We cannot think that. We cannot think that the high purpose of this enactment is to be thus frustrated. Who is to exert the remedy? We think it is the Tax Commissioner. We deduce this from a reading of the act, evidently intending to vest its execution in that officer. The act says he shall be chief inspector and supervisor of public offices, and have power and authority set forth in the act; and section 2 commands him to prescribe the system of accounting. Does it impose this duty, and yet give no authority to enforce it? He has implied authority to enforce compliance by officers with the duties which the Commissioner shall prescribe. The act gives no suit,

in the case supposed, to any other officer. Public rights must be enforced by public agents. The Tax Commissioner is the public agent in such case as we have in hand. We think he has such an interest officially as enables him to ask the writ of mandamus.

Is it necessary to invoke that worn principle of law that a court approaches such a question with timidity, and must take a statute as constitutional, unless it is very plainly repugnant to the Constitution?

But for the fact that the act in question is, in all its parts, a very important one, and new, and the elaborate briefs of counsel, which, on both sides, evince thought and labor and ability, and have been very helpful to the court, I would not have written so much. I have not found the case to involve difficulty in decision.

We overrule the motion to quash the alternative writ and the demurrer to it, and retain the case for further proceeding.

(69 W. Va. 761)

BLUE, State Tax Com'r, v. SMITH,  
Sheriff.

(Supreme Court of Appeals of West Virginia.  
Nov. 14, 1911.)

(Syllabus by the Court.)

1. STATES (§ 44\*)—CREATION OF OFFICES—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The Legislature had the power to create the office of State Tax Commissioner, and said office is not in violation of the state Constitution.

[Ed. Note.—For other cases, see States, Dec. Dig. § 44.\*]

2. STATES (§ 68\*)—CREATION OF OFFICES—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Said office is subordinate in the executive department of the state, and the power and duties thereof do not conflict with those of any office created by the state Constitution.

[Ed. Note.—For other cases, see States, Dec. Dig. § 68.\*]

3. CONSTITUTIONAL LAW (§ 62\*)—DISTRIBUTION OF GOVERNMENTAL POWER—DELEGATION OF LEGISLATIVE POWER.

Chapter 33 of Acts Ex. Sess. 1908 (Code Supp. 1909, c. 10b), providing for an uniform system of public accounting, and appointing the State Tax Commissioner chief inspector and supervisor of public offices, and authorizing him to prescribe forms for the keeping of accounts of public funds, and, after having such forms approved by the board of public works, making it the duty of every public officer and employé to keep the accounts of his office according to such prescribed form, does not empower such chief inspector to perform a legislative function. Said act is not in conflict with either the letter or the spirit of the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.\*]

Original proceeding by Fred O. Blue, State Tax Commissioner, for mandamus to S. P. Smith, Sheriff of Kanawha County. Peremptory writ awarded.

L. S. Echols, E. R. Kingsley, and Fred O. Blue, for petitioner. W. G. Mathews, for respondent.

WILLIAMS, P. This is an original mandamus proceeding by Fred O. Blue, State Tax Commissioner, and ex officio chief inspector and supervisor of public offices, against S. P. Smith, sheriff of Kanawha county, to compel him to keep his accounts of the public funds according to certain forms of public accounting, prescribed by said chief inspector for the use of the sheriffs of all the counties of the state, and approved by the board of public works on the 27th of May, and on the 8th of July, 1910.

On the filing of the petition, an alternative writ was issued, to which respondent appeared and demurred. He also moved to quash said writ, and at the same time made return thereto. To sustain the demurrer and motion to quash, it is insisted that the office of State Tax Commissioner was created in violation of the state Constitution, and is therefore not a lawful office, and confers no power on the incumbent.

[1] The Legislature has the inherent power to create the office, in our opinion, unless there is an express or a necessarily implied prohibition upon it to do so, contained in the Constitution. Counsel for respondent concedes this to be the law. Looking to that solemn document, we find that there is certainly no such inhibition expressed, and instead of finding any implied restriction upon the power of the Legislature to create offices, we find that section 8 of article 4 (Code 1906, p. lix), expressly authorizes that body, even if such authorization were thought to be necessary, to prescribe by general law the terms of office, powers, duties, and compensation of all public officers and agents, and the manner in which they shall be elected, appointed, and removed, "in cases not provided for in this Constitution." Section 8 of article 7 (Code 1906, p. lxxv) prohibits the Legislature from appointing or electing any officers (but not from creating offices), and confers upon the Governor the right to nominate, and, by and with the advice and consent of the Senate, to appoint, not only officers mentioned in the Constitution, the manner of whose election is not therein provided for, but also such officers as "*shall be created by law.*" This is certainly as clear an express recognition of the right of the Legislature to create, by law, other officers than those named in the Constitution, as it is a vesting of power in the Governor, acting with the advice of the Senate to fill such offices by appointment, after they are created.

[2] The Legislature, of course, cannot create offices which will conflict with or curtail the constitutional powers of any of the offices provided for by the Constitution. But the office of State Tax Commissioner does not do so. That office was created as an aid to the executive department in the adminis-

tration of the laws respecting the state's revenues. The Governor has the power, together with the Senate, to fill it, and the Governor alone has power to declare it vacant. The State Tax Commissioner is a subordinate office in the executive department; the incumbent may be removed by the chief executive at his will. His powers and duties are purely ministerial, and do not in any manner conflict with those of any other office created by the Constitution. Our conclusion is that the Legislature had the power to create the office of State Tax Commissioner, and that the office is lawfully constituted.

It is not necessary that I should enter upon an extended discussion of this question, because we have to-day decided the same point, raised in the case of Blue, State Tax Commissioner, v. Tetrick, Clerk, 72 S. E. 1033, and I am content to refer to the very able discussion of the subject in the opinion prepared by Judge Brannon in that case. The reasons which he there assigns for holding the office to be lawfully created apply with equal force here. We are too much burdened with work, and too much pressed for time, to justify a repetition of reasons for repeated decisions of the same questions, especially when made at the same time, and so well considered as in the opinion in that case.

[3] The unconstitutionality of chapter 33, Acts 1908 (Code Supp. 1909, c. 10b), was not discussed by counsel in this case; still it may be regarded as having been raised by the demurrer. But we have no doubt concerning the constitutionality of that act, and hold it constitutional and valid, and I again refer to the opinion prepared by Judge Brannon, in the case above cited, for the reasons in support of our opinion sustaining the act.

By that act, the Legislature made the State Tax Commissioner ex officio chief inspector and supervisor over public offices, and imposed upon him duties, power, and authority, in addition to those conferred upon him by chapter 4, Acts 1904 (Code 1906, c. 29), which was the act creating the office of State Tax Commissioner. Chapter 33, Acts 1908, was enacted for the purpose of securing a uniform system of keeping the accounts of public funds of the state and its political subdivisions. It authorizes the chief inspector to prescribe and install a system of accounting and reporting which shall be uniform for all public offices and for all public accounts of the same class. It provides that when such system is formulated by him it shall then be submitted to the board of public works for its inspection and approval before it becomes operative. The act itself became effective on the 1st of January, 1909. The chief inspector did prescribe forms for the keeping of accounts of all public moneys, for the use of the sheriffs of the various counties of the state. On the forms there are columns for keeping the accounts of the various funds which the sheriff receives from all the different sources provided for by law,

and also columns for noting the time it was received, and columns for noting the times and purposes for which it was disbursed. Said form was submitted to the board of public works, and was approved by it on the 27th of May, and on the 8th of July, 1910. At the same time, the chief inspector also submitted to the board of public works printed instructions and explanations, intended to guide the sheriffs in the use of said prescribed forms and they were also approved.

The alternative writ charges that respondent has not kept, and that he is not now keeping, his public accounts in the manner which he was required to do according to the aforesaid forms and instructions. Respondent does not deny this charge; but he insists in his return that the system prescribed is complicated and difficult to understand and to follow. We do not think so; neither would it furnish a good excuse for noncompliance, if it were so. True there are many different accounts for the sheriff to keep; but there are also many different purposes for which the public funds, handled by him, are to be used. It may be true that the system imposes some extra labor upon the sheriff, and perhaps may require some additional clerical assistance in his office, not necessary under the old law. But the law was passed in February, 1908, and was to take effect the 1st of January, 1909, and respondent must have known of the law before he was elected. Hence it cannot be said to have the effect to decrease the emoluments of his office during his term, by making it necessary for him to employ additional clerks, because the law took effect at the same time he took office. The system prescribed may require the keeping of more separate accounts of the receipts and disbursements of the several public funds which

are handled by the sheriff than he has heretofore been accustomed to keep, but the system is not complicated; neither does it seem to us difficult to understand. It is useful and valuable, in that it furnishes daily balances of each particular fund which he collects and disburses, and operates automatically as a settlement of his accounts of all the various funds. The new system may occasion a little more trouble and labor to keep the accounts, but it will occasion vastly less in making the sheriff's annual settlements.

It is true that at the time the application was made for the alternative writ property taxes, assessed for the fiscal year 1911, were not due and payable, and none had been collected. It would be expected that respondent's accounts would be blank as to such taxes. But liquor license taxes are payable, under the law, the 1st of July of each year, and respondent admits that he has collected many thousands of dollars of liquor license taxes, and that he has not kept an account of them in the form prescribed and furnished him by the chief inspector; but he avers that he has kept a separate and distinct record of such taxes in a ledger, or cashbook, which he keeps for that purpose.

He also admits that he has not kept fines received by him from justices of the peace in the manner provided by the prescribed form, but avers that he has kept an account of said fines in a separate ledger. He makes the same admission and allegation with respect to his accounts of fines received by him, which have been imposed upon offenders against the law by the criminal and the circuit courts. These admissions show a noncompliance with the law relating to the uniform keeping of public accounts, and justify the awarding of the peremptory writ, which will be awarded.

(157 N. C. 612)

## STATE v. FRANCIS.

(Supreme Court of North Carolina. Dec. 13, 1911.)

## 1. CRIMINAL LAW (§ 970\*)—ARREST OF JUDGMENT—DEFECTIVE INDICTMENT.

To arrest a judgment after verdict of guilty, the indictment must be so defective that judgment cannot be pronounced on it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.\*]

## 2. CRIMINAL LAW (§ 970\*)—ARREST OF JUDGMENT—DEFECTIVE INDICTMENT.

The caption of an indictment is no part of it, and the omission in the caption of the county in which the indictment was found is not ground for arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.\*]

## 3. CRIMINAL LAW (§ 970\*)—ARREST OF JUDGMENT—DEFECTIVE INDICTMENT.

The failure to insert in the caption of the indictment the term of court at which it was returned is not ground for arrest of judgment, especially where the record shows that the indictment was returned at a specified term.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 970.\*]

## 4. CRIMINAL LAW (§ 970\*)—ARREST OF JUDGMENT—INDICTMENT—REQUISITES.

Time is not of the essence of the offense of unlawfully manufacturing spirituous liquor, and, under Revisal 1905, § 3255, providing that no judgment shall be stayed for the failure of the indictment to state the time of the commission of the offense, an indictment need not state the time of the commission of the offense to support it against a motion in arrest.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 970.\*]

## 5. INTOXICATING LIQUORS (§ 224\*)—UNLAWFULLY MANUFACTURING SPIRITUOUS LIQUORS—PROSECUTION—EVIDENCE.

The state on a trial for the unlawful manufacture of spirituous liquor must show that the offense was committed within two years.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 224.\*]

## 6. CRIMINAL LAW (§ 968\*)—ARREST OF JUDGMENT—EVIDENCE—INSTRUCTIONS.

The failure of the state to show that the offense of unlawfully manufacturing spirituous liquors was committed within two years should be taken advantage of by accused by a requested instruction, and is not available in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2437; Dec. Dig. § 968.\*]

Appeal from Superior Court, McDowell County; Long, Judge.

James Francis was convicted of unlawfully manufacturing spirituous liquors, and he appeals. Affirmed.

After verdict defendants moved in arrest of judgment. The bill is as follows:

"State of North Carolina, ——— County. Superior Court, ——— Term, 191—. The jurors for the state, upon their oaths, do present that Jim Francis, Loge Francis, Ben Francis, late of the county of ——— on the ——— day of ———, with force and arms, at and in the county aforesaid, unlawfully and wilfully manufacture and make

spirituous liquors, against the form of the statute in such case made and provided and against the peace and dignity of the state. Johnson, Solicitor. No. 70. State v. Jim Francis, Loge Francis, Ben Francis. Indictment, making liquor. Witnesses: Alexander Crawley,\* J. A. Lughridge,\* J. P. Ray.\* Those marked \* sworn by the undersigned, foreman, and examined before the grand jury, and this bill found 'A true bill.' C. C. Burgin, Foreman of the Grand Jury.

"This bill was returned into open court at February term, 1911, by C. C. Burgin, foreman of the grand jury. Thos. Morris, C. S. C."

The court overruled the motion, and pronounced judgment.

D. F. Morrow, for appellant. T. W. Bickett, Atty. Gen., and Geo. L. Jones, Asst. Atty. Gen., for the State.

BROWN, J. It is much the best that solicitors should fill in the blanks in the printed forms of indictment. It expedites the administration of the criminal law, and prevents such appeals as this. Had the defendant moved to quash this bill or for a bill of particulars to supply him with any needed information, it is probable the one motion or the other would have been allowed. The defendant has not been taken at any disadvantage, for he allowed the trial to proceed and attacked the bill only after he had been convicted.

[1] To arrest the judgment, it must appear that the bill is so defective that judgment cannot be pronounced upon it.

[2] The fact that the county in which the bill of indictment was found does not appear in the caption of the indictment does not constitute ground for arresting the judgment. State v. Wasden, 4 N. C. 596; State v. Brickell, 8 N. C. 354; State v. Lane, 26 N. C. 121; State v. Dula, 61 N. C. 441; State v. Sprinkle, 65 N. C. 463; State v. Williamson, 81 N. C. 541; State v. Arnold, 107 N. C. 864, 11 S. E. 990. The caption is no part of the indictment, and its omission is no ground for arresting judgment. State v. Arnold, 107 N. C. 864, 11 S. E. 990, and cases cited.

[3] The term of the court being a part of the caption of the bill, the failure to insert it is no ground for arresting judgment. Besides, the records of the superior court of McDowell county embodied in the transcript of appeal sent to this court show that the bill was returned a true bill at February term, 1911.

[4] Time is not of the essence of the offense charged in the bill, and it was not necessary to allege the time at which the offense was committed. Revisal, 3255; State v. Caudle, 63 N. C. 30; State v. Taylor, 83 N. C. 601; State v. Peters, 107 N. C. 876, 12 S. E. 74.

[5, 6] The burden of proof is on the state

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to show that the offense was committed within two years, and a failure to make such proof should be taken advantage of by the defendant by a request to instruct the jury. *State v. Carpenter*, 74 N. C. 230; *State v. Molder*, 133 N. C. 709, 45 S. E. 862.

The bill, while defective in form, is sufficient to sustain the judgment of the court. Affirmed.

(157 N. C. 238)

**HARDEN v. CHESAPEAKE & O. RY. CO.**  
et al.

(Supreme Court of North Carolina. Nov. 22, 1911.)

1. CARRIERS (§ 205\*)—LIVE STOCK—LIABILITY.  
Carriers of live stock receive and hold the same as common carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 918, 920, 923; Dec. Dig. § 205.\*]

2. CARRIERS (§ 216\*)—LIVE STOCK—LIABILITY.  
Carriers of live stock do not insure against injuries arising from the natural vices and propensities of the animals.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 929; Dec. Dig. § 216.\*]

3. CARRIERS (§§ 209, 211, 216\*)—LIVE STOCK—DUTY OF CARRIERS.

A carrier of live stock must provide suitable and adequate cars for the care and preservation of the stock during transportation, and must afford proper facilities for having them watered and attended to, and make proper provision for them respecting peculiar traits or conditions of which it has notice, and especially when the carrier makes stipulations in regard to such conditions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 925, 928, 929; Dec. Dig. §§ 209, 211, 216.\*]

4. CARRIERS (§ 228\*)—LIVE STOCK—ACTION FOR INJURY—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence, in an action against a railroad company for injury to live stock, held to warrant a finding of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.\*]

5. CARRIERS (§ 218\*)—LIVE STOCK—LIMITATION OF LIABILITY—VALIDITY.

Stipulation in a live stock shipment contract, limiting the carrier's liability for negligence to an inadequate valuation, without good-faith intent to arrive at the actual value, is unenforceable, though the classification and rate made in the bill of lading has been approved by the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 933-939; Dec. Dig. § 218.\*]

6. EVIDENCE (§ 80\*)—PRESUMPTIONS—LAWS OF OTHER STATES.

In the absence of evidence to the contrary, a doctrine, derived from the common law, prevailing in the state is presumed to obtain in a sister state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80;\* Common Law, Cent. Dig. §§ 14-16.]

Appeal from Superior Court, Wake County; Whedbee, Judge.

Action by George M. Harden against the Chesapeake & Ohio Railway Company and

another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

Civil action to recover for damages to live stock, shipped by plaintiff over the lines of defendant companies. On the trial, it appeared that plaintiffs, having purchased a number of standard bred horses, in February, 1910, shipped same over lines of defendant companies from Lexington, Ky., over the Chesapeake & Ohio Road, to Lynchburg, Va., and from that point over the Southern to Greensboro, N. C. There was evidence, on the part of plaintiff, tending to show that plaintiff, during the negotiations for shipment, informed the agent of the Chesapeake & Ohio Road that the horses were a high-priced lot, and that one was a stallion, about three years old; that the natural propensities of a stallion of that age, and of this one, were such that it was dangerous to turn him in with the other stock, and that defendant (the Chesapeake & Ohio Road), on being informed that such an animal was in the lot, undertook and agreed to have him securely boxed off from the others; that this was done in such a negligent manner that when the car reached Lynchburg this partition or stall was entirely down, allowing all the stock to mingle together. The agent of the Chesapeake & Ohio, describing the manner in which it had been first constructed, spoke of it as a "sorry job," and, owing to this fact and the condition of the car, the Southern Railroad refused to receive the stock at Lynchburg until the car was repaired and the conditions corrected; that this was done by the agent of the Chesapeake & Ohio, and the stall securely built, but, in replacing the horses in the car, said agent put in the box stall one of them which had already been hurt, and turned the stallion in with the others, and with the result that, when the stock arrived at Greensboro, they were bitten and kicked until one of them died of his injuries, and others badly damaged to the amount of \$1,160; that of this damage \$450 was done to the horses of another shipper, and the damage done to plaintiff's horses, attributable to defendant's negligence, amounted to \$710. There was allegation with evidence on part of defendant, tending to show that defendant, the Chesapeake & Ohio Railroad, had only made a rate as far as Lynchburg, the shipment from that point being over the lines of the Southern Railway; that the defendant, the Chesapeake & Ohio Railroad, had not undertaken to box off the stallion, and was guilty of no negligence in that respect. Defendant further introduced and relied upon the written contract of shipment, or bill of lading, in which it was stipulated, in effect, and as relevant to the inquiry, that, in consideration of a reduced freight rate, the Chesapeake & Ohio Railroad was only to be chargeable for injuries arising from its

gross negligence, and, on the question of value, that in case of any injuries to the stock, for which said company was responsible, under the contract, the amount of recovery should in no case exceed \$75 for each horse, mule, stallion, or jack, \$30 for each cow, steer, or bull, and \$5 for each other animal; and the agent testified that this was an old printed form, and the value (\$75) having been changed to \$100 by subsequent regulations of the company, he inserted the \$100 in lieu of the \$75, and that by this classification and rating the plaintiff saved several hundred dollars in freight charges. There was testimony, also, for defendant that the classification and freight rate in this instance was in accord with a regulation made and approved by the Interstate Commerce Commission. The judge charged the jury, and on issues submitted they rendered the following verdict:

"(1) Was the plaintiff's property injured by the negligence of the defendant, the Southern Railway Company as alleged in the complaint? Answer: No.

"(2) Was the plaintiff's property injured by the negligence of the defendant, the Chesapeake & Ohio Railway Company, as alleged in the complaint? Answer: Yes.

"(3) What damages is plaintiff entitled to recover from the Southern Railway Company? Answer: None.

"(4) What damages is plaintiff entitled to recover from the Chesapeake & Ohio Railway Company? Answer: \$710."

Judgment on verdict for plaintiff, and defendant Chesapeake & Ohio Railroad excepted and appealed.

Aycock & Winston, for appellant. Armistead, Jones & Son, for appellee.

HOKE, J. (after stating the facts as above). [1, 2] It is very generally held that railroad companies receiving live stock for shipment take and hold them as common carriers, and, as a rule, are chargeable with the duties of such carriers concerning them. There is a recognized limitation on the obligations of common carriers, in reference to live stock, to the effect that they are not considered as insurers of such property against injuries arising from the natural or proper vices or the inherent nature and propensities of the animals themselves, or from the "vitality of the freight," as it is sometimes expressed, unless the injuries from such source are attributable, in whole or in part, to the carrier's negligence. The general principle, with its recognized modifications, is very well stated in Moore on Carriers, p. 486, as follows: "Carriers of live stock are common carriers, subject to all the duties, responsibilities, and liabilities, and entitled to all the rights and privileges, of a common carrier of merchandise or other inanimate property, save in one important respect. While common carriers are insurers of inanimate property against all loss and damage, except

such as is inevitable or attributable to the act of God, or caused by public enemies, and except that they are not held liable for losses which result from the inherent and intrinsic qualities of the goods carried by them, as carriers of live stock, they are not insurers of animals against injuries arising from or attributable to the natural or proper vices, or the inherent nature, propensities, and habits, of the animals themselves, and which could not be prevented by foresight, vigilance, and care;" and in Hale on Railments and Carriers, it is said: "Carriers of live stock are common carriers wherever carriers of other goods would be; but they are not liable, in the absence of negligence, for such injuries as occur in consequence of the vitality of the freight," and these statements will be found to accord with the great weight of authority. Selby v. Railroad Co., 113 N. C. 592, 18 S. E. 88, 37 Am. St. Rep. 635; Covington Stock Goods v. Keith, 139 U. S. 128, 11 Sup. Ct. 469, 35 L. Ed. 73; McCune v. Railroad Co., 52 Iowa, 600, 8 N. W. 615; Clark v. Railroad Co., 14 N. Y. 570, 67 Am. Dec. 205; Elliott on Railroads, § 1548; Hutchinson on Carriers (3d Ed.) § 339.

[3] Accordingly, carriers, in the proper performance of their duties, are required to provide suitable and adequate cars for the care and preservation of live stock during their carriage, and to afford proper facilities for having them watered and attended to, and to make proper provision for them in reference to peculiar traits or conditions of which they have notice, and especially when the carrier makes stipulations in reference to such conditions. Kinnick Bros. v. Railroad Co., 69 Iowa, 685, 29 N. W. 772; Haynes v. Railroad Co., 54 Mo. App. 582; Sturgeon v. Railroad Co., 65 Mo. 569; Indianapolis & C. R. R. v. Allen, 31 Ind. 894; Smith v. New Haven, etc., Railroad, 12 Allen (Mass.) 531, 90 Am. Dec. 166; Shaw v. Great Southern R. R. Co., L. R. 1, vol. 8, p. 10 (1881-82); Hutchinson on Carriers (3d Ed.) §§ 342, 343, and 636; Moore on Carriers, p. 498, § 3.

[4, 5] There was ample evidence on part of plaintiff tending to establish a breach of duty on the part of the Chesapeake & Ohio Railroad Company, and justifying the verdict that the stock was injured by the negligence of said company. The agent of that road, testifying for defendant in reference to the original construction of the stall, said it was "a sorry job," and when he had caused it to be rebuilt at Lynchburg, he put the wrong horse into it, and turned the stallion in with the other horses. This being true, it is well established with us that "a common carrier, in its contract of shipment, cannot stipulate against recovery for loss or damage occasioned by its own negligence, and it can make no such stipulation against total or partial loss." Stringfield v. Railroad Co., 152 N. C. 128, 67 S. E. 333, citing McConnell v. Railroad Co., 144 N. C. 90, 56 S. E. 559; Everett v. Railroad Co., 138 N. C. 71, 50 S.

E. 557, 1 L. R. A. (N. S.) 985; *Capehart v. Railroad Co.*, 81 N. C. 438, 31 Am. Rep. 505; *Parker v. Railroad Co.*, 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827; *Calderon v. Steamship Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033; *Railway v. Solan*, 169 U. S. 135, 18 Sup. Ct. 289, 42 L. Ed. 688; *Railway v. Lockwood*, 84 U. S. 357, 21 L. Ed. 627; *Moulton v. Railway*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781, and numerous other decisions.

There are cases which hold that the act of defendant, in turning the stallion in with the other stock, would be an act of gross negligence, and so expressly within the terms of the agreement, but, without reference to this aspect of the evidence, under the doctrine as it prevails in this jurisdiction, this stipulation is entirely void as against public policy, or in any event can only operate to relieve them from liability as insurers, which is perhaps the correct interpretation of the words. And on the facts in evidence this same principle, which avoids stipulations against recovery for negligence on the part of the carrier, should obtain in reference to the clause in the bill of lading, restricting the amount, where the recovery is had on that ground. Speaking of this question in *Everett's Case*, the court said: "It would be an idle thing for the courts to declare the principle that contracts for total exemption from such loss are subversive of public policy and void, and, at the same time permit and uphold a partial limitation which could avail to prevent anything like adequate or substantial recovery by the shipper."

In the present case it appears that this was a high-priced lot of horses, and the agent of the initial carrier was informed of this fact; that the value was inserted by the agent in a printed formula according to a predetermined, inadequate valuation, and that there was no intent or effort to fix upon the true value of the shipment, or to approximate it under any conditions sanctioned or permitted by the law; and it further appears by the uncontradicted testimony that the fair average value of the stock was between two or three hundred dollars per head.

In the *Stringfield Case*, *supra*, on facts very similar, the court held that a restrictive stipulation of this kind, as to recoveries for negligence on the part of carriers, was in contravention of public policy, and void. The ruling in *Stringfield's Case* and others of like purport was not made to depend upon whether there was one or more horses in the shipment (a view presented on the argument here), but on the position that there had been no bona fide effort to arrive at the true value of the shipment, or to approximate it, and to allow an arbitrary, predetermined valuation to stand, far below the actual value, would in actions of that character be in effect to uphold a stipulation against recovery for negligence—a stipulation, as stated, forbidden by our law. In *Stringfield's Case*, at-

tention was called to the fact that the principle we are discussing, "when properly understood and applied, did not prevent the parties from agreeing upon the valuation of a given shipment which should form the basis of adjustment in case of loss or damage; and where this was done in the bona fide effort to fix upon the true value, and was made the basis of a fair and reasonable shipping rate, the parties would be held to the agreed valuation, though the loss should occur by reason of the carrier's negligence." And it was said, too, that an agreed valuation might be in rare instances allowed to stand for the purpose indicated, where it appeared that the agent of the carrier, being without knowledge or notice of the true value of the property, and without opportunity to inform himself, so as to make intelligent estimate concerning it, the parties, in the bona fide effort to put a correct valuation upon it, fixed upon a fair average value of property of the kind constituting the proposed shipment, and made the same, as stated, the basis of a fair and reasonable shipping rate—an instance afforded in the case of *Jones v. Railroad Co.*, 148 N. C. 581, 62 S. E. 701. Such an agreement, and a valuation so established, may not be allowed to prevail, simply because the minds of the parties have met and agreed upon the amount, but in actions for injuries, caused by negligence of the carrier, it must have been agreed upon in the bona fide effort to fix upon a true valuation of the stock; and as an aid to the correct solution it may at times be well to submit an issue as to the true value or the average valuation of the property of the kind constituting the shipment, where such a view of the question is permissible.

There is no allegation or evidence of any fraud or concealment as to value on the part of the shipper, a principle sometimes present in such cases; nor can the doctrine of estoppel be invoked for defendant's relief on the facts presented in the testimony. The plaintiff, on this question, testified that he simply asked for the shipping rate, and it was given him without more. The agent of defendant testified that all that was said on the subject was that he asked if the horses were to be shipped at the usual valuation, and, on being answered, "Yes," he wrote that valuation in the bill of lading. And further as follows: "Q. Did he say anything about the value of the horses? A. No; I do not recall that he did. I asked him the question if they were to be shipped at that valuation, and he said, 'Yes.' Q. He did not say anything about the value himself? A. No. Q. He did not suggest it to you? A. No. Q. He did not read the contract? It was all done in about two minutes? A. Yes; it would take a long time to read it. Q. You did not read it to him? A. No. Q. He said nothing as to the value of the horses? A. He only answered my question, when I asked if they were to be



shipped on the \$100 valuation. He answered my question."

Speaking to this subject in *Springfield's Case*, the court said: "Nor do we think that the doctrine of estoppel, as applied in many of the cases relied upon, should avail defendant here. Some of these decisions could be reconciled, on the ground that if the disproportion between the actual and the stipulated values is so great as to give clear indication that there was no effort made to fix upon or approximate the true value, as in this case, it could be properly held that such a contract would be neither fair nor reasonable; but in many of them we think the doctrine of estoppel is too broadly stated; for, if a contract like the one we are considering is such as to deny substantial recovery for loss occasioned by the carrier's negligence, it is void, as against public policy, and it is not permissible to uphold such an agreement on the principle of estoppel. Such a position, carried to its logical conclusion, would enable individuals, as to their personal contracts and conduct towards each other, to set at naught both the public statutes and police regulations of the state. Accordingly, we find that, except in cases of positive fraud, which, in whole or in part, may operate to set aside the contract relation, the doctrine of estoppel, as ordinarily applied, is only available in aid or extension of valid contracts. *Bigelow on Estoppel* (5th Ed.), citing *Brightman v. Hicks*, 108 Mass. 246; *Langan v. Sankey*, 55 Iowa, 52 [7 N. W. 393]; *Shorman v. Eakin*, 47 Ark. 351 [1 S. W. 559]; *Klenk v. Knable*, 37 Ark. 304—authorities which fully support the text."

It was further insisted that the recovery should not be sustained, because the classification and rate made in the bill of lading had the sanction and approval of the Interstate Commerce Commission. We have not the ruling of the Commission before us, but, in our opinion, it cannot for a moment be sustained that a ruling of the Commission, designed and intended simply as a regulation establishing a reasonable and proper freight rate without more, should have the effect of altering a principle of public policy long prevailing in the state, as said in *Everett's Case*, supra—a principle established and adhered to for grave and weighty reasons, and considered necessary for the protection of the great body of shippers. Replying to a suggestion somewhat similar, the court, in *Kissenger v. Fitzgerald*, 152 N. C. 252, 67 S. E. 590, said: "It is the settled policy of this state that common carriers may not contract against loss or damage occasioned by their negligence; and it has been held by the Supreme Court of the United States that, unless and until there is some valid regulation by Congress of the Interstate Commerce Commission directly affecting the matter, a state has the right to establish such a policy and enforce it in reference to

interstate shipments. *Pa. Ry. v. Hughes*, 191 U. S. 477 [24 Sup. Ct. 132, 48 L. Ed. 268.]"

[8] We are not inadvertent to the fact that the contract of shipment was made in Kentucky, and there is no evidence before us to the rules prevailing in that state concerning it. The doctrine referred to, and which we hold to be controlling on the facts presented, was established and has come down to us from the principles and policy of the common law in reference to public carriers, and the same is presumed to obtain in a sister state, in the absence of evidence to the contrary. *Roberts v. Pratt*, 152 N. C. 731, 68 S. E. 24. On investigation, however, it seems that like doctrine prevails in full force in the state of Kentucky, and has been made a part of the organic law of that state. *Lewis v. Louisville & Nashville R. R.*, 135 Ky. 362, 122 S. W. 184, 25 L. R. A. (N. S.) 938. On the whole matter, we find no reversible error in the record, and the judgment in plaintiff's favor is affirmed.

No error.

CLARK, C. J. (concurring). For reasons of the soundest public policy, it has always been settled law that a common carrier cannot contract for either total or partial exemption from loss occasioned by its own negligence. The shipper and the common carrier are not on equal terms. The shipper must send his freight by the common carrier, or not at all. He is therefore entirely at the mercy of the carrier, unless protected by the higher power of the law against being forced into contracts limiting the carrier's liability.

In this case the evidence of negligence of the carrier is abundant, and has been found by the jury. Therefore the carrier could not by any alleged contract relieve itself from liability for any part of the damages caused by its own negligence. The fact that it offered to carry the stock on the common-law basis of liability for its own negligence, if the shipper would pay \$650 extra, but would take off the \$650, provided it was relieved against liability for its own negligence for all above \$100 per animal, should not be seriously considered in the light of the decisions and of the "reason of the thing." In the language of the great dramatist (*Henry VIII*, act 5, scene 3), the device is "too thin and bare to hide the offense."

The shipper was entitled to have his stock carried at the rate at which they were actually carried, which is evidently the current rate fixed by competition, and with the common-law liability on the carrier to pay the full extent of any damages caused by its own negligence. The carrier had no right to require \$650 additional freight by way of insurance to shipper against its own negligence, since that is a liability which is assumed by the very nature of the contract of carriage.

A provision, limiting liability to an agreed amount, is invalid, if the injury was caused by the carrier's negligence. *Everett v. Railroad*, 138 N. C. 71, 50 S. E. 557, 1 L. R. A. (N. S.) 985; *Capehart v. Railroad*, 81 N. C. 438, 31 Am. Rep. 505; *Gardner v. Railroad*, 127 N. C. 293, 37 S. E. 328; *McConnell v. Railroad*, 144 N. C. 90, 56 S. E. 559. This has also been held in England, Alabama, California, Colorado, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, New Jersey, Pennsylvania, Tennessee, and Texas. See cases collected in 12 Am. & Eng. Ann. Cas. 1131-1134.

It is true that in *Hart v. Railroad*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, that court was led away by some means to disregard this principle which has been so long and so uniformly held, and the maintenance of which in its integrity is so necessary to the business interests of this country, which are largely dependent upon fair treatment by the great common carriers. To cure this aberration of the court, Congress passed what is known as the Hepburn amendment to section 20 of the interstate commerce act (U. S. Comp. Stat. Supp. 1907, p. 906; Supp. 1909, p. 1164) which provides that the initial carrier is liable for any loss, damage, or injury to the goods caused by it or any connecting carrier, and makes void any contract, receipt, rule, or regulation which attempts to exempt the carrier from this liability. 12 Am. & Eng. Ann. Cas. 1133, and cases cited.

In *Railroad v. Orenshaw*, 5 Ga. App. 675, 63 S. E. 865, it is held that the state courts have jurisdiction of an action arising under the Hepburn act, and that any limitation of value or preadjustment of damages by a stipulation, restricting the recovery of damages to an amount less than the actual loss caused by the carrier's negligence, is void under this act. To same effect, *Latta v. Railroad*, 172 Fed. 850, 97 C. C. A. 198. Under these decisions, the doctrine laid down in *Hart v. Railroad*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, is reversed by the Hepburn act, which restores in its integrity the common-law rule that a common carrier cannot contract to be relieved in whole or in part from liability for damages caused by its negligence. The Pennsylvania court, in *Grogan v. Express Co.*, 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360, even prior to the Hepburn act, refused to follow the decision in *Hart v. Railroad*, supra, and many other courts of repute did the same; and it may be said with some confidence that the best legal thought of the country sustained them. The effect of the Hart Case, supra, if unreversed, would have been to place the business interests of the country in the power of the common carriers, for no shipper can contract on equal terms with them. I agree with Mr. Justice ALLEN that *Jones v. Railroad*, 148 N. C. 580, 62 S. E. 701, and *Winslow v. Rail-*

*road*, 151 N. C. 250, 65 S. E. 965, should be overruled.

ALLEN, J. (concurring). I think the authorities establish the following principles, which are based on a sound public policy and on reason: (1) That a common carrier is an insurer, and without proof of negligence is liable for all injuries to goods being transported, unless the injury is caused by the act of God, the public enemy, the negligence of the shipper, or by the inherent qualities of the goods. (2) That the natural propensities of live stock are included in the term "inherent qualities." (3) That a private carrier for hire is not an insurer, but is a bailee, and is only liable for negligence. (4) That the common carrier may limit its common-law liability as an insurer by contract, which is reasonable and based on a valuable consideration, and when so limited it becomes a bailee for hire, and liable for negligence. (5) That it cannot limit its liability for negligence. The cases in our reports uniformly hold this doctrine, except *Winslow v. Railroad*, 151 N. C. 250, 65 S. E. 965, which follows *Jones v. Railroad*, 148 N. C. 580, 62 S. E. 701.

I do not think the Jones Case was correctly decided, and believe it is wise to overrule it and the Winslow Case. The learned judge who wrote the opinion in the Jones Case, cites, in support of the decision, four North Carolina cases: *Selby v. Railroad*, 113 N. C. 588, 18 S. E. 88, 37 Am. St. Rep. 635; *Mitchell v. Railroad*, 124 N. C. 246, 32 S. E. 671, 44 L. R. A. 515; *Gardner v. Railroad*, 127 N. C. 293, 37 S. E. 328; and *Everett v. Railroad*, 138 N. C. 74, 50 S. E. 557, 1 L. R. A. (N. S.) 985; and quotes from the Gardner Case as follows: "In the Gardner Case, the law is summarized as follows: 'A common carrier can make a valid agreement, fixing the value of shipments in case of loss by its negligence, if such agreement be reasonable or based upon a valuable consideration, and it must clearly appear that such was the intention of the parties.'" I do not think these authorities sustain the decision.

In the Selby Case, the valuation clause in a bill of lading was not involved, and the only question raised was the reasonableness of a stipulation requiring the owner to give notice of injury to his stock before removal from possession of the carrier.

In the Mitchell Case, the bill of lading exempted the carrier from risks "not arising from negligence," and the single question decided was whether, under such a bill of lading, the burden was on the plaintiff to prove negligence, or that a presumption of negligence arose from proof of injury while in possession of the carrier.

In the Gardner and Everett Cases, it was expressly held that the valuation clauses in those cases were not valid, and the owners were allowed to recover the amount of their

losses. The quotation from the Gardner Case was taken from a headnote, and is not, I think, supported by the opinion. It is said in that case: "It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its negligence."

In the Everett Case, this is quoted with approval, as is the following from Hutchinson on Carriers: "A majority of the authorities in the United States hold that it is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants, and it is also held by a majority of the courts that a contract, limiting the liability of the carrier to a certain sum in case of loss—that is, contracts designed to secure a partial exemption from liability—while valid and conclusive where the loss is occasioned by something other than the carrier's negligence, cannot be allowed where the loss was occasioned by the negligence of himself or his servant, but that in such case the owner may recover the full value of the goods."

I do not think Judge Ashe has been excelled for accuracy and clearness by any judge who has been a member of this court, and in *Capehart v. Railroad*, 81 N. C. 443, 31 Am. Rep. 505, speaking of the effect of stipulations in bills of lading limiting liability, he says: "Public policy demands that the right of the owner to absolute security against the negligence of the carrier and all persons engaged in performing his duty shall not be taken away by any reservation in his receipt, or by any arrangement between them and the performing company. \* \* \* From an examination of the authorities on this subject, we conclude that a common carrier cannot, by special notice brought home to the knowledge of the owner of the goods, much less by general notice, nor by contract even, exonerate himself from the duty to exercise ordinary care and prudence in the transportation of goods; and we deduce from the principles enunciated by them, the following propositions: (1) That a common carrier, being an insurer against all losses and damages, except those occurring from the act of God or the public enemy, may by special notice brought to the knowledge of the owner of goods delivered for transportation, or by contract, restrict his liability as an insurer, where there is no negligence on his part. (2) That he cannot, by contract even, limit his responsibility for loss or damage resulting from his want of the due exercise of ordinary care."

In Cyc. vol. 6, §31, the author says: "The attempt on the part of carriers to limit their liability as against their own negligence, or that of their servants, has been particularly persistent where the contract of transporta-

tion is with reference to live stock, but such limitations have been uniformly held ineffectual."

In this case the jury has found as a fact that the stock of the plaintiff was injured by the negligence of the defendant, under instructions to which there is no exception, and I therefore concur in the opinion that the plaintiff is entitled to recover the damages he sustained, notwithstanding the valuation clause in the bill of lading.

(157 N. C. 369)

**ABERDEEN & A. R. CO. v. SEABOARD  
AIR LINE RY. CO.**

(Supreme Court of North Carolina. Dec. 6, 1911.)

**1. RAILROADS (§ 287\*)—APPEAL AND ERROR (§ 1066\*)—HARMLESS ERROR.**

A train of plaintiff railroad company, permitted to remain on the main line of defendant railroad company for 10 minutes, was run into by a train of defendant. The track was straight for a mile, affording opportunity for defendant's trainmen to discover the presence of plaintiff's train; but they ran their train at 25 miles an hour. The evidence was conflicting on the issue whether the time limit had expired at the time of the collision. *Held* that, if the collision occurred, during the 10 minutes, defendant was guilty of actionable negligence, authorizing a recovery, unless plaintiff was negligent in failing to get its train out of the way, in view of the facts; but the doctrine of last clear chance was inapplicable, and an instruction submitting that issue was reversible error.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 925-927; Dec. Dig. § 287.\* *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1066.\*]

**2. RAILROADS (§ 287\*)—COLLISIONS BETWEEN TRAINS OF DIFFERENT COMPANIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.**

If the collision occurred after the expiration of the 10 minutes, plaintiff was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 925-927; Dec. Dig. § 287.\*]

**3. RAILROADS (§ 287\*)—COLLISIONS BETWEEN TRAINS OF DIFFERENT RAILROAD COMPANIES—NEGLIGENCE—LIABILITY.**

Whether the collision occurred before or after the expiration of the time limit, defendant could not recover damages to its train, since the circumstances showed that its trainmen had ample opportunity to observe plaintiff's train in time to avoid the collision.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 925-927; Dec. Dig. § 287.\*]

Appeal from Superior Court, Moore County; Justice, Judge.

Action by the Aberdeen & Ashboro Railroad Company against the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial awarded.

On issues submitted, the jury rendered the following verdict:

"(1) Was the property of the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff by its own negligence

contribute to the injury of its property, as alleged in the answer? Answer: No.

"(3) Notwithstanding the negligence of the plaintiff, could the defendant, by the exercise of ordinary care, have avoided the injury to plaintiff's property? Answer: Yes.

"(4) What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: \$8,000.

"(5) Was the defendant's property injured by the negligence of the plaintiff, as alleged and set out in the counterclaim pleaded by the defendant? Answer: No."

Walter H. Neal and Murray Allen, for appellant. R. L. Burns, Douglass, Lyon & Douglass, and Jerome & Price, for appellee.

HOKE, J. [1,2] After full and careful consideration, the court is of opinion that the cause should again be submitted to the jury. There was evidence to the effect that on the 19th of February, 1910, a train of plaintiff company was on the main line of defendant's track at Aberdeen, N. C., with a permit to remain there for 10 minutes; the evidence tending to show that the time would expire at 8:46 p. m. It was about the schedule time for a passenger train of defendant (No. 43) to arrive at Aberdeen, and plaintiff's conductor was at first refused permission, but, on the necessity for it being urged, and No. 43 being reported late after consulting the train dispatcher at Hamlet, permission was given, and the train entered on the track as stated; the purpose being to back the train and leave three sleepers on a siding, that they might be attached to a train of defendant company going north. While standing on the track and just as it was being signaled to back for the purpose indicated, the train was run into by the passenger train of defendant company (No. 43), causing great damage to plaintiff's engine and several of the cars composing the train. The testimony showed that the track of defendant road towards the north was practically straight for a mile, affording ample opportunity for employes of defendant operating its train to observe and note the present placing of plaintiff's train, and that 43 approached the station at about 20 to 25 miles per hour. The evidence of plaintiff tended to show that the time limit of its permit had not expired at the time of the collision, and there was evidence on part of defendant tending to show that same occurred after the time limit had expired. Upon this statement, sufficient to present the case in its general aspects, we are of opinion that the cause should be tried and determined on the three issues of negligence on part of defendant, contributory negligence on part of plaintiff, and the

third issue as to damages in case the answer on the first and second require that the third issue should be determined. If the collision occurred before the time limit expired, the first issue should be answered in favor of plaintiff; and, if before such time plaintiff was negligent in failing to get its train out of the way under the rules of law properly applicable, the second issue should be answered for defendant, this to be determined on the entire facts relevant to the inquiry, including the fact that it was there by permit from defendant company, and with the purpose at the time of backing its train onto a siding. If the collision occurred after the time limit expired, then, in view of all the facts in evidence, the obligation on the part of plaintiff's agents and employes to keep vigilant and continuous outlook and remove the train in time to avoid a collision was so insistent that a breach of duty in this respect would amount, as a conclusion of law, to contributory negligence, continuing to the time of impact, and no recovery by plaintiff should be allowed. In this view, there is no place for the doctrine of the last clear chance, for all the controlling facts as to defendant's liability may, and in this case should, be determined on the first and second issues. In the charge on the first issue and on the third, as to the existence of the last clear chance, and on the fifth issue, that as to the responsibility of plaintiff, the court in various ways submitted the question of whether the remaining on the track by plaintiff's train after the time limit had expired was or was not the proximate cause of the injury, and in our view, and considering the difficulty in obtaining the permit to enter on the track and the imminence of the arrival of No. 43, and the other facts relevant to the inquiry, we think this was prejudicial error which entitles defendant to a new trial.

[3] Whether the collision occurred before or after the time limit expired, the defendant may not be allowed to recover, for the entry on the track was by its permission, and on all the evidence, if the placing of plaintiff's train constituted an obstruction on the main line in the direction defendant's passenger train was moving, the attendant circumstances showed that the defendant's employes had ample opportunity to have observed this and stopped its train in time to have avoided a collision. The view presented is in accord with the general principles applicable, as shown in *Exum v. Railroad*, 154 N. C. 418, 70 S. E. 845; *Edge v. Railroad*, 153 N. C. 212, 69 S. E. 74, and other cases.

For the error indicated, we are of opinion that a new trial should be awarded.

New trial.

(157 N. C. 340)

**Ex parte WATSON.**

(Supreme Court of North Carolina. Dec. 6, 1911.)

**1. CONSTITUTIONAL LAW (§ 48\*)—STATUTES—PRESUMPTIONS.**

All reasonable doubts should be resolved in favor of the constitutionality of a statute, and it should not be declared unconstitutional unless clearly in excess of the General Assembly's powers.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48;\* Statutes, Cent. Dig. § 56.]

**2. INFANTS (§ 12\*)—DETENTION—POWER OF STATE.**

The state's power to detain minor children is not unlimited and arbitrary, and depends upon their lack of parental care and the existence of improper environment.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 13; Dec. Dig. § 12.\*]

**3. REFORMATORIES (§ 2\*)—"HOUSE OF CORRECTION."**

A "house of correction" is designed for the reformation of youthful criminals.

[Ed. Note.—For other cases, see Reformatories, Cent. Dig. §§ 1, 2; Dec. Dig. § 2.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3359.]

**4. REFORMATORIES (§ 2\*)—POWER TO ESTABLISH—HOUSE OF CORRECTION.**

Const. art. 11, § 4, authorizing the erection of a house of correction where vagrants, etc., shall be restrained and usefully employed, authorizes the establishment of a reformatory for minors.

[Ed. Note.—For other cases, see Reformatories, Cent. Dig. §§ 1, 2; Dec. Dig. § 2.\*]

**5. JURY (§ 21\*)—RIGHT TO JURY TRIAL—JUVENILE INVESTIGATIONS.**

An investigation into the status and needs of a child to determine whether he shall be committed to an institution not of penal character, as being dependent, incorrigible, or delinquent, is not one to which the constitutional guaranty of right to jury trial extends.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 134-142; Dec. Dig. § 21.\*]

**6. CONSTITUTIONAL LAW (§ 83\*)—"DEPRIVATION OF LIBERTY"—REFORMATORIES—"CONVICTED"—"SENTENCE."**

Revisal 1908, §§ 5416a-5416q, establishing the Stonewall Jackson Training and Industrial School for delinquent, etc., children, is not unconstitutional as amounting to a deprivation of liberty within the declaration of rights, the restraint being of parental nature and not as a punishment for crime, though only persons under 16 years of age, who have been "convicted" of a criminal offense, can be admitted, and "sentence" of such persons is required; the word "convicted" referring to a verdict of guilty, and the word "sentence" being broad enough to include any judgment of a criminal court, though in its ordinary acceptation it refers to a judgment of imprisonment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 150, 151½; Dec. Dig. § 63.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1584-1591; vol. 3, p. 2007; vol. 7, pp. 6411, 6412.]

**7. HABEAS CORPUS (§ 30\*)—GROUNDS FOR DISCHARGE—IRREGULARITIES IN COMMITMENT.**

A child committed to the Stonewall Jackson Manual Training and Industrial School

will not be discharged on habeas corpus because of irregularities in the commitment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.\*]

**8. HABEAS CORPUS (§ 85\*)—EVIDENCE—ADMISSIBILITY.**

Under Revisal 1908, §§ 5416a-5416q, establishing the Stonewall Jackson Manual Training and Industrial School, and providing for the commitment of delinquent persons under 16 years of age, on petition by a committed child for writ of habeas corpus, his age was a material inquiry, and the court properly heard evidence upon it.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.\*]

Habeas corpus by S. S. Watson to obtain the discharge of his son Richard Watson from the Stonewall Jackson Manual Training and Industrial School. From an order on the petition, petitioner appeals. Affirmed.

This proceeding was commenced by a petition for a writ of habeas corpus, by S. S. Watson, in behalf of his minor son, Richard Watson, restrained in the Stonewall Jackson Manual Training and Industrial School since August 27, 1909, by virtue of a conviction on that date in the recorder's court of the city of Charlotte for the crime of vagrancy; said petition being also made by S. S. Watson on his own behalf to regain the custody and care of his son. The petition was addressed to Mr. Justice Walker, under date of July 27, 1911. The writ was issued addressed to Walter Thompson, superintendent of the Stonewall Jackson Manual Training and Industrial School in Cabarrus county, returnable at Charlotte, August 8, 1911. On the return thereto the hearing was held in chambers on said date at said place.

In the return to the writ the respondent justified the detention of Richard Watson by virtue of two commitments, one issued by the recorder of Charlotte, dated August 27, 1909, and set forth above under heading "Original Commitment," and another issued nunc pro tunc, dated July 25, 1911, as of August 27, 1909, and set forth above under heading "Commitment Nunc Pro Tunc, No. 1," said commitment issued by the same authority as the original. Petitioner, through his attorney, objected to the introduction or consideration by the court of "Commitment Nunc Pro Tunc, No. 1," on the ground that the recorder had no authority to amend same from memory, and that the records of the court nowhere showed that at the time of the trial said Richard Watson was under 16 years of age. Objection overruled. Petitioner excepted, which was petitioner's first exception.

Petitioner then objected to its introduction or consideration by the court, on the ground that the Commitment Nunc Pro Tunc, No. 1, was addressed to the superintendent or keeper of the Stonewall Jackson Manual Training and Industrial School, whereas the original

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

commitment was addressed to the keeper of the common jail of Mecklenburg county, and that the recorder was without authority to make such amendment. Objection overruled. Petitioner excepted, and this was petitioner's second exception.

Petitioner then moved the court to discharge Richard Watson from the custody of the respondent, in that in neither of the commitments did it appear what the age of the petitioner's son, Richard Watson, was at the time of the commitment, nor did such appear in any other records in the case, and that therefore there was nothing in the commitments or other records from which either the respondent or the petitioner's son, Richard Watson, could ascertain when the period of confinement would come to an end, and that each and both of said commitments were therefore void. Motion overruled. Petitioner excepted, and this was petitioner's third exception.

The petitioner then offered witnesses to prove that S. S. Watson, the father of the minor, Richard Watson, was at the date of the hearing a fit and proper person to have the custody of his son, and to prove the other allegations of paragraph 5 of the petition. Respondent's attorney, in open court, thereupon stated that they did not controvert the allegations of paragraph five of the petition. Whereupon petitioner, through his attorney, moved the court to order that S. S. Watson have the care and custody of his minor son, Richard Watson, and that the respondent deliver Richard Watson to him for said purpose. Motion overruled. Petitioner, S. S. Watson, excepted. This was petitioner's fourth exception.

The petitioner then moved the court to order the discharge of the said Richard Watson from the custody of the respondent on the ground that Richard Watson had only been convicted of the crime of vagrancy, the punishment for which is fixed by law at 30 days' imprisonment, and that Richard Watson had already been confined by virtue of the conviction for the crime of vagrancy nearly two years, and that any act of the Legislature purporting to authorize his detention for a period exceeding 30 days and extending over a period of at least 5 years for the conviction of the crime of vagrancy is unconstitutional and void, in that, in attempting to so authorize, it deprives him of the rights guaranteed to him as a citizen of this state and the United States contained in sections 1, 14, and 33, article 1, of the Constitution of North Carolina, and articles 13 and 14 of the amendments to the Constitution of the United States, and deprives him of his constitutional and natural rights in other particulars, all of which points are set forth in paragraph 4 of the petition. Motion denied. Petitioner excepted, and this was petitioner's fifth exception.

The court then, of its own motion, called to the stand S. S. Watson, and questioned

him as to the age of Richard Watson, and as to what his age was at the date of the trial of said Richard Watson for vagrancy. Petitioner through his attorney objected on the ground that it was too late, at the hearing on the return to the writ of habeas corpus, to take testimony which should have been taken at the trial in the recorder's court, and which was not, and which finding of fact was necessary to have been ascertained and incorporated in the judgment and commitment to make the restraint of the petitioner's son legal. Objection overruled. Petitioner excepted, and this was petitioner's sixth exception.

Said S. S. Watson then testified as follows: "Richard Watson, my son, as nearly as I can remember, was born about the 29th day of November, 1894." The court then, of its own motion, called D. B. Smith, who was recorder of the city of Charlotte, August 27, 1909, and who is now recorder, to the stand, and asked him whether or not he found as a fact at the trial of the said Richard Watson that he was under the age of 16 years. The recorder, Hon. D. B. Smith, testified as follows: "I took testimony at the trial and found that Richard Watson was at that time under the age of 16 years." The court then stated that the recorder might incorporate into the commitments and other records of the court the true age of Richard Watson at the time of said trial in the recorder's court, and also might correct the records in such other particulars as might be necessary. Petitioner objected on the ground that the court's power and authority on the return to the writ of habeas corpus was limited to the right to ascertain and judicially decree whether or not the petitioner's son was illegally restrained of his liberty at that time, and did not extend to taking testimony that should have been taken at the trial of the case in the recorder's court, which testimony was not taken, and did not extend to so adding to the records of the court as to make his detention, after such addition to the records, legal, where before taking such testimony after the return to the writ, and additions to the records, the restraint was illegal. Objection overruled, and this was petitioner's seventh exception.

In compliance with this action of the court, an additional commitment was issued by said recorder, and is found in the records under the head "Commitment Nunc Pro Tunc, No. 2." The court then rendered judgment as appears in the record, and the petitioner and the said Richard Watson duly excepted, and this was the petitioner's eighth exception. And thereupon the petitioner and the said Richard Watson appealed to the Supreme Court.

#### Warrant for Arrest of Richard Watson.

"North Carolina, Mecklenburg County, City of Charlotte. In the Recorder's Court. Before D. B. Smith, Recorder. The State and

the City of Charlotte v. Richard Watson. T. M. Christenbury being duly sworn, complains and says, that on or about the 25th day of August, 1909, Richard Watson with force and arms, at and in the county aforesaid, and within the city limits, did willfully, maliciously and unlawfully become a vagrant spending his time in idleness, against the statute in such cases made and provided, and against the peace and dignity of the State and in violation of the city ordinance. Sec. ———, chap. ———, page ———. [Signed] T. M. Christenbury, Complainant.

"Subscribed and sworn before me this 25th day of Aug. 1909. [Signed] W. B. Orr, J. P. [Seal.]

"State of North Carolina, to the Chief of Police of the City of Charlotte, or Other Lawful Officer of Mecklenburg County—Greeting: These are to command you forthwith to apprehend the said party and him have before D. B. Smith, recorder, at his office in the city of Charlotte, on the 26th day of Aug. 1909, then and there to answer the above complaint and be dealt with according to law. Given under my hand and seal this 25th day of Aug., 1909. [Signed] W. B. Orr, J. P. [Seal.]

"North Carolina, Mecklenburg County. The State and City of Charlotte v. Richard Watson. Judgment. Upon the trial of this case, the defendant is guilty and is ordered and adjudged that ——— to be committed to the Stonewall Jackson Training School. This the 27th day of August, 1909. [Signed] D. B. Smith, Recorder."

#### Original Commitment.

"Mecklenburg County. Before the Recorder of Charlotte. State v. Richard Watson. Commitment. To the Keeper of the Common Jail of Said County—Greeting: Whereas, Richard Watson, the prisoner herewith sent you, has been required by me, the recorder of the city of Charlotte: You are hereby commanded to receive the said party in the Stonewall Jackson Training School. He will be delivered to Officer J. E. McCall. This the 27th day of August, 1909. Charge, vagrancy. D. B. Smith, Recorder. W. B. Orr, Desk Sergeant."

#### Commitment Nunc Pro Tunc, No. 1.

"State of North Carolina, County of Mecklenburg. Before the Recorder of the City of Charlotte. State and City of Charlotte v. Richard Watson. Commitment. To the Superintendent or Keeper of the Stonewall Jackson Manual Training and Industrial School—Greeting: Whereas, Richard Watson was, on the 27th day of August, 1909, convicted before the recorder of the city of Charlotte on the charge of vagrancy and was ordered committed to your institution by the said recorder; and whereas, doubts have arisen as to the proper form of the said commitment; and whereas, it appears to

the court that the said Richard Watson is less than 16 years of age, and the court is of the opinion that it would be best for the said Richard Watson and the community that the said Richard Watson should be sentenced to your institution to keep, restrain and control him during his minority or until such time as you shall deem proper for his discharge, under such proper and humane rules and regulations as may be adopted by the governing board of your institution as provided by the statute: You are, therefore, hereby authorized and empowered to receive the said Richard Watson unto the said Stonewall Jackson Manual Training and Industrial School, there to remain until he is discharged according to law and the rules and regulations of the said institution. The said Richard Watson was delivered to you by Officer J. E. McCall. This July 25, 1911, as of Aug. 27, 1909. [Signed] D. B. Smith, Recorder of the City of Charlotte, North Carolina."

#### Commitment Nunc Pro Tunc, No. 2.

The following commitment was issued and filed after judgment and bears date of the return day to the writ.

"State of North Carolina, Mecklenburg County. Before D. B. Smith, Recorder of the City of Charlotte. State v. Richard Watson. The above-mentioned case coming on to be heard on the 27th day of August, 1909, before the recorder of the city of Charlotte, upon a warrant duly issued charging Richard Watson with being a vagrant, and having been heard, and it appearing to the court, and the court having found the following facts: That the said Richard Watson is under the age of 16 years, having been born on the 29th day of November, 1894, and that his father, with whom he has been residing, is being detained in the Mecklenburg county jail and is a confirmed dope fiend, and that his mother is dead and his grandmother, with whom he has been living, is an inmate of the Mecklenburg county home, and that the said Richard Watson has been loitering and sauntering about the streets of Charlotte, without any fixed place of abode and without any occupation or visible means of support. It is, therefore, adjudged and found as a fact that the said Richard Watson is a vagrant and under 16 years of age; and the said recorder of the city of Charlotte, being of the opinion that it would be best for the said Richard Watson and this community in which he has been so convicted, that he should be sentenced to the Stonewall Jackson Manual Training and Industrial School. It is also ordered and decreed that the said Richard Watson be committed to the Stonewall Jackson Manual Training and Industrial School, to the end that the trustees or other governing agencies thereof may keep, restrain and control him during his minority, or until such time as they shall

deem proper for his discharge, under such proper and humane rules and regulations as may be adopted by the said trustees, in accordance with the provisions of chapters 509 and 956 of the Public Laws of 1907. This the 8th day of August, 1911, as of the 27th day of August, 1909. [Signed] D. B. Smith, Recorder of the City of Charlotte."

It was not denied that, at the time of the arrest and trial of Richard Watson, for vagrancy, his father, the petitioner, was in jail and was then an unfit person to have the custody of his child.

Wm. M. Wilson, for appellant. L. T. Hartsell and Shannonhouse & Jones, for respondent.

ALLEN, J. The principal questions considered in the able and carefully prepared brief of counsel for the petitioner are that the detention of Richard Watson is illegal, for that: The act establishing the Stonewall Jackson Training School is unconstitutional because (1) it provides for imprisonment as a punishment for crime, and in excess of that fixed by statute for vagrancy, and for such a length of time that it is cruel or unusual; (2) under it he is deprived of his liberty without due process of law; (3) that his detention, under the statute, amounts to involuntary servitude.

[1] The duty is imposed on the courts of passing on the constitutionality of an act of the Legislature when the question is presented, and this duty arises from the obligation to declare what the law is. The courts recognize the principles declared in the Constitution that it is "ordained and established" by the people of the state, and "that all political power is vested in and derived from the people," and when a statute, which is the work of legislators, who are agents of the people, is contrary to its provisions, they sustain the will of the people as expressed in the Constitution, and not the will of their agents. Respectful regard, however, for a co-ordinate department of the government, demands that the duty shall not be lightly undertaken, and that in its performance all reasonable doubts shall be resolved in favor of the legality of legislation. The principle is so declared by Chief Justice Clark in *Sutton v. Phillips*, 116 N. C. 504, 21 S. E. 968, in which he says: "While the courts have the power, and it is their duty, in proper cases, to declare an act of the Legislature unconstitutional, it is a well-recognized principle that the courts will not declare that this co-ordinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." And by Justice Hoke in *State v. Baskerville*, 141 N. C. 818, 53 S. E. 744, that: "It is well established that an act of the Legislature will never be declared unconstitutional unless it plainly and clearly ap-

pears that the General Assembly has exceeded its powers." Applying these rules of construction, can it be said that the act is unconstitutional?

[2] In determining this question, we must consider the purpose for which the act was passed, and the grounds upon which the state can rightfully exercise the power to detain minor children. It is not an unlimited and arbitrary power, and is justified only upon the idea that the child is without parental care, and that his environment is such that he may reach manhood without restraint or training and under corrupting influences, unless the state, as *parens patrie*, performs the duty which devolves primarily on the parent. Outside of the humanitarian idea, which properly has its influence on courts and Legislatures, and considered solely from the materialistic view, each citizen is interested in having men and women honest and law-abiding, because this conduces to the safety of his person and property, and a system which does no more than measure the days and years, which must be paid by him who has violated law, "to satisfy justice," is a survival of the days when the only object of punishment was vengeance. Under this system, society receives no protection, except as the example deters others from the commission of crime; no hope is held out to the convict, and he is imprisoned with other criminals with the knowledge that, in all probability, at the end of his term, he will be turned loose upon society, an expert in crime. It has always been a perplexing question how far society has the right to demand a day or an hour of his life as an example, when he has been permitted to live amid surroundings that nourish and stimulate the criminal tendency. The purpose of the act before us is to meet, in some measure, the duty imposed upon society, for its own protection and for the good of the child.

[3,4] When we turn to the Constitution, we find that the establishment of a reformatory is not only not prohibited, but that it is expressly authorized by article 11, § 4, which says: "The General Assembly may provide for the erection of a house of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed." And a house of correction, "as its name indicates, is designed for the reformation of youthful criminals, those who have not yet become hardened in crime." *Ex parte Moon Fook*, 72 Cal. 11, 12 Pac. 803. We are also of opinion that the power would exist without this provision of the Constitution, in the absence of a prohibition in that instrument. If, then, the Legislature has the power to establish a reformatory, has it rightfully exercised this power, or has it, under the guise of reformation, made it possible to imprison, as a punishment for crime? If the latter construction is adopted, the restraint of the son of the petitioner is illegal, because the punishment for vagrancy, the charge made



against the son, cannot exceed imprisonment for 30 days, under the statute now in force, and the act under which a child might be held 5 years for that offense would be violative of section 14 of the Bill of Rights, which prohibits "cruel or unusual punishment."

[5, 6] The question as to the extent to which a child's constitutional rights are impaired by a restraint upon its freedom has arisen many times with reference to statutes authorizing the commitment of dependent, incorrigible, or delinquent children to the custody of some institution, and the decisions appear to warrant the statement as a general rule that, where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character, such investigation is not one to which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the Declaration of Rights, nor is it a punishment for crime.

In *McLean County v. Humphreys*, 104 Ill. 378, it is said: "It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriæ*, to protect and provide for the comfort and well-being of such of its citizens, as, by reason of infancy, defective understanding, or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions, and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise."

And in *Jarrard v. State*, 116 Ind. 98, 17 N. E. 912: "We think it settled, in accordance with principle, that the Legislature has power to provide for the reformation of boys who are entering upon a career of wickedness, by prescribing measures for committing them to a reformatory institution."

In *Ex parte Ah Peen*, 51 Cal. 280, it was held that proceedings resulting in the committing of a minor child to an industrial school did not deprive such child of his liberty without due process of law, such proceedings not amounting to a criminal prosecution, the court saying: "The purpose in view is not punishment for offenses done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority. Having been abandoned by his parents, the state, as *parens patriæ*, has succeeded to his control and stands in *loco parentis* to him. The restraint imposed upon him by public authority is in its nature and purpose the same which, under other conditions, is habitually imposed by parents, guardians of the person, and others exercising supervision and control over the conduct of those who are, by reason of infancy,

lunacy, or otherwise, incapable of properly controlling themselves."

In *Reynolds v. Howe*, 51 Conn. 472, it was held that a statute providing that justices of the peace may commit to the State Reform School any boy under the age of 16 who is in danger of being brought up, or who is being brought up, to lead an idle or vicious life, does not deprive such minor of his liberty without due process of law; the court saying: "But, as we have shown, the boy is not proceeded against as a criminal. Nor is confinement in the State Reform School a punishment, nor in any proper sense imprisonment. It is in the nature of a parental restraint. It is a mode of education to usefulness; compulsory, but not for that reason improper; and the restraint is a necessary incident of the compulsory education. It is all made necessary by the corrupting influences that surround and are likely to control the boy, and by the need of society for protection, and that necessity justifies the proceeding. To make the restraint and instruction of any permanent value, they must be continued for a long time. Habits are not changed in a month, not often in a year. This is specially true of bad habits. The attempt to reform viciously inclined boys would be an utter failure if limited to a few months."

In *Ex parte Liddell*, 93 Cal. 640, 29 Pac. 253, the court says: "There can be no question as to the power of the Legislature to provide for the detention and education of juvenile offenders, as it has done in this act, and the provisions of the act are not obnoxious to the criticism that it prescribes unjust or unequal penalties. It is true the term of detention at the reform school may be made greater by the judgment of the court than the term of imprisonment in the county jail or in the state prison for the same offense would be, but it cannot be said that the punishment inflicted is greater than could be put upon an adult for the same offense. The object of the act is not punishment, but reformation, discipline, and education. While detained for a longer period, perhaps, than he would be if sent to the state prison or the county jail, the conditions surrounding the child are vastly different. He is given the opportunity and instruction to learn a trade and qualify himself for the duties of citizenship, so that at the end of his term he will go out prepared to take care of himself, and those dependent upon him, without the odium which attaches to an ex-convict. There is no doubt of the power of the state to make and enforce provisions for the compulsory education of all children within the state; and it is equally clear that the state may arrest the downward tendency of those who have offended against its laws, and manifested a disposition to follow a criminal career, by placing them in an institution where they will receive the care, education, and discipline necessary to pre-

pare them for honorable citizenship. The records of the penal institutions of this state show that a large majority of their inmates are young men—many of them juveniles. The Legislature in its wisdom has endeavored to provide a place for children manifesting criminal traits, where they can be cared for without being thrown under the baneful influence of veterans in crime. We think the policy of the act a wise one, and we see no constitutional ground for declaring it invalid."

In *Ex parte Crouse*, 4 Whart. (Pa.) 11, which was approved in *Roth v. House of Refuge*, 31 Md. 334, and in *Jarrard v. State*, 116 Ind. 98, 17 N. E. 12, the court says: "The House of Refuge is not a prison, but a school. Where reformation, and not punishment, is the end, it may indeed be used as a prison for juvenile convicts who would else be committed to a common gaol; and in respect to these the constitutionality of the act which incorporated it stands clear of controversy. \* \* \* The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living, and, above all, by separating them from the corrupting influence of improper associates. To this end, may not the natural parent, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriæ*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it. That parents are ordinarily intrusted with it is because it can seldom be put into better hands; but, where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance? The right of parental control is a natural, but not an inalienable, one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation; and it consequently remains subject to the ordinary legislative power, which, if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is constituted, cannot be doubted. As to abridgment of infeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school; and we know of no natural right to exemption from restraints which conduce to an infant's welfare." There are many others to the same effect. *Ex parte Ferrier*, 103 Ill. 372, 43 Am. Rep. 10; *Refuge v. Ryan*, 37 Ohio St. 203; *Farnham v. Pierce*, 141 Mass. 204, 6 N. E. 830, 55 Am. Rep. 452.

In some of the statutes on this subject, provision is made for the detention of the child, when the parent is unworthy, although

no charge of crime is preferred, while in others the basis of the order of commitment is a verdict of guilty, and in all the principle on which the authority for legislative interference rests is that the child may be saved, and that society may be protected.

It is also usual to require notice to issue to the parent, and to give him an opportunity to be heard, and, when this is not done, the parent may have the legality of the detention of the child inquired into, upon a petition for a writ of habeas corpus. Upon the hearing of such petition, he will be required to show that he has applied to the authorities in charge of his child for his release; that he was a fit and proper person to have care of the child at the time of his commitment, and is still such. When it is remembered that, if he was an unworthy parent when his child was taken charge of by the state, he had abdicated his parental authority, it is not unreasonable to say to him that the interests of the child and of society have become paramount, and that these must be considered in passing upon his application for the custody of the child. Let us then consider the terms of the statute.

The counsel for the petitioner contends that because only persons under the age of 18, who have been convicted of a criminal offense, can be admitted to the training school, and that the judicial officer is required to sentence such person, are conclusive evidences that the institution is penal and the object punishment.

The word "convicted" is sometimes used to embrace the judgment upon a verdict of guilty, but usually it refers to the verdict itself, and it is in this sense it is used in the statute. *Bugbee v. Boyce*, 68 Vt. 311, 35 Atl. 330. That it does not include the judgment is made clear by the fact that after conviction the officer must "sentence."

"Sentence," in its ordinary acceptation, refers to a judgment of imprisonment; but it means more than this, and describes any judgment of a criminal court. *Allen v. Delaware*, 161 Pa. 550, 29 Atl. 288; *Wright v. Donaldson*, 158 Pa. 88, 27 Atl. 867; *People v. Adams*, 95 Mich. 541, 55 N. W. 461; *Com. v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699.

If, therefore, these words stood alone, the contention of the petitioner could be sustained; but imprisonment or a punishment for crime is not necessarily inferred from their use and, when considered in connection with other parts of the statute, it is a reasonable construction that conviction is merely an evidence that the child needs the care and nurture of the state, and that the sentence is an order of detention.

The act (chapter 116a, *Pell's Revision*) is entitled "Stonewall Jackson Manual Training and Industrial School," and it is "for the training and moral development of the criminally delinquent children of the state"; the superintendent is "intrusted with the author-

ity for correcting and punishing any inmate thereof to the same extent as a parent may, under the law, impose upon his own child"; the judicial officer is not authorized to commit a child, under 16, because he has been convicted, but only in the event that, after conviction, he "shall be of the opinion that it would be best for such person, and the community in which such person may be convicted, that such person should be so sentenced"; and it is made the duty of the officers in charge of the school to see that the children committed to it are instructed "in such rudimentary branches of useful knowledge as may be suited to their various ages and capacities," to teach them useful trades and give them manual training, and also to teach "the precepts of the Holy Bible, good moral conduct, how to work, and to be industrious." These are the obligations of the benign Christian parent, who does not punish or restrain the child except for its good.

We conclude, therefore, that when the act is considered as a whole, detention under its provisions is not imprisonment as a punishment for crime, and that it is constitutional.

[7] If constitutional, the order of detention was authorized, and the courts would not discharge the child because of irregularities in the order or in the commitment.

"The writ of habeas corpus is not designed to fulfill the functions of an appeal or a writ of error. It is not intended to bring into review mere errors or irregularities, whether relating to substantive rights or to the law of procedure, committed by a court having jurisdiction over person and subject-matter." 21 Cyc. 285.

In *State v. Armistead*, 106 N. C. 643, 10 S. E. 873, there was an irregular mittimus, and in discussing the effect of it the court says: "The jailer, it may be, would have been authorized to refuse the prisoner until a fuller and more perfect mittimus was sent. The defendant certainly, if he chose, could have inquired into the legality of his detention in jail under it, by a writ of habeas corpus. The latter course, in this particular instance, would have availed little, however, as the judge, upon production of the justice's judgment, must have remanded the prisoner." This clearly recognizes the principle that, if one is restrained of his liberty under a judgment authorizing his detention, he will not be discharged upon a petition for a writ of habeas corpus, because the commitment or mittimus is irregular.

[8] The age of the child was a material inquiry upon the hearing, and it was proper for the court to hear evidence upon it.

It is advisable for notice to be given to the parent before an order of detention is made, when this can be done, and for the order to include a finding as to notice and of the age of the child, and that it is made after investigation and because it is for the best in-

terests of the child and of the community in which he is convicted.

We find no error, and the judgment of Mr. Justice Walker is affirmed.

Affirmed.

(157 N. C. 331)

# LYTTON v. MARION MFG. CO.

(Supreme Court of North Carolina. Dec. 13, 1911.)

## 1. EVIDENCE (§ 244\*)—DECLARATIONS OF OFFICERS OF CORPORATIONS—ADMISSIBILITY.

Declarations of an officer of a corporation made to an employé of the corporation who had previously sustained a personal injury that he expected the employé to sue and recover large damages, which would have to be paid by insurance people, are inadmissible as hearsay, in an action by the employé against the corporation, under the rule that declarations of officers of a corporation are competent only when made in the line of official duty and in discharge thereof in a transaction for the corporation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.\*]

## 2. DAMAGES (§ 165\*)—PERSONAL INJURIES—PROCEEDINGS TO ASSESS DAMAGES—EVIDENCE.

In an action for injuries to a servant, evidence that the master is insured in a casualty company is incompetent.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 165.\*]

Appeal from Superior Court, Rutherford County; Long, Judge.

Action by J. W. Lytton against the Marion Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Ryburn & Hoey, for appellant. Solomon Gallert, for appellee.

BROWN, J. The plaintiff was a machinist in the employment of defendant, and alleges that he was injured while operating a machine lathe by some defect in the mandrel furnished him.

[1] The admission of the following evidence over the defendant's objection is assigned as error. On his redirect examination the plaintiff was asked the following question by his counsel: "Q. You testified, Mr. Lytton, in response to Mr. Ryburn's question that you were still in the employ of the Marion Manufacturing Company, notwithstanding the fact that you met with this accident and are suing them, and I wish you would tell the court and the jury how it happens that you are still in the employ of that company?" To this question he replied: "A. Well, when I came back from the hospital, Mr. D. D. Little, the president of the mill, come to me, and said, 'Mr. Lytton, I want to know how you feel about this matter;' and I said, 'Mr. Little, I feel like I am injured for life, and that the company is responsible for not furnishing me the proper material.' He said, 'Yes, Mr. Lytton; I

expect you will have to sue, and you ought to have big damage;' and I said, 'Mr. Little, I want you to do something for me.' And I said: 'Mr. Little, I want you to do something for me. I think the company is due me something. If they had furnished me the proper stuff, I would not have been hurt. I would have two eyes now if they had give me the right steel in there and tools.' And he said: 'I am awfully sorry you are injured, and I can't do nothing for you myself, but don't be afraid to sue. It don't come off me. I would like to do something for you, but it's got to come off the insurance people, and it shan't have anything to do with your job. If you have to sue, go ahead. I hope you get something.' This evidence was incompetent, and should have been excluded. It is well settled that the declarations of officers of a corporation are competent only when made in the line of official duty and while the officer is discharging it in reference to a transaction for the corporation. *Younce v. Lumber Co.*, 155 N. C. 241, 71 S. E. 329, and cases cited; *Rumbough v. Imp. Co.*, 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528. In addition to the incompetency of Little's declarations as mere hearsay, the subject-matter of the declaration is universally held to be incompetent and disconnected with the inquiry before the court.

[2] Evidence that the defendant in an action for damages arising from an injury is insured in a casualty company is entirely foreign to the issues raised by the pleadings and is incompetent. By some courts it is held to be so dangerous as to justify another trial even when the trial judge strikes it from the record. *Cosselmon v. Dunfee*, 172 N. Y. 509, 65 N. E. 494; *Loughlin v. Brasill*, 187 N. Y. 128, 135, 79 N. E. 854; *Hordern v. Salvation Army*, 124 App. Div. 674, 676, 109 N. Y. Supp. 131; *Haigh v. Edelmeyer & M. H. Elevator Co.*, 123 App. Div. 376, 380, 107 N. Y. Supp. 936; *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861.

New trial.

(157 N. C. 385)

MORSE et al. v. FREEMAN et al.

(Supreme Court of North Carolina. Dec. 13, 1911.)

#### 1. EJECTMENT (§ 108\*)—EVIDENCE—ISSUES.

Where, in an action for the possession of land, both parties claimed under a common grantor, and it was admitted that the land was included in the deed to plaintiff, and his evidence showed that the deed to defendant, senior in date and registration, did not include the land, but that, if it did, plaintiff had held adverse possession for seven years, a nonsuit was properly denied.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 316; Dec. Dig. § 108.\*]

#### 2. WITNESSES (§ 252\*)—EXAMINATION—MAPS—USE BY WITNESS.

A witness, who testified that a map was a reproduction on a large scale of a map made under order of court, is properly permitted to use the map posted on a wall, to illustrate his testimony, as elicited by an attorney also using the map, in the absence of any suggestion that it is not correct.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 866, 867; Dec. Dig. § 252.\*]

#### 3. BOUNDARIES (§ 3\*)—DESCRIPTION—CALLS FOR COURSE AND DISTANCE.

Where natural objects or boundaries called for in a deed have not been ascertained, course and distance govern in locating the land.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.\*]

#### 4. ADVERSE POSSESSION (§ 106\*)—CLAIM UNDER TITLE—RIGHTS ACQUIRED.

A grantee, who has been for more than seven years in the continuous, exclusive, and adverse possession of land included in his deed, claiming under it, acquires title as against a grantee in a prior recorded deed including the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 604-623; Dec. Dig. § 106.\*]

#### 5. APPEAL AND ERROR (§ 501\*)—QUESTIONS REVIEWABLE—ASSIGNMENTS OF ERROR.

An assignment of error not based on any exception in the record cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 501.\*]

Appeal from Superior Court, Rutherford County; Lane, Judge.

Action by H. B. Morse and another against J. B. Freeman and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This is an action to recover possession of a tract of land, which was commenced on the 30th day of December, 1909. The defendant denies the plaintiff's title, but admits that he is in possession of a part of the land described in the complaint. Both parties claim under deeds from J. B. Freeman, the deed under which the defendant claims being senior in date and registration. The deed to the plaintiff is dated the 12th day of December, 1902, and it is admitted that it covers the land in controversy. The plaintiff offered evidence that he had used the property (a part of the Chimney Rock property) for scenic purposes since the date of his deed, and that he had kept men on it as watchmen and tollkeepers all the year. The principal contention between the parties is as to the location of the last call in the defendant's deed, "thence along the upper edge of the cliff, above Chimney Rock, in a westerly direction to the beginning"; the defendant contending that there was a line of cliffs which the call in the deed would follow, and the plaintiff that there were no cliffs, and that the last line would go straight to the beginning. If the line is run straight to the beginning, it does not cover the land in controversy, and the evidence was conflicting as to whether there

was a line of cliffs. There was no evidence when the defendant entered into possession. The jury answered the issues in favor of the plaintiff, and from a judgment entered thereon defendant appealed.

McBrayer, McBrayer & McRorie, for appellants. Smith & Shipman, for appellees.

ALLEN, J. [1] The motion to nonsuit was properly overruled. As both parties claimed title under a common source, the decision of the controversy between the parties depended upon two facts: (1) Did the deed of the defendant cover the land? (2) If so, had the plaintiff held the land adversely for seven years under his deed? If the deed of the defendant did not cover the land, the plaintiff was the owner, because both claimed under Freeman, and it was admitted that the land was included in the deed of the plaintiff. If the deed of the defendant did include the dispute, the plaintiff was the owner if he had held possession adversely for seven years under his deed. Evidence was offered to sustain both contentions of the plaintiff, and therefore a judgment of nonsuit could not have been entered.

[2] During the trial, the surveyor was allowed to post up in sight of the court and jury a map made on a large scale, purporting to be a copy of the court map, and the witness was allowed to refer to said map as a matter of demonstration, after the surveyor had stated that it was a fac simile or reproduction on a large scale of the court map. The use of this map by the witness and by the attorneys in the examination of the witness was objected to by defendant's counsel.

It does not appear that any exception was entered by the defendant to the use of the map; but, if it had been done, we think no error was committed. An unofficial map may be used by a witness to illustrate his testimony, and it can make no difference that it is posted on a wall; but in this instance the map was simply an enlargement of the one made under order of the court, and there is no suggestion that it was not correct.

The defendant also excepts to the following parts of the charge, which, in our opinion, are well supported by the authorities:

[3] 1. "But if you find from the greater weight of the evidence that there are no natural boundaries, or, in other words, cliffs, or no such cliffs in no such place as are called for, and you, calling to your aid all the evidence in the case, are unable to locate the objects, and you find further that the last call in the deed is a straight line from the stake at figure 5 on the map to the beginning, you will answer the first is-

sue, 'Yes,' since where the natural objects or boundaries have not been fixed and ascertained, then course and distance must govern the jury in fixing the line; therefore, if you locate the line by course and distance, you will find for the plaintiff."

[4] 2. "That if the jury should find for defendant on the location of his deed, so'll if the jury shall find from the evidence that the plaintiffs have, claiming under their deed, been in the possession of the lap, or interference, or any part thereof, continuously, adversely notoriously, and exclusive for seven years before the suit was brought, December 30, 1909, no other person being seated on the lap, this would ripen the plaintiff's title, and he should recover."

[5] There is one other assignment of error, but it is not based on any exception appearing in the record, and therefore cannot be considered. *Thompson v. Railroad*, 147 N. C. 412, 61 S. E. 286.

The assignments of error are for the purpose of grouping exceptions already taken, and not to introduce new exceptions.

Upon an examination of the whole record, we find no error.

No error.

(157 N. C. 333)

JOHNSON v. CAROLINA, C. & O. R. CO.  
et al.

(Supreme Court of North Carolina. Dec. 13, 1911.)

1. MASTER AND SERVANT (§ 88\*)—INDEPENDENT CONTRACTOR—DEFINITION.

An "independent contractor" is one who, in the exercise of an independent employment, contracts to do a piece of work according to his own methods, without being subject to his employer's control, except as to the results of the work.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 146; Dec. Dig. § 88.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3542-3543; vol. 8, p. 7686.]

2. MASTER AND SERVANT (§ 88\*)—INDEPENDENT CONTRACTOR—RELATION.

The relationship of independent contractor is not changed because the owner reserves the right to supervise the work through an engineer, architect, etc., for the purpose of seeing that it is done pursuant to the contract.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 146; Dec. Dig. § 88.\*]

3. MASTER AND SERVANT (§ 88\*)—INDEPENDENT CONTRACTOR—EXISTENCE OF RELATION.

If a workman's immediate employer was not acting in good faith under an alleged contract with defendant railroad company for doing work, but was in fact only the company's agent, such employer was not an independent contractor so that plaintiff could sue the railroad company for injuries received.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 146; Dec. Dig. § 88.\*]

Appeal from Superior Court, Burke County; Lane, Judge.

Action by Henry Johnson against the Carolina, Clinchfield & Ohio Railroad Company

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

and others. From a judgment for plaintiff, defendant railroad company appeals. Affirmed.

There was evidence tending to show that, on or about July 15, 1908, plaintiff was injured while at work as an employé of defendant company, by reason of a defective car, being then used for hauling dirt in the construction of defendant road, and that the injury was attributable to the negligence of defendant. There was evidence tending to show that there was no negligence; that plaintiff was, at the time, an employé of Propts & Co., an independent contractor; and, further, that plaintiff had executed a receipt in full discharge for the liability. The following verdict was rendered:

"(1) Was plaintiff injured by the negligence of the defendant? Answer: Yes.

"(2) Did the plaintiff by his own negligence contribute to his own injury? Answer: No.

"(3) Did the plaintiff release any cause of action he had against defendant on account of such injury? Answer: No.

"(4) What injury, if any, is plaintiff entitled to recover? Answer: Two hundred dollars."

Judgment on verdict for plaintiff, and defendant excepted and appealed.

Hudgins & Watson and A. Hall Johnston, for appellant. Spainhour & Mull and S. J. Ervin, for appellee.

HOKE, J. [1] It was chiefly objected to the validity of this recovery that plaintiff was, at the time, the employé of an independent contractor (Propts & Co.), and that, on the facts in evidence, there had been no breach of duty towards plaintiff on the part of the railroad company. This doctrine of independent contractor and its effect on the rights of parties have been the subject-matter of discussion in several recent decisions of the court, as in *Hopper v. Ordway*, 72 S. E. 839, at the present term; *Denny v. Burlington*, 155 N. C. 33, 70 S. E. 1085; *Beal v. Fiber Co.*, 154 N. C. 147, 69 S. E. 834; *Thomas v. Lumber Co.*, 153 N. C. 351, 69 S. E. 275, 32 L. R. A. (N. S.) 584; *Hunter v. Lumber Co.*, 152 N. C. 682, 68 S. E. 237, 29 L. R. A. (N. S.) 851, 136 Am. St. Rep. 854; *Young v. Lumber Co.*, 147 N. C. 26, 60 S. E. 654; *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654, 63 L. R. A. 492; *Craft v. Timber Co.*, 132 N. C. 151, 43 S. E. 597. In *Beal v. Fiber Co.*, the following, as general definitions, are referred to with approval: "An independent contractor has also been defined to be one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work." *Lurton, J.*, in *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925, and from *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep.

113: "Where one who contracts to perform a lawful service for another is independent of his employer in all that pertains to the execution of the work, and is subordinate only in effecting a result in accordance with the employer's design, he is an independent contractor, and in such case the contractor alone, and not the employer, is liable for damages caused by the contractor's negligence in the execution of the work."

[2] *Hopper v. Ordway*, at the present term, and *Denny v. Burlington* support the proposition that, when a contractor has undertaken to do a piece of work according to plans and specifications furnished, and within the meaning of the definitions referred to, this relationship of independent contractor is not affected or changed, because the right is reserved for the engineer, architect, or other agent of the owner or proprietor to supervise the work to the extent of seeing that the same is done pursuant to the terms of the contract. The position is carefully stated in *Denny's Case*, as follows: "When the relation of independent contractor has been established, and the work is to be done according to plans and specifications furnished, the mere fact that a supervisor of the contractee is present for the purpose of seeing that the work is being done according to the contract, at the time the tort complained of is committed, does not render the contractee liable therefor." And *Hopper's Case*, supra, is in full approval of this statement. Again, in *Beal's Case*, citation is made from *Thompson on Negligence*, as follows: "If the proprietor retains for himself or for his agent [e. g., architect and superintendent] a general control over the work, not only with reference to results, but also with reference to methods of procedure, then the contractor is deemed the mere agent or servant of the proprietor, and the rule of respondeat superior operates to make the proprietor liable for his wrongful acts or those of his servants, whether the proprietor directly interfered with the work and authorized and commanded the doing of such acts, or not. It is not necessary, in such a case, that the employer should actually guide and control the contractor. It is enough that the contract vests him with the right of guidance and control."

[3] On the facts of this case, and on the various contracts presented for consideration, the rights of supervision and control reserved to the engineer of the railroad company are so extensive and all-pervading that we incline to the opinion that these operators may not maintain the position of independent contractors, but are themselves only representatives and agents of the company, for whose acts the company is, in the main, responsible. It is not necessary to decide the question, however, as the jury, under a correct charge, have found as a fact that the plaintiff's immediate employer, at the time of the injury and in reference thereto, was not

acting bona fide under the terms of the contracts, but was, in fact, only the agent of the company in the work that plaintiff was engaged in doing. The position was recognized in *Young v. Lumber Co.*, supra, and, in our opinion, there was evidence in the present case permitting its consideration. There is no error, and the judgment below is affirmed.

No error.

(157 N. C. 564)

**WHITENER v. CAROLINA, C. & O. R. CO.**  
(Supreme Court of North Carolina. Dec. 13, 1911.)

**MASTER AND SERVANT (§ 97\*)—INJURY TO SERVANT—EVIDENCE—NONSUIT.**

The injury to an employe from a piece of rock striking him in the eye, while driving crushed ballast under railroad ties with a tamping pick, being evidently the result of an accident, which the evidence fails to account for, a nonsuit is properly granted.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 163; Dec. Dig. § 97.\*]

Appeal from Superior Court, McDowell County; Long, Judge.

Action by H. W. Whitener against the Carolina, Clinchfield & Ohio Railroad Company for personal injury received from a piece of rock striking plaintiff in the eye, while driving crushed ballast under the railroad ties of defendant's road with a tamping pick. Defendant's motion to nonsuit and dismiss the action was sustained, and plaintiff appeals. Affirmed.

Pless & Winborne, for appellant. Hudgins & Watson, A. Hall Johnston, and J. Norment Powell, for appellee.

**PER CURIAM.** Upon a review of the record in this case, we are of opinion that his honor correctly sustained the motion to nonsuit. *House v. Railroad*, 152 N. C. 399, 67 S. E. 981, and cases cited; *Dunn v. Railroad*, 151 N. C. 313, 66 S. E. 134. The injury was evidently the result of an accident, which the evidence fails to account for. *Martin v. Manufacturing Co.*, 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671.

Affirmed.

(157 N. C. 416)

**MAY et ux. v. WESTERN UNION TELEGRAPH CO.**

(Supreme Court of North Carolina. Dec. 6, 1911.)

**1. TRESPASS (§ 13\*)—UNLAWFUL ACTS.**

A right to enter on the lands of another does not authorize exercise of such right in a violent or insulting manner, regardless of the rights of others.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 11; Dec. Dig. § 13.\*]

**2. TRESPASS (§ 13\*)—UNLAWFUL ACTS.**

Where employes of a telegraph company lawfully entering on the lands of an individual

to remove poles indulged during the prosecution of the work in loud, profane, and lewd language, to the injury of the individual's wife, who was in a delicate condition, the company was liable for the injuries sustained by the wife, though the servants did not know of her physical condition.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 13.\*]

**3. DAMAGES (§ 49\*)—MENTAL SUFFERING—PHYSICAL INJURY.**

Where the servants of a telegraph company lawfully entering on the land to remove poles were guilty of wrongful acts while prosecuting the work, resulting in injury to the wife of the landowner, the company was liable therefor, though there was no direct physical injury to her.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 100; Dec. Dig. § 49.\*]

**4. HUSBAND AND WIFE (§ 209\*)—INJURIES TO WIFE—RIGHT OF HUSBAND.**

A husband whose wife sustained a personal injury through the wrongful acts of another may recover for expenses incurred in treating his wife for the injuries, and for the loss of her society and services, and, where the injuries are permanent, he may recover compensation for her future diminished capacity to labor, but he may not recover for his mental suffering.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 766-772; Dec. Dig. § 209.\*]

**5. DAMAGES (§ 91\*)—PUNITIVE DAMAGES—WHEN RECOVERABLE.**

Where the wrong is willful or wanton, or accompanied by acts of oppression, insult, or brutality, exemplary damages are recoverable, and a telegraph company is liable for punitive damages for wanton acts of its servants in the performance of their work on the land of an individual, consisting of loud, profane, and lewd language, to the terror of the wife of the individual.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 193-201; Dec. Dig. § 91.\*]

Appeal from Superior Court, Guilford County; Daniels, Judge.

Action by Joseph L. May and wife against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

King & Kimball, for appellant. R. C. Strudwick and F. P. Hobgood, Jr., for appellees.

**WALKER, J.** This action was brought to recover damages for a trespass on land. The plaintiffs, husband and wife, alleged that the servants of the defendant entered upon the land of John May, where they were living, for the purpose of removing telegraph poles, and while so engaged in their employer's business unlawfully and wrongfully violated the rights of the plaintiffs, as occupants of the land, by entering their home, and accompanied their act of trespass by menaces of violence and the use of profane and vulgar words, and by other conduct and acts, which were unprovoked and nothing less than inexcusable, if not wanton. The defendants justify upon the ground that they had the right to enter in order to remove certain telegraph poles within the right of

way of the North Carolina Railroad Company, or its lessee, the Southern Railway Company, and that John May, the owner of the land, licensed them to enter, and that, if they did not enter lawfully by his permission, they had the lawful right to enter and remove the poles by reason of the permission of the railway company to the telegraph company to do so; the locus in quo being within the right of way of the railway company.

We will assume, for the sake of the discussion, that the defendant by its servants entered lawfully upon the land, and yet this did not excuse them for what was done after their entry was made. The servants of the defendant were about their master's business when they committed the act of trespass, and they apparently did it for the purpose of advancing his interests, while doing the work assigned to them by him, in the prosecution of that work, and within the scope of their authority. There were many exceptions taken to matters of evidence, and others were addressed to collateral questions, and all of them subsidiary to the main point. (1) Was the defendant, by its servants, guilty of a trespass upon the plaintiff's premises? (2) If so, were the plaintiffs entitled to recover punitive damages in addition to those which are compensatory.

[1] The defendant's lawful right of entry upon the land did not authorize it, or its servants, to do so in a violent and insulting manner, regardless of the rights of others. We do not think that we venture anything in asserting this to be a general statement of the law. There was evidence in the case to the following effect: That the servants of the defendant during the day in question, and while on the premises of John May, engaged in the work already described, indulged in loud, profane, and boisterous language, and sang lewd and vulgar songs, to the terror of the feme plaintiff and others; that they yelled at the feme plaintiff and others in the house; that they invaded the house, and at one time seized a guitar which was there, and played on it, and sang ribald songs; that Stern, defendant's principal foreman in charge of said crews, went to the well near by, and, facing the open door of the feme plaintiff's bedroom, yelled at her and sang lewd and vulgar songs in her immediate presence and hearing; and that the noise and tumult, the profanity and vulgar songs of defendant's servants throughout the day, and while engaged in moving the poles in question were so great, loud, and boisterous as to be heard by many people in the neighborhood; that in the morning, standing on the railroad tracks, Jno. L. May, one of the plaintiffs, told Stern and May, the two foremen of defendant in charge of said crews, of the bad and precarious health of his wife, and that she was in the house, and asked them not to go upon the property of his father; that Stern replied that he had

orders from the defendant to set the poles on John May's land, and that he would set them there regardless of witness' or any other man's wife, and that he did not "give a damn." There was further evidence as to the injury suffered by the feme plaintiff, resulting in a state of unconsciousness followed by great suffering and permanently impaired health, and as to the damage suffered by the male plaintiff in consequence of the defendant's wrong. The defendants entered at first lawfully, but afterwards abused their right of entry while in the prosecution of their work by acts and conduct which were plainly in violation of the rights of the plaintiffs, who were then in the lawful and peaceable possession of the premises. Conduct more reprehensible, under the circumstances, could not well be imagined. The feme plaintiff was in a delicate condition, and, in consequence of the violent and insulting manner in which the defendants invaded her home and even her private apartments, her health was greatly impaired. Defendant answers that its servants did not know of her physical condition, but this is no excuse. Their tortious acts were the immediate, natural, and proximate cause of her injuries. So far as the liability of the defendant for this wrong is concerned, it is not necessary that it should have contemplated the particular injury which the wrongful act produced, but it is liable if the wrong was of such a character as to be injurious in its natural and proximate consequences. It can make no difference in the view of the law whether it hurts one part or another of the person who is injured. The law will not excuse a defendant if in committing the wrongful act he aimed at the foot to wound, and killed by striking the head or the heart. His wrong is the same in law, and is actionable, though he may have missed his mark. He is in such a case presumed to have intended the natural and probable consequences of his act. *Drum v. Miller*, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528. In that case, distinguishing negligent from willful torts, we said: "In the case of willful or intentional wrongdoing, we have an act intended to do harm, and harm done by it, and the inference of liability from such an act may seem a plain matter, under the general rule of liability, and, assuming that no just cause of exception to it is present, 'it is clear law that the wrongdoer is liable to make good the consequences, and it is likewise obvious to common sense that he ought to be. He went about to do harm, and, having begun an act of wrongful mischief, he cannot stop the risk at his pleasure nor confine it to the precise objects he laid out, but must abide it fully and to the end.' The principle is commonly expressed in the maxim that a man is presumed to intend the natural consequences of his acts." It will be seen from this quotation that in the case of a willful tort the wrongdoer is



responsible for the direct and proximate consequences of his act, without regard to his intention to produce the particular injury. But the matter is made clearer, and the ruling in that case more pertinent to the question now under consideration, by what the court said later, at page 214 of 135 N. C., page 424 of 47 S. E. (65 L. R. A. 890, 102 Am. St. Rep. 528): "It may be stated as a general rule that when one does an illegal or mischievous act, which is likely to prove injurious to another, or when he does a legal act in such a careless and improper manner that he should foresee, in the light of attending circumstances, that injury to a third person may naturally and probably ensue, he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. It is not necessary that he should actually intend to do the particular injury which follows, nor, indeed, any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case, and in the other he will be presumed to intend that which, in the exercise of the care of a prudent man, he should see will be followed by injurious consequences."

But it seems to us that this case in all of its essential features is like that of *Jackson v. Telegraph Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738, and must be governed by it. The language there used is so directly applicable to the facts disclosed by the evidence in this case that we cannot more clearly state the law, which we think should determine the question now presented, than by repeating what we then said: "The jury have found that the defendant by its servant caused the plaintiff to be unlawfully arrested for the purpose of putting him out of the way, so that its agents and servants might erect telephone and telegraph poles on his land. If this is not an act done in the course of the employment and in furtherance of the master's business for his benefit and advantage, it would be hard to conceive of one that would come under that class. The case is in principle like that of *Railroad v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146, which has, at least twice, been approved by this court. *Hussey v. Railroad*, 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312; *Redditt v. Mfg. Co.*, 124 N. C. 100, 32 S. E. 392. In *Harris's Case* the defendants by their servants committed, it is true, a direct and violent trespass upon lands in order to carry on their master's work, and in doing so shot and injured the plaintiff; but is there any difference in law between the two cases? It is not the quality of the act that determines the master's liability, but the fact that it is done by his implied direction; that is, within the scope of the servant's authority, in the course of his employment and in furtherance of his master's in-

terests. *Daniel v. Railroad*, supra [136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455]; *Daniel v. Railroad*, 117 N. C. 592, 23 S. E. 327; *Kelly v. Traction Co.*, 133 N. C. 418, 45 S. E. 826; *Lovick v. Railroad*, 129 N. C. 427, 40 S. E. 191; *Williams v. Gill*, 122 N. C. 967, 29 S. E. 879; *Pierce v. Railroad* [124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316]; and *Cook v. Railroad*, supra [128 N. C. 333, 38 S. E. 925]. It was in this case a question for the jury under proper instructions from the court, whether *McManus* in arresting the plaintiff was performing his master's business, or was engaged in some pursuit of his own. *Hussey v. Railroad* [98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312], and *Daniel v. Railroad*, supra; *Tiffany on Agency*, 271. The court charged fully and correctly in respect to this matter." And so in the case at bar the court instructed the jury fully upon the facts and the law, in a clear and able charge, which surely could have left no doubt in the minds of the jurors as to what the rights of the parties were under the law and upon the facts as they might find them to be.

[3] The fact that the defendant's servants did not commit an assault or a battery upon the plaintiffs cannot change the result. They unlawfully trespassed upon their property, and, if their other acts did not, by themselves, constitute an actionable wrong, the jury could at least consider them in aggravation of damages. We held in *Kimberly v. Howland*, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545, that the general principles of the law of torts support a right of action for physical injuries resulting from either a willful or a negligent act, none the less strongly because the physical injury consists of a wrecked nervous system instead of wounded or lacerated limbs, as those of the former class are frequently much more painful and enduring than those of the latter. Approving what is said in the text-books, *Justice Brown*, who wrote an able and learned opinion for the court in that leading case, thus summarized the result of our investigations: "A recent writer on the subject trenchantly says: 'To deny recovery against one whose willful or negligent tort has so terribly frightened a person as to cause his death, or leave him through life a suffering and helpless wreck, and permit a recovery for exactly the same wrong which results, instead, in a broken finger, is a travesty upon justice. The reasoning which can lead to such a result must be cogent, indeed, if it should be entitled to respect.' Case and Comment, August, 1906. A text-writer of repute says: 'The preferable rule on this subject is, in our opinion, that if a nervous shock is a natural and proximate consequence of a negligent act, and physical injuries result directly from mental disturbance, there should be a recovery for the anguish of mind and the consequent physical loss, irrespective of contam-

poraneous bodily hurt.' Watson on Damages for Personal Injuries, § 405." This is a sufficient answer to the contention that there must have been some direct physical injury to the plaintiffs, in order to render the acts of the defendant's servants tortious, in a legal sense, and consequently actionable.

[4] The Howland Case also answers another position of the defendant, that the husband of the feme plaintiff cannot recover for the wrong done to his wife, and in these words: "It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense or is deprived of the society or services of his wife, he is entitled to recover therefor, and he may sue in his own name. 15 Am. & Eng. Enc. Law (2d Ed.) 861, and cases cited. In this case there is no evidence of an outlay of money in medical bills and other actual expenses, and the court so charged the jury, and directed them to allow nothing on that account. His honor correctly instructed the jury to allow nothing because of any mental suffering upon the part of the husband. There was, however, evidence as to the loss of the services of the wife, and that the injury inflicted was of such a character as to deprive the husband of her society, services, aid, and comfort. The court further charged that, if the injuries are permanent, the husband could also recover such sum as will be a fair compensation for the future diminished capacity to labor on the part of the wife. This instruction we think is correct and supported by authority. 6 Thompson's Negligence, §§ 7341, 7342. It is impossible to lay down a rule by which the value of her services and the loss of the wife's society can be exactly measured in dollars and cents. All the judge can do is to direct the jury to allow such reasonable sum as will fairly compensate the husband therefor under all the circumstances of the case." It may be added that in this case defendant's servants trespassed upon the husband's property—his home. He had possession, and they entered after being forbidden to do so.

[5] As to punitive damages, the rule is well settled that when the wrong is willful or wanton or done maliciously, or accompanied by acts of oppression, insult, or brutality, exemplary damages may be added by the jury to punish the offender, as an example to others and to vindicate justice. Hale on Damages, p. 209. The subject is fully considered in the recent case of Saunders v. Gilbert (at this term) 156 N. C. —, 72 S. E. 610; the facts being substantially like those in this case, and we refer to that decision without further discussion of this

exception as to the correctness of the court's ruling that the jury could in their discretion allow punitive damages.

We have considered the case as if the defendant's right to enter upon the land as part of the right of way of the North Carolina Railroad Company by its permission was clear, though the concession was made only for the sake of argument. It had no right, by itself or its servants, to abuse the license or privilege by grossly violating the rights of others in peaceable possession of the land, and especially it may be said the defendant by its servants did not have the lawful right to enter the home of plaintiffs in the manner adopted by them. The other exceptions require no special consideration. No error.

(157 N. C. 353)

EARNHARDT et al. v. SOUTHERN RY. CO.  
(Supreme Court of North Carolina. Dec. 6, 1911.)

1. RAILROADS (§ 68\*)—CHARTERS—CONSTRUCTION.

Railroad charter provisions fixing the width of rights of way should be construed in the light of conditions existing when the charter was granted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 159, 160; Dec. Dig. § 68.\*]

2. RAILROADS (§ 68\*)—RIGHTS OF WAY—WIDTH.

Under North Carolina Railroad Charter, §§ 27, 29, authorizing condemnation of a right of way not invading dwelling houses, etc., and providing that, in the absence of agreement to the contrary, it shall be presumed that land upon which the road is constructed, and for 100 feet on each side of the center thereof, has been granted, a former owner of land within the 100-foot limit upon which it is now sought to construct a track will be presumed to have granted a right of way over it, where it does not appear that the new track would interfere with any dwelling, etc., existing when the right of way was granted.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 68.\*]

3. RAILROADS (§ 82\*)—RIGHTS OF WAY—WIDTH.

If the original owner granted such right of way, subsequent use thereof by him or his successors did not affect the company's rights.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213-219; Dec. Dig. § 82.\*]

4. RAILROADS (§ 82\*)—RIGHTS OF WAY—WIDTH.

The company was not bound from the first to use the full width of right of way acquired, and could use such parts as were required from time to time.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213-219; Dec. Dig. § 82.\*]

5. RAILROADS (§ 134\*)—LEASES—RIGHTS OF LESSEE.

The lessee of the North Carolina Company succeeds to its right to lay a double track on land acquired as a right of way.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 134.\*]

Appeal from Superior Court, Rowan County; Lyon, Judge.

Action by T. C. Earnhardt and another against the Southern Railway Company. Judgment of nonsuit, and plaintiffs appeal. Affirmed.

This is an action to recover the possession of a lot of land and damages for the wrongful entry thereon by the defendants. The entry was made by the Southern Railway Company for the purpose of laying a double track. It is not denied by the defendants that the plaintiffs are the owners of the land subject to the easement and right of way of the North Carolina Railroad. The land was originally a part of the Robards land, and the house now occupied by the plaintiffs has been built within six or seven years. The plaintiff offered evidence tending to prove that at the time of the entry a dwelling house was situate on said land about 55 feet from the center of the main line of the North Carolina Railroad Company; that in front of the house there is a yard, and between the yard and the railroad a roadway; and that by the entry of the Southern Railway to build the double track there is an interference with a part of said roadway, leaving a walkway outside of the plaintiffs' yard; also, that plaintiffs and those under whom they claim have been in possession of the land for about 70 years. There was also evidence that in 1850 or 1851 there was a house on the Robards land, but the witnesses do not state where the house was located, nor is there any evidence that the double track, as now constructed, would interfere with any dwelling or yard in existence in 1850 or 1851. The evidence as to the house tends to prove that a blacksmith shop or some temporary structure was on the land, and not a permanent house. The defendant offered evidence tending to prove that on account of increased business a double track was necessary, and that the Southern Railway had so determined, and that in its construction the right of way in use did not approach the dwelling house of the plaintiffs nearer than 25 feet, and that the yard was not interfered with; also, that there was no house within 100 feet of the main line in 1850 or 1851. The North Carolina Railroad was completed about 1854.

Section 27 of its charter provides for the condemnation of a right of way, and at the end of said section there is the following proviso: "Provided further, that the right of condemnation herein granted shall not authorize the said company to invade the dwelling house, yard, garden or burial ground of any individual without his consent." Section 29 of said charter is as follows: "Sec. 29. That in the absence of any contract or contracts with said company, in relation to lands through which the said road or its branches may pass, signed by the owner thereof or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land upon which the said road or any of its

branches may be constructed, together with the space of one hundred feet on each side of the center of the said road, has been granted to the said company by the owner or owners thereof, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used for the purposes of said road, and no longer, unless the person or persons owning the said land at the time that part of the said road was finished, or those claiming under him, her or them, shall apply for an assessment of value of said lands, as hereinbefore directed, within two years next after that part of the said road which may be on said lands was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply within two years after the said part was finished, he, she or they shall be forever barred from recovering said land or having any assessment or compensation thereof: Provided, nothing herein contained shall forfeit the rights of femes covert or infants until two years after the removal of their respective disabilities." No question is raised as to the proviso in section 29. On the 16th day of August, 1895, the North Carolina Railroad Company leased to the Southern Railroad Company, for a term of 99 years, its entire railroad, with all its franchises, rights of transportation, works and property, and said lease is now in force.

At the conclusion of the plaintiffs' evidence, there was a motion to nonsuit, which was overruled, and, after the introduction of evidence by the defendant, the case was submitted to the jury, and pending its consideration his honor granted the motion to nonsuit, and the plaintiffs excepted and appealed.

The plaintiffs' counsel contends in his brief:

(1) That there is evidence that a dwelling house was situate on the land in controversy at the time of the construction of the North Carolina Railway, and therefore that said company could not acquire a right of way which would interfere with the house or yard.

(2) That, if the North Carolina Railroad Company did not acquire a right of way, the Southern Railway Company has none, as it derives its powers and rights under its lease from the North Carolina Railroad Company.

(3) That, if the North Carolina Railroad Company has a right of way, it is only to the extent that may be necessary to transact the business of the company, and does not include such as may be needed by the business of the Southern Railway Company, much of which is the transportation of interstate passengers and freight.

(4) That laying the double track is an additional burden on the property of the plaintiffs, for which they are entitled to recover damages.

Geo. W. Garland, for appellants. Linn & Linn, for appellee.

ALLEN, J. [1-3] The first question to be settled is whether the North Carolina Railroad Company has acquired a right of way 100 feet wide on each side of its main track over the land in controversy, because, if it has not done so, the Southern Railway Company, which derives its powers under a lease from the North Carolina Company, has no such right of way. It must be remembered, in the consideration of this question, that there is no evidence that the double track, as now laid, invades any house or yard as it existed in 1850 to 1851, nor that it invades the dwelling or yard of the plaintiff. Section 27 of the charter of the North Carolina Company relates wholly to the acquisition of a right of way by condemnation proceedings, and, of course, a right of way could be acquired by deed or contract from the owners. By section 29 it is intended to provide for cases where there has been no condemnation proceeding, and evidence of the consent of the owner has been lost or cannot be produced, and it says that, in the absence of contract, there arises a presumption of a grant from the owner for the land on which the road is located, together with a space of 100 feet on each side of the center of the track, and, if the owner fails to claim compensation for such right of way within two years after the road is finished over his land, he is barred.

Provisions like these cannot be construed in the light of conditions as they exist today, but as they were when the charters were granted. As was well said by Justice Connor in *Railroad v. Olive*, 142 N. C. 273, 55 S. E. 268: "The point of view from which charters for railroads were drawn in this state 50 years ago must not be lost sight of in construing them in the light of present conditions. If, to induce the investment of capital in the construction of railroads and development of the country, large privileges were conferred, not inconsistent with the exercise of the sovereign power of the state in controlling them, we may not construe them away without doing violence to sound principle and fair dealing. When these rights of way were granted, or statutes enacted permitting their acquisition in the exercise of the right of eminent domain, it was contemplated that they should be of sufficient width to enable the company to safely operate the road and protect the adjoining lands from fire communicated by sparks emitted by the engines. Land was cheap and population sparse. The railroads, as the charters show, were to be built by the citizens of the state, the capital stock to be subscribed by large numbers of people. Legislatures were ready to make broad concessions to these domestic corporations, and, as shown by the record in this and other cases in this court, the owners of lands, because the benefits which will arise from the building of said railroads to the owners of the

land over which the same may be constructed will greatly exceed the loss which may be sustained by them,' were desirous to promote the building thereof, and to that end to give them rights of way over their lands. When the road has been constructed and the benefits enjoyed, although new and unexpected conditions have arisen, the rights granted may not be withdrawn, although the long-deferred assertion of their full extent may work hardship." The effect of inaction on the part of the owner for a period of two years after the completion of the road has been considered in several cases in this court under charters similar to the one before us, and, without difference of opinion, it has been held that under such circumstances, a presumption of a grant from the owner arises for the land on which the road is located and for the right of way provided for in the charter.

In *Railroad v. McCaskill*, 94 N. C. 751, Chief Justice Smith, discussing this question, says: "In whomsoever the estate was vested, there being no suggestion that they were under disabilities, it was, under the statute, as soon as the road was constructed and toties quoties as it progressed towards conclusion, transferred to the corporation, of the required width of 100 feet on either side, to be paid for as directed, when no written contract has been entered into for the purchase. In such case the inaction of the owner in enforcing his demand for compensation for land taken and appropriated after the finishing of the construction of the road thereon for the space of two years thereafter raises, under the statute, a presumption of a conveyance and of satisfaction, and hence becomes a bar to an assertion by legal process, of such claim. \* \* \* The presumption of the conveyance arises from the company's act in taking possession and building the railway, when, in the absence of a contract, the owner fails to take steps for two years after it has been completed for recovering compensation. It springs out of these concurring facts, and is independent of inferences which a jury may draw from them. If the grant issued, it would not be more effective in passing the owner's title and estate. Thus vesting, it remains in the company as long as the road is operated, of the specific breadth, unaffected by the ordinary rules in reference to repelling presumptions." This statement of the law, as modified by *Railroad v. Sturgeon*, 120 N. C. 225, 26 S. E. 779, has been approved in *Railroad v. Olive*, 142 N. C. 272, 55 S. E. 263, *Parks v. Railroad*, 143 N. C. 293, 55 S. E. 701, 12 L. R. A. (N. S.) 680, *Railroad v. New Bern*, 147 N. C. 168, 60 S. E. 925, *Muse v. Railroad*, 149 N. C. 446, 63 S. E. 102, 19 L. R. A. (N. S.) 453, and in other cases. Speaking of the effect of the *Sturgeon Case*, Justice Connor said in *Barker v. Railroad*, 137 N. C. 220, 49 S. E. 117: "It is there held that under similar

conditions, construing the same language, the road acquired, not a title to the land, but an easement which entitles it to possession of the whole right of way only when it shall appear that it is necessary for its purposes in the conduct of its business. We do not understand that in any of the decisions of this court the doctrine of McCaskill's Case [94 N. C. 746], has been otherwise modified."

It will be noted that the presumption does not arise except in the absence of a contract, and it may be that where permanent structures have been erected by the owner of the land within 100 feet of the main line, and have been used for a long time without objection, and also in localities where it is customary to acquire rights of way by purchase, less in width than 100 feet, that the presumption would not arise, when neither party introduces any evidence that there was no contract. It is also intimated in McCaskill's Case and in *Gudger v. Railroad*, 106 N. C. 484, 11 S. E. 515, that there may be a recovery for permanent improvements, made without objection, and in good faith, in the event the right of way is taken for the use of the railroad. These questions are not, however, before us on this appeal. It follows, therefore, that there is a presumption that the then owner of the land granted to the North Carolina Railroad a right of way over the land in controversy, and, if so, the subsequent use of the land by the owner or by those who claim under him, as shown by the evidence in this case, could not affect the right. Rev. § 388; *Railroad v. McCaskill*, 94 N. C. 746; *Muse v. Railroad*, 149 N. C. 446, 63 S. E. 102.

[4] It is also well settled that, if the North Carolina Railroad acquired the right of way over the land, it was not required to use all of it, but could use such parts of it from time to time, as the development of its business demanded. In *Thomason v. Railroad*, 142 N. C. 322, 55 S. E. 206, the court so holds, and it is there said: "It would seem that upon the reason of the thing and from the nature of and the purpose for which the powers are granted, when the company acquired the right of way, in the absence of any restrictions, either in the charter or the grant, if one was made, it became invested with the power to use it, not only to the extent necessary to meet the then present demands, but such further demands as arose from the increase of its business and the proper discharge of its duty to the public. Any other construction of its charter in this respect would defeat the very purpose for which it was created—the growth and development of the resources of the country through which it was constructed. It would seriously interfere with railroads in the discharge of their duty to the public in a country the population and business of which are rapidly increasing, if because, to

meet and encourage these conditions, they doubled their tracks, erected larger depots, made connections with branch lines, etc., new rights of action accrued against them in regard to the use of their right of way." And it is also held that: "As the company is held accountable for the condition of its right of way, and may be compelled to build side tracks and other structures necessary for the discharge of its duties to the public, it must have the correlative right to be the judge of the necessity and extent of such use." *Railroad v. Olive*, supra.

[5] If the North Carolina Company has the right of way over the land in controversy, and has the right to lay a double track thereon, the question remaining is, Can the Southern Railway Company do so? The North Carolina Company has leased to the Southern Railway Company its road, franchises, and rights of property, and this lease is valid (*Hill v. Railroad*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. [N. S.] 606), and in passing on this same lease Chief Justice Clark said in *McCulloch v. Railroad*, 146 N. C. 317, 59 S. E. 882: "The Southern Railway Company, the defendant, as lessee of the North Carolina Railroad Company, is entitled to use said lot as fully as its lessor could have done (so far as this action is concerned), including any increased burden on the lot by reason of the increased business of said North Carolina Railroad Company's part of the business of the 'Southern,' whether the said business originates along the line of the North Carolina Railroad Company, or, originating elsewhere, is shipped to any point over the line of the North Carolina Railroad." These authorities seem to answer the contentions of the plaintiffs, and to sustain fully the ruling of his honor.

No error.

(157 N. C. 378)

CARRICK v. SOUTHERN POWER CO.  
(Supreme Court of North Carolina. Dec. 6, 1911.)

1. MUNICIPAL CORPORATIONS (§ 750\*)—TORTS—OMISSIONS OF OFFICERS AND AGENTS—INDEPENDENT CONTRACTOR.

Governing authorities of a town cannot absolve themselves of the duty of proper care as to the condition of its streets and sidewalks; and when they authorize work to be done on them which is essentially dangerous, or which will create a nuisance, unless special care is taken, they are chargeable with a breach of duty, whether the work is being done by a licensee or by an independent contractor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1579; Dec. Dig. § 750.\*]

2. MASTER AND SERVANT (§ 317\*)—INJURIES TO THIRD PERSONS—ACT OF INDEPENDENT CONTRACTOR.

Where a town has given permission to a power company to construct its line through the town, the company cannot relieve itself from the duty of properly safeguarding work that is liable to create a nuisance, even though the

work is delegated to an independent contractor, and is liable for an injury caused by leaving a sidewalk in a dangerous condition, after making excavations for its improvements.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1254; Dec. Dig. § 317.\*]

### 3. MUNICIPAL CORPORATIONS (§ 821\*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a person, injured by falling into a hole left in a sidewalk by a public service company, was guilty of contributory negligence is properly a question for the jury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 821.\*]

*Appeal from Superior Court, Davidson County; Daniels, Judge.*

Action by Vangy Carrick against the Southern Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On January 27, 1910, plaintiff, a fireman in a cotton mill, was going to his work along Salisbury street, in the town of Lexington, N. C., his usual route, and fell into a hole near the edge of the sidewalk and partly on the sidewalk, and was seriously injured. The hole was about 2 feet square at the top and 4 to 5 feet deep; about one-half of the opening being on the sidewalk and 3 to 5 feet from the inside fence, and the hole was left without covering, or without lights or warning of any kind, and was dug by procurement of defendant company, which was constructing its line through the town, under permission of the municipal government, evidenced by an ordinance granting defendant a license for the purpose. Defendant denied there was negligence in leaving the hole uncovered; alleged that the work was being done by an independent contractor, for whose conduct defendant was in no way responsible; and, further, that plaintiff was well aware of the existence and placing of the hole, and was guilty of contributory negligence at the time, and offered evidence in support of these positions. The jury rendered the following verdict:

"(1) Was the plaintiff injured by and through the negligence of the defendant? Answer: Yes.

"(2) Did the plaintiff contribute to his own injury by his negligence? Answer: No.

"(3) What damage, if any, is the plaintiff entitled to recover? Answer: \$1,200."

Walser & Walser and Osborne, Lucas & Cocke, for appellant. McCrary & McCrary and Phillips & Bower, for appellee.

HOKE, J. (after stating the facts as above).

[1] The governing authorities of a town may not absolve themselves of the duty of proper care and supervision as to the condition of its streets and sidewalks; and when they authorize work to be done on them which is essentially dangerous, or which will create a nuisance, unless special care and precaution is taken, they are chargeable with a breach of duty in this respect,

whether the work is being done by a licensee or by an independent contractor. *Bailey v. Winston*, 72 S. E. 966, at present term and authorities cited, more especially *Bennett v. Mt. Vernon*, 124 Iowa, 537, 100 N. W. 349; *Brusso v. City of Buffalo*, 90 N. Y. 697. And see an instructive case on this subject, *City of Baltimore v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395.

[2] The same principle holds as to the obligations of licensees and independent contractors doing work of the kind suggested; that is, when the work that is being done for their benefit or by their procurement is of a kind to create a nuisance, unless special care is taken, they are charged with the duty of properly safeguarding it, and may not relieve themselves by delegating the duty to others. *Bridge Company v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, reported, also, in 76 Am. St. Rep. 375; *City of Anderson v. Fleming*, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119; *Spence v. Schultz*, 103 Cal. 208, 37 Pac. 220; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421; *Village of Jefferson v. Chapman*, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136; *Cameron Mill Co. v. Anderson*, 98 Tex. 156, 81 S. W. 232, 1 L. R. A. (N. S.) 198; *Rock v. Construction Co.*, 120 Ia. 831, 45 South. 741, 14 L. R. A. (N. S.) 653; *McCarrier v. Hollister*, 15 S. D. 366, 89 N. W. 862, 91 Am. St. Rep. 695; *Moll on Independent Contractors*, § 75. In *Rock v. Construction Co.*, supra, the court held as follows: "As a municipal corporation would itself be liable to a citizen for injury sustained by reason of its reducing a sidewalk to a dangerous condition, it is evident that the privilege granted by it to a public utility company of making excavations therein cannot authorize such company to leave the excavations so made unguarded, and to dispense with all precautions, whereby those who are rightfully using the sidewalk may be warned of their existence. Nor can the company in such case escape liability on the plea that an excavation, made under the authority conferred on it and for its account and benefit, has been made by an independent contractor." In *Bridge Co. v. Steinbrock*, supra, Marshall, J., delivering the opinion, said: "The weight of reason and authority is to the effect that where a party is under a duty to the public or third person to see that work that he is about to do or have done is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to another's injury; and, in the citation to *Moll*, supra, the author, in reference to street excavations, says correctly, we think, that "digging trenches in highways or across footpaths has been considered by many, if not most, courts so dangerous as not to be assignable, so far as liability is concerned. An incorporated company un-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dertaking to lower the grade of its road while in the receipt of tolls, and while the road is open for travelers, is bound to guard that part retained for public use, to warn travelers of danger threatened by obstructions, and by suitable devices to direct them in the proper route; of which duties it may not divest itself by shifting the responsibility to others." A contrary doctrine which seems to have prevailed in certain cases relied upon by defendant, as in *Hackett v. Telegraph Co.*, 80 Wis. 187, 49 N. W. 822, *Smith v. Simmons*, 103 Pa. 32, 49 Am. Rep. 113, are expressly disapproved in some of the decisions to which we have referred, and are, we think, contrary to the great weight of authority. The position chiefly relied upon by defendant that it is relieved of responsibility, if any existed, because the work was being done by an independent contractor may not therefore be sustained. The hole, two feet square at the opening and four or five feet deep, on the edge of a sidewalk, extending partly in and leaving only a space of from three to five feet for pedestrians to pass, going to or from their work along an unlighted street, comes well within the principle stated, and defendant has been properly held responsible for the neglect established and its consequences.

[3] The evidence hardly presents the question of contributory negligence; for the only testimony we find, on the part of defendant, tending to fix knowledge of the existence of the hole on plaintiff, also tends to show that the hole was being covered over; but if it were otherwise the question was submitted under the principles recognized as sound in *Russell v. Monroe*, 116 N. C. 721, 21 S. E. 550, 47 Am. St. Rep. 823, and there is no error to defendant's prejudice in having referred the matter to the jury's decision. In *Neal v. Marion*, 126 N. C. 412, 35 S. E. 812, the claimant, with full knowledge of conditions and contrary to the general custom, had voluntarily chosen to go along an abandoned and neglected walkway, when there was a good, safe way provided on the opposite side of the road, and the case has no proper application to the facts presented here. There is no error, and the judgment on the verdict is affirmed.

No error.

(157 N. C. 324)

#### DOVER v. MAYES MFG. CO.

(Supreme Court of North Carolina. Dec. 13, 1911.)

#### 1. MASTER AND SERVANT (§ 302\*)—TORTS OF SERVANT—SCOPE OF EMPLOYMENT—MASTER'S LIABILITY.

Defendant's driver, who was shown to have the duties of an ordinary driver, invited a boy to ride on a lumber wagon, and while he was on the load the team ran away, and he was killed. *Held*, in an action for the alleged negligent killing of the boy, that defendant's

driver had no implied authority to permit boys to ride on his wagon, and in so doing acted beyond the scope of his authority.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217-1229; Dec. Dig. § 302.\*]

#### 2. NEGLIGENCE (§ 22\*)—"DANGEROUS INSTRUMENTALITY"—TEAM OF MULES.

A team of mules, drawing a wagon partially loaded with lumber, and driven by a negro boy 17 years old, is not a "dangerous instrumentality," so as to render the owner of the team liable for the death of a boy 10 years old, riding in the wagon at the invitation of the driver, caused by the running away of the team, irrespective of whether the invitation of the driver was within the scope of his employment.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 81, 82; Dec. Dig. § 22.\*]

#### 3. NEGLIGENCE (§ 56\*)—PROXIMATE CAUSE OF INJURY.

Where defendant's servant, driving a team of mules attached to a wagon partially loaded with lumber, invited plaintiff's intestate, a boy 10 years old, to ride with him in the wagon, and the boy was killed by the running away of the team, the character of the mules was not the proximate cause of plaintiff's death; the accident being the result of the unauthorized act of the driver in inviting intestate to ride.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.\*]

Appeal from Superior Court, Mecklenburg County; Biggs, Judge.

Action by D. T. Dover, administrator of William Dover, deceased, against the Mayes Manufacturing Company. Judgment for defendant and plaintiff appeals. Affirmed.

Burwell & Cansler, for appellant. A. G. Mangum and Osborne, Lucas & Cocke, for appellee.

BROWN, J. The plaintiff's intestate, a boy 10 years old, was killed by the running away of a team of mules belonging to the defendant, Mayes Manufacturing Company, and in charge of one of its servants. The evidence offered by the plaintiff shows that the team was being driven by a negro boy 17 years old, and was at the time pulling a wagon partially loaded with lumber, which was being moved for the defendant. After the lumber was loaded, the plaintiff's intestate and two other small boys climbed on the wagon. There was also on the wagon with the driver another negro boy, 18 or 19 years old. When the wagon was approaching a hill on a street in the village of Mayesworth, and just before starting up the hill, the negro driver made two of the white boys on the wagon get off, but let the Dover boy, plaintiff's intestate, remain on the wagon, and permitted him to drive the mules; and while the boy was driving the negro boy stood up behind him, and whipped the mules, so that they trotted up the hill, and he continued to whip them until they passed over the top of the hill and out of sight of the witness. Another witness for the plaintiff testified that when he saw the mules they

were running down the hill on the opposite side; that one of the negro boys had the reins, and the Dover boy was sitting on the wagon in front of him; and that presently the negro boys jumped or fell from the wagon.

This witness then gives the following description of the manner in which the Dover boy was killed: "They ran on about 20 feet, and the lumber got to jogging, and he got on his feet in some way and leaned over, and the lumber carried him over, and as he went over the hind wheel struck him right across the head." There was evidence that the mules had run away several times before this accident; the runaways being attributed by the witnesses to several causes. Once the lumber was "punching" the mules, and in another instance a table, which was being placed on the wagon, fell on the mules; and one witness said he had seen them run away and did not know the cause.

Augustus Lay, a witness for the plaintiff, testified that he was manager of the defendant's store, and had charge of the teams and farms; that these mules "would run off if a man is not there sufficient to hold them, if lumber jumps up and strikes them, or if a table or box strikes them;" that the boys in the village were in the habit of riding on the wagons, and he would run them off three or four times a day.

At the conclusion of the plaintiff's evidence, the court overruled defendant's motion for judgment of nonsuit, and the defendant introduced a number of witnesses, whose testimony was directly opposed to that of the plaintiff. At the conclusion of all the evidence, upon an intimation of the court that he would charge the jury that, if they believed the evidence, the plaintiff was not entitled to recover, the plaintiff submitted to a judgment of nonsuit. The correctness of this ruling is the sole question presented for our determination.

[1] At the very threshold of this case, we are confronted with a state of facts which compels us to sustain the judgment of his honor, Judge Biggs. Construed in the light most favorable to the plaintiff, the evidence establishes the fact his intestate was invited by the defendant's servant to ride on the wagon. It is not alleged, nor does it appear in evidence, that the servant had express authority to invite or permit boys to ride on the defendant's wagons. It was shown that the servant's duties were those of an ordinary driver of a team of mules; and that at the time of the accident he was engaged in the performance of such duties. We must hold upon this state of facts that he had no implied authority to permit boys to ride on his wagon; and that in doing so he acted beyond the scope of his employment. As authority for this conclusion, we have only to repeat well-settled principles in the law of master and servant. "In an action for tort, in the nature of an action on the case, the

master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that, if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable." *Howe v. Newmarch*, 12 Allen (Mass.) 49; *Fleischner v. Durgin*, 207 Mass. 435, 93 N. E. 801, 33 L. R. A. (N. S.) 79. This doctrine, so well expressed by the Supreme Court of Massachusetts, has found ready acceptance and frequent application by our court. *Roberts v. Railroad*, 143 N. C. 178, 55 S. E. 509, 8 L. R. A. (N. S.) 798; *Sawyer v. Railroad*, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716; *Vassor v. Railroad*, 142 N. C. 68, 54 S. E. 849, 7 L. R. A. (N. S.) 950; *Hayes v. Railroad*, 141 N. C. 195, 53 S. E. 847; *Jackson v. Telephone Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; *Palmer v. Street Railway Co.*, 131 N. C. 250, 42 S. E. 604; *Cook v. Railroad*, 128 N. C. 333, 38 S. E. 925; *Pierce v. Railroad*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316; *Willis v. Railroad*, 120 N. C. 508, 26 S. E. 784; *Waters v. Lumber Co.*, 115 N. C. 648, 20 S. E. 718.

The recent case of *Marlowe v. Bland*, 151 N. C. 140, 69 S. E. 752, presents an interesting application of this principle. In that case a farm hand was directed to cut and pile certain cornstalks and, without being directed to do so, he set fire to the pile, from which sparks were blown by the wind to defendant's woods, causing a fire and doing two or three hundred dollars of damage. Upon these facts, we sustained a judgment of nonsuit, and in the opinion of the court, written by Mr. Justice Hoke, will be found frequent quotations from the very thorough discussions of this question by Mr. Justice Walker, in *Jackson v. Telephone Co.*, supra, and in *Daniel v. Railroad*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455. In the latter case, the learned justice says: "It is not intended to assert that a principal cannot be held responsible for the willful or malicious acts of the agent, when done within the scope of his authority, but that he is not liable for such acts, unless previously and expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as, when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity, to give vent to some private feeling of his own (*McManus v. Crickett*, 1 East, 106); and, as is forcibly stated by Lord Kenyon in the case cited, quoting in part from Lord Holt: 'No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues



that which his own malice suggests he no longer acts in pursuant of the authority given him, and his master will not be answerable for his acts."

In his learned opinion in *Stewart v. Lumber Co.*, 146 N. C. 112, 59 S. E. 568, Mr. Justice Walker quotes this language from his opinion in the *Daniel Case*, and well says: "What better authority can we invoke in support of our position than the opinions of the Court of King's Bench as delivered by Lord Holt and Lord Kenyon?"

"The test of liability in all the cases," says Mr. Justice Hoke, in *Sawyer v. Railroad*, 141 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, "depends upon the question whether the injury was committed by the authority of the master, expressly conferred, or fairly implied from the nature of the employment and the duties incident to it."

This doctrine of respondent superior, as it is now established, is a just but a hard rule. The master exercises care in the selection of his servant and retains in his service only such servants as are prudent and trustworthy; the servant, in the prosecution of the master's business, must of necessity pass beyond his sight and out of his control, and yet the law makes the master liable for the conduct of the servant. The application of this principle, without working the greatest injustice to every employer of a servant, is made possible only by the limitation, established by the courts, that when the servant does an act which is not within the scope of his employment the master is not liable. "Beyond the scope of his employment, the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master. The rule as it is now established by the later judicial declarations should be strictly held within its defined limits. It is a rule, capable of great abuse and much hardship, and the courts should guard against its extension or misapplication." *Holler v. Ross*, 68 N. J. Law, 324, 53 Atl. 472, 59 L. R. A. 943, 96 Am. St. Rep. 546.

The authorities on this question from other courts are collected and fully discussed in the opinion of Mr. Justice Connor, in *Stewart v. Lumber Co.*, 146 N. C. 85, 59 S. E. 545. The principal opinion in that case was not in conflict with the views expressed in the dissenting opinion upon the general principle of the liability of the master for the conduct of his servant, when acting beyond the scope of his employment. The conflict arose upon the application of this principle to the willful and wanton conduct of an engineer in blowing his whistle for the purpose of frightening plaintiff's horses. We said, in the opinion of the court: "This immunity from liability for tort referred to is not generally extended to railroads, whose servants are intrusted with such dangerous instrumentalities, and have thereby such unusual and extensive means of

doing mischief." Mr. Justice Walker and Mr. Justice Connor entered vigorous dissents to this exception to the general rule, and maintained that the rule should be applied to railroads, as well as to other employers, exempting them from liability for the wanton and malicious acts of their servants when beyond the scope of their employment.

We have a number of cases from other courts which directly sustain the position that the defendant's driver was not acting for his master when he permitted plaintiff's intestate to ride on the wagon. In the leading case of *Bowler v. O'Connell*, 162 Mass. 319, 38 N. E. 498, 27 L. R. A. 173, 44 Am. St. Rep. 359, the servant of the defendant, a boy 13 years old, was leading a colt belonging to the defendant from the stables to defendant's yard, and invited the plaintiff, a boy between 5 and 6 years of age, to ride, and the plaintiff was kicked by the colt while going forward to accept the invitation. The court, denying defendant's liability, says: "The true test of liability on the part of the defendant is this: Was the invitation given in the course of doing this work, or for the purpose of accomplishing it? Was the act done for the purpose, or as a means of doing what Frank [the servant] was employed to do? If not, then in respect to that act he was not in the course of the defendant's business. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the work of the master. And under this rule, in view of the testimony, the defendants were not responsible for the consequences of Frank's invitation to the plaintiff to ride upon the colt." This case was followed in *Driscoll v. Scanlon*, 165 Mass. 348, 43 N. E. 100, 52 Am. St. Rep. 523, in which it is held: "If a driver of a cart invites an infant to drive with him, either for pleasure or to take his place in driving while he sleeps, and the infant falls from the cart and is run over by it, the act is outside the driver's authority, and his master is not liable to the infant."

"The owner of the wagon in charge of a skillful driver is not liable for the death of a child fatally injured in attempting to alight from the wagon, after having climbed thereon at the invitation of the driver, who was neither expressly or by implication authorized to invite children to get upon the wagon, and whose act in doing so was in no sense within the scope of his employment, or in furtherance of the master's business." *Stone Co. v. Pugh*, 115 Tenn. 688, 91 S. W. 199.

In *Kiernan v. Ice Co.*, 74 N. J. Law, 175, 63 Atl. 998, it appeared from the testimony that the plaintiff, a boy of 15 years, was invited by the defendant's servant, engaged at the time in driving an ice wagon, to take a piece of ice from the wagon, and while he was in the act of doing so he was assaulted by the servant. In denying plaintiff's right

to recover, the court says: "There is nothing to show that Lahey [the driver] had any express or implied authority from the defendant to permit any one to take ice gratuitously from the wagon. Therefore, when Lahey gave such permission, he did it on his own responsibility, and not as a servant of the defendant."

The Supreme Court of Michigan, in *Schulwitz v. Lumber Co.*, 126 Mich. 559, 85 N. W. 1075, had occasion to apply this principle to a state of facts very similar to that presented in this case, and held that: "A master is not liable for the negligence of his servant in permitting a boy, contrary to the master's orders, to ride upon a wagon provided for the servant's use in hauling lumber; such act not being within the scope of the servant's employment." *Mahler v. Scott*, 129 Mich. 614, 89 N. W. 340; *Corrigan v. Hunter*, 139 Ky. 315, 122 S. W. 131, 130 S. W. 798; *Sweedeen v. Improvement Co.*, 93 Ark. 397, 125 S. W. 439, 27 L. R. A. (N. S.) 124.

[2, 3] We cannot hold that a team of mules and wagon is a "dangerous instrumentality," and that the defendant should be made liable for the death of plaintiff's intestate, without regard to whether the servant was acting beyond the scope of his employment. *Pollock on Torts*, 480. But, if we should so hold, it would not change our decision, because the character of the mules was not the cause of the death of plaintiff's intestate. The accident was the result of the conduct of the defendant's servant, for which the defendant is not liable. *Dougherty v. Railway Co.*, 137 Iowa, 257, 114 N. W. 902, 14 L. R. A. (N. S.) 590, 126 Am. St. Rep. 282.

The judgment of the superior court is affirmed.

(157 N. C. 320)

**MCBRAYER v. BLANTON et al.**  
(Supreme Court of North Carolina. Dec. 13, 1911.)

**EJECTMENT (§ 86\*)—BURDEN OF PROOF.**

The burden was on defendant in an action to recover land to locate a deed constituting a part of his chain of title, and to show that it covered the property in controversy.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 238-245; Dec. Dig. § 86.\*]

Appeal from Superior Court, Rutherford County; Lane, Judge.

Action by T. C. McBrayer against Franklin Blanton and others. From the judgment finding in part for plaintiff, he appeals. Reversed, and new trial ordered.

These issues were submitted to the jury:

"(1) Is the plaintiff the owner in fee, and entitled to the possession, of the land described in the complaint? Answer: No.

"(2) Are the defendants, or any of them, in possession of the land described in the complaint, or any part of it? Answer: Yes.

"(3) What damages, if any, is plaintiff entitled to recover of the defendants? Answer: —."

Tillett & Guthrie and Robert S. Eaves, for appellant. McBrayer, McBrayer & McRorie, for appellees.

**BROWN, J.** In order to show title out of the state, plaintiff introduced grant to Thomas Whitesides, dated November 23, 1792, admitted to cover the land in controversy. Plaintiff then introduced (1) allotment to Sarah Gettys in partition proceedings of Alpha Sweezy Estate, covering land in controversy; (2) deed of Sarah Gettys and husband, Smith Gettys, to Augustus Surratt for same; (3) deed of Surratt to plaintiff for said land; (4) evidence showing adverse possession in Surratt for more than 15 years prior to 1904 and up to that year. Present possession by defendant was admitted. The defendants introduced (1) deed from Franklin Whitesides, administrator of Thomas Whitesides, to James Chitwood, dated April 19, 1796; (2) deed from James Chitwood to Jesse Chitwood; (3) will of Jesse Chitwood, dated January 8, 1856, devising the land to Sarah Blanton, subject to life estate of Sarah Chitwood; (4) deed from James Chitwood to Elijah Sweezy dated August 16, 1824, offered for purpose of estoppel. We find nothing in the record connecting plaintiff with Elijah Sweezy, or tending to prove that plaintiff claimed the land under him, or that his deed covers the land in controversy. Therefore the attempt to connect plaintiff with James Chitwood and to show that plaintiff claims under him has failed.

The plaintiffs contend that the deed introduced by the defendant from James Chitwood to Jesse Chitwood is void for insufficient description, and cannot be located. The description is as follows: Also a part of another tract of land containing 800 acres, granted to Thomas Whitesides, and by him conveyed to the said James Chitwood, and by him now conveyed to Jesse Chitwood, beginning at a post oak, corner of said tract; thence the line running east, 187 poles, to a black oak; thence south a certain distance, to a black oak on the middle of the road; thence with said road a certain distance, to a stake in Morrell's west line; thence with said line north, the line of the 800-acre survey; thence with said line a certain distance, to a stake; thence a conditional line northwest to a tree on the south side of the branch, to range with one on the north side of the said branch; thence N. 70° E., to the beginning, containing 100 acres, be the same more or less. In reference to the location of this deed the surveyor testified: "I do not think the deed could be surveyed. The first call, if you begin at the post oak on the northern line of the grant, would have to be

shortened from 187 to 157 poles. This would put you at the corner at the end of this line. The next call could not be run, nor the next. What I say with reference to the location of the boundaries of this deed is simply my opinion as a surveyor, and is not based on any effort to run the deed or to locate the corners called for in it."

The burden of proof was on the defendant to locate this deed, as it constituted a link in defendant's claim of title, and to establish that it covered the locus in quo, and his honor should have so instructed the jury. *Bailey's Onus Probandi*, 113; *Collins v. Swanson*, 121 N. C. 67, 28 S. E. 65.

As this case is to be tried again, we will not discuss the deed from William Franklin Whitesides, administrator of Thomas Whitesides. It is an essential part of the defendant's claim of title, and we note that the description of the land is full, but there is no evidence of any authority upon the part of the administrator to sell the land, and no recitals whatever in the deed which would in an ancient deed be evidence of such authority.

New trial.

(157 N. C. 619)

#### STATE v. CORBIN.

(Supreme Court of North Carolina. Dec. 13, 1911.)

#### 1. INDICTMENT AND INFORMATION (§ 110\*)—REQUISITES—LANGUAGE OF STATUTE.

An indictment in the language of the statute punishing the pollution of any source of public water supply used for drinking purposes is sufficient.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. § 110.\*]

#### 2. INDICTMENT AND INFORMATION (§ 121\*)—BILL OF PARTICULARS.

Where an indictment in the language of the statute for polluting a public water supply does not inform accused as to what stream he is charged with polluting or the manner of pollution, he can obtain a bill of particulars under Revisal 1906, § 3244.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 316-320; Dec. Dig. § 121;\* *Criminal Law*, Cent. Dig. § 1378.]

#### 3. CRIMINAL LAW (§ 970\*)—TRIAL—ARREST OF JUDGMENT.

Where an indictment, otherwise unobjectionable, fails to give sufficient specific information, and accused fails to inquire at the trial for a bill of particulars, he cannot obtain an arrest of judgment after verdict.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970.\*]

Appeal from Superior Court, Henderson County; Long, Judge.

M. N. Corbin was convicted of crime, and he appeals. Affirmed.

The defendant was convicted upon the following bill of indictment: "The jurors for the state upon their oaths do present: That M. N. Corbin, late of the county of Hender-

son, on the 10th day of July, in the year of our Lord one thousand nine hundred and eleven, with force and arms at and in the county aforesaid, unlawfully and willfully did defile, corrupt, or pollute a creek, the source of a public water supply used for drinking purposes in the vicinity of Tuxedo in said county, against the form of the statute in such case made and provided, and against the peace and dignity of the state. Johnston, Solicitor." After conviction he moved in arrest of judgment, for that the indictment did not show what public water supply was polluted, and in what manner. The motion was overruled, and the defendant excepted.

Staton & Rector, for appellant. Attorney General Bickett and Geo. L. Jones, Asst. Atty. Gen., for the State.

ALLEN, J. [1] The indictment follows the words of the statute (Revisal 1906, § 3862) which is as follows: "If any person shall defile, corrupt or pollute any well, spring, drain, branch, brook or creek, or other source of public water supply used for drinking purposes, in any manner, or deposit the body of any dead animal on the watershed of any such water supply, or allow the same to remain thereon, unless the same is buried with at least two feet cover, he shall be guilty of a misdemeanor, and fined and imprisoned in the discretion of the court." And it has been held repeatedly that it is sufficient for the indictment to follow the language of the statute. *State v. Stanton*, 23 N. C. 430; *State v. Roberson*, 136 N. C. 587, 48 S. E. 595; *State v. Harrison*, 145 N. C. 408, 59 S. E. 867; *State v. Leeper*, 146 N. C. 655, 61 S. E. 585.

[2, 3] If the defendant did not know which stream he was charged with polluting, or the means alleged to have been used, he could have obtained specific information by asking for a bill of particulars under section 3244 of the Revisal. Speaking of this question in *State v. Shade*, 115 N. C. 757, 20 S. E. 537, Mr. Justice Avery says: "The trend of judicial decision and the tendency of legislation is towards the practical view that objections founded upon mere matter of form should not be considered by the court unless there is reason to believe that a defendant has been misled by the form of the charge, or was not apprised by its terms of the nature of the offense which he was held to answer. Where the defendant thinks that an indictment, otherwise unobjectionable in form, fails to impart information sufficiently specific as to the nature of the charge, he may before trial move the court to order that a bill of particulars be filed, and the court will not arrest the judgment after verdict where he attempts to reserve his fire until he takes first the chance of acquittal." The motion was properly overruled.

No error.

(157 N. C. 429)

**In re JENKINS' WILL.**

(Supreme Court of North Carolina. Dec. 13, 1911.)

**1. WILLS (§ 131\*)—HOLOGRAPHIC WILLS—STATUTES—CONSTRUCTION—"AND."**

Though Rev. Code, c. 119, § 1, now Revisal 1905, § 3127, providing that a holographic will must be found among the valuable papers and effects of the deceased, changed the prior law by substituting "and" for "or," the word "and" should still be construed as "or," since otherwise a person owning effects of ever so much value, without any valuable papers, could not execute a holographic will; it being improbable that the Legislature intended such a radical change in the law by the alteration of a single word.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 131.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 385-394; vol. 8, p. 7575.]

**2. WILLS (§ 135\*)—HOLOGRAPHIC WILLS—STATUTES—"EFFECTS."**

Under Revisal 1905, § 3127, providing that to be probated a holographic will must be found among the valuable papers and effects of decedent, the word "effects" is broad enough to include policies of insurance, which are both valuable papers and effects.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 346; Dec. Dig. § 135.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2320-2323.]

**3. WILLS (§ 131\*)—EXECUTION—FORMALITIES.**

Statutes, relating to the execution of wills, are for the protection of the heirs at law and the next of kin of a decedent, and when relating to holographic wills should be strictly and reasonably construed so as to protect such persons, but at the same time so as to give effect to their purpose.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 131.\*]

**4. WILLS (§ 131\*)—HOLOGRAPHIC WILLS—STATUTES.**

Statutes, relating to the execution and formalities necessary to give effect to holographic wills, are mandatory, and not directory.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 131.\*]

**5. WILLS (§ 135\*)—HOLOGRAPHIC WILLS—STATUTES—MOST VALUABLE PAPERS.**

Revisal 1905, § 3127, providing that a holographic will shall be admitted to probate, if found among valuable papers and effects, does not require that the will should be found among the most valuable papers of a decedent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 346; Dec. Dig. § 135.\*]

**6. WILLS (§ 238\*)—HOLOGRAPHIC WILLS—VALUABLE PAPERS—PRESUMPTION.**

The finding of a holographic will among the valuable papers and effects of a decedent raises the presumption that it was placed there by him, with the intent that it should operate as a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 662; Dec. Dig. § 288.\*]

**7. WILLS (§ 302\*)—HOLOGRAPHIC WILLS—STATUTES.**

Under Revisal 1905, § 3127, providing that a holographic will should be given effect, if found among the valuable papers and effects of decedent, proof that the instrument was placed there by the decedent is unnecessary, in the first instance, when there is no countervailing proof.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 302.\*]

**8. WILLS (§ 135\*)—HOLOGRAPHIC WILLS—"VALUABLE PAPERS."**

Under Revisal 1905, § 3127, providing that a holographic will shall be given effect, if found among the valuable papers of decedent, the term "valuable papers" means such papers as are kept and are considered by the decedent worthy of being taken care of.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 346; Dec. Dig. § 135.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7274.]

**9. WILLS (§ 324\*)—HOLOGRAPHIC WILLS—JURY QUESTION.**

Upon a caveat to test the validity of an alleged holographic will, *held*, that whether the will was found in a proper place of deposit, as required by Revisal 1905, § 3127, was, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 324.\*]

Appeal from Superior Court, Halifax County; J. S. Adams, Judge.

Application for the probate of the will of W. T. Jenkins, contested by Dollisa Jenkins and others. From a decree sustaining the will, contestants appeal. Affirmed.

This is a caveat to a paper writing, which purports to be the last will and testament of W. T. Jenkins. Upon issues submitted to them, the jury found that the script and every part thereof is in the handwriting of the said Jenkins. It was unattested. The jury also found that the paper writing, which had been proved in common form, is the will of W. T. Jenkins.

The evidence tended to show that Jenkins died in May, 1909, and after his death a search was made for a will by Levi Browning, who married his niece, and had lived in the house with him three years; his wife having lived there practically all her life. The witness Browning testified that they searched the clothes of the deceased, and looked over the papers and his house and his room. On direct examination, he said there were no papers in the house, but on cross-examination corrected that statement, and said that there were some papers in W. T. Jenkins' bedroom, in a bureau. They did not find a will in the house, according to Browning, and proceeded to examine the papers at W. T. Jenkins' store. The witness was asked: "Q. W. T. Jenkins was a business man, was he not? A. Yes, sir; so far as I know. Q. He did have some papers that you found at the store? A. Yes, sir. Q. Valuable papers—notes and mortgages, were they not? A. I don't know that they were so valuable; didn't seem to be kept up. Of course, there were some valuable papers in them—some deeds and things."

According to the evidence of Browning and other witnesses, Capt. Jenkins was a man of good business judgment, and a great many of the people in the neighborhood would come and get him to write papers for them. The paper writing was dated April, 9, 1909, and the witness testified that W. T.

Jenkins' mind was sound at that time. Browning further testified that after N. E. Jenkins, a brother of the deceased, had qualified as administrator, which was 12 or 15 days after the death of Capt. Jenkins, he renewed the search for a will, and found the paper writing offered for probate in a table drawer in the hall of Capt. Jenkins' house. The paper was in an envelope with some insurance papers—insurance on his gin and dwelling—only one of which was then in force. After finding this paper, the witness, according to his own admission, did not tell any one connected with the estate or with Capt. Jenkins about finding this paper until it was offered for probate, and he refused to let anybody compare the handwriting. Carrie E. Browning, who will take one-half of the estate of Capt. Jenkins if this will is sustained, and who is the wife of Levi Browning, testified that it was two or three weeks after the death of Capt. Jenkins before the will was found. She describes the finding of it as follows: "Well, as there had not been one found, of course, we were on the lookout for one. We were hunting for some medicine my husband was taking. There was a person in the neighborhood who wanted some poison, and he wanted to send him some sugar of lead, and he, with the object in view of finding a will, if there was one, and to get this medicine, happened to think of this drawer, and went in there and found this paper." Mrs. Browning was asked why the table was not examined earlier. She answered: "*Because we did not think of papers being in there, as it was used for this poison medicine generally, as well as other kinds.*" The witness also said that she had turned the drawer to the wall, to keep the children from going in where this medicine was. She further said: "I knew what was in the drawer, but it was a drawer not used much—in everyday use, I should have said." Asked, "How long, Mrs. Browning, before the death of Capt. Jenkins did you go in the drawer?" she answered, "Well it probably might have been several months since we needed an article in that drawer. Q. During his sickness, you kept his medicines in that drawer? A. No, no; did not keep them in there. We had them fresh from the doctor; kept them right on his table, and administered them from his table."

Levi Browning was recalled, and testified that he found the paper in an envelope, which was offered in evidence, and that insurance policies were also in the envelope. There was evidence that the will was found in an envelope, on which was written, in the handwriting of W. T. Jenkins, the word "Important." Much testimony was introduced by the propounders to prove that the script was in the handwriting of W. T. Jenkins, and by the caveators to show the contrary. Evidence was also offered by the caveators as to the circumstances under which the paper was found in the drawer.

N. E. Jenkins, a witness for the caveators and a brother of the deceased, testified that he examined all the papers of W. T. Jenkins, both at his house and store, but could not find a will. About 15 days after his brother's death, he qualified as administrator, and several days later, about the 18th or 19th of May, he received notice of the existence of this paper, but was not notified by Browning.

At the close of the caveators' evidence, Levi Browning was again recalled, and testified that there was another policy in the envelope that had expired. At the close of the evidence, the caveators requested the court to instruct the jury that, upon the evidence, they should answer the issue, "No," thereby finding that the paper writing exhibited by the propounders is not the last will and testament of W. T. Jenkins; and they also asked for special instructions, based upon the insufficiency of the evidence to establish the will, all of which were refused, and caveators excepted, and from the judgment against them appealed to this court.

Murray Allen, Jos. P. Pippen, and Geo. C. Green, for appellants. W. E. Daniel and R. C. Dunn, for appellees.

WALKER, J. (after stating the facts as above). There was sufficient evidence in the case to prove that the script was found in the drawer with policies of insurance, some of which had expired, and that it had been placed there by W. T. Jenkins, in an envelope, upon which he had written the word "Important," and that Levi Browning, when he found it, immediately took it from the envelope and read it to his wife, and the next morning she read it. In the paper the testator devised and bequeathed his property to his nieces, Bessie M. Liles and Carrie E. Browning, wife of Levi Browning, who seems to have had the best claim upon his bounty, and appointed as his executor Hon. E. L. Travis, who had been his attorney and legal adviser.

[1, 2] The formal execution of the script was sufficiently proved before the clerk, and at the trial of the issue *deviseavit vel non*, but the contention of the caveators is that the paper was not found "among the valuable papers and effects" of the deceased, as required by statute. Revisal, § 3127. Prior to the enactment of the Revised Code, the language of the statute (Laws 1784, c. 10, § 5) was "that such will was found among the valuable papers or effects of the deceased." We do not think the substitution of the copulative for the disjunctive conjunction was intended to make any substantial change in the law, and the word "and" should be construed as "or." Otherwise a person owning effects of ever so much value, but not having any valuable papers, or a person having valuable papers, but no valuable effects, could not execute a valid holographic will.

We cannot believe that the Legislature contemplated such a radical change in the law, and that any such result should follow the change of a single word, and it has been so held, with good reason. *Hughes v. Smith*, 64 N. C. 493; *Winstead v. Bowman*, 68 N. C. 170. In the last case, Justice Rodman said: "We do not think this substitution ('and' for 'or') was intended to make any change in the meaning of the statute. At all events, it made none to affect the present case. We only notice it to put it out of the way." Besides, the word "effects" is comprehensive in meaning, and is broad enough to include policies of insurance, which will answer both descriptions—valuable papers and effects. *Brown v. Eaton*, 91 N. C. 26.

[3, 4] We will now proceed to consider the other question, whether the paper was found in a proper place of deposit. "The statute of frauds in England, in relation to wills, and our act upon the same subject, have in view the same object, namely, the protection of the heirs at law, and next of kin of a decedent, from the effect of a forged or false paper as a will. For that purpose, many forms and ceremonies are required to be observed in the execution of such instruments. With regard to attested wills, the requisites of the English, and our statute, except as to the number of witnesses, are substantially the same. It is well known to the profession how strictly—we may say, sternly—the courts in both countries have demanded a compliance with these provisions of the law. The same policy must govern us when we come to decide whether the requisitions of our statute have been complied with in the execution of a paper writing, propounded as a holograph will. One alternative requisition of the statute is that it must be 'found among the valuable papers or effects' of the alleged testator." *Little v. Lockman*, 49 N. C. 495. The provisions of the statute are, of course, mandatory and not directory, and therefore there must be a strict compliance with them before there can be a valid execution and probate of a holograph script as a will; but this does not mean that the construction of the statute should be so rigid and binding as to defeat its clearly expressed purpose. It must be construed and enforced strictly, but at the same time reasonably.

[5] "The requirements of the statute are sufficiently complied with if the script is found among the valuable papers and effects, under such circumstances as that the deceased regarded it as an valuable paper, worthy of preservation, and desired it to take effect as his will." *Hughes v. Smith*, supra. This court said, in *Winstead v. Bowman*, 68 N. C. 170: "We are led to conclude that the phrase 'among the valuable papers and effects' cannot, necessarily and without exception, mean 'among the most valuable,' etc. If that were required, it might be difficult for one who had two or more places for keeping his val-

uable papers to know in which he could safely place his will. The values in cash would be liable to change more or less frequently. It might well happen that a bond or a large sum might be paid off, and the money deposited in bank or invested in real estate, so that the place which contained the most valuable papers to-day might to-morrow contain only those of comparatively insignificant value. The phrase cannot have a fixed and unvarying meaning, to be applied under all circumstances. It can only mean that the script must be found among such papers and effects as show that the deceased considered it a paper of value—one deliberately made and to be preserved, and intended to have effect as a will. This would depend greatly upon the condition, and business and habits of the deceased in respect to keeping valuable papers, and the place and circumstances under which the script was executed, viz., whether at home or on a journey, etc. It was not the intention of the Legislature to destroy or unreasonably restrict the power of making a holograph will, but simply to assure that the writing offered as a will was really and deliberately intended as such. The place in which it is found, supposing it to be found among valuable papers and effects, is but one circumstance in evidence upon that issue." Referring to this passage in Judge Rodman's opinion, the present Chief Justice said, in *Re Sheppard's Will*, 128 N. C. 54, 88 S. E. 27: "In *Winstead v. Bowman*, 68 N. C. 170, that court criticised, if it does not overrule, the narrow rule which had been laid down in *Little v. Lockman*, 49 N. C. 494"—citing with approval *Tate v. Tate*, 30 Tenn. (11 Humph.) 466, to this effect: "The intention of the statute is that it shall appear to be a will, whose existence and place of deposit were known to the testator, and that he had it in his care and protection, preserving it as his will." And also *Reagan v. Stanley*, 79 Tenn. (11 Lea) 316, to this effect: "In a diary was found, imbedded among other entries, a disposition of property, written and signed. This diary was found among his books of account, and the will therein written was [held to have been properly] admitted to probate." Substantially to the same effect is *Harper v. Harper*, 148 N. C. 453, 62 S. E. 553.

[6, 7] The fact that it is found among the writer's valuable papers and effects implies that it must have been placed there by him, or with his knowledge and consent or approval, with the intent that it should operate as his will, and not that it was deposited surreptitiously by another person, for the purpose of defeating, instead of executing, his will. If the paper is so found, it will be presumed that the deposit of it in the place was made by him, or with his assent; and, in the absence of evidence to the contrary, or of suspicious circumstances, no proof of the fact is required. *Pritchard on Wills*, § 236; *Hooper v. McQuary*, 5 Cold.

(Tenn.) 136. The statute does not demand proof that the author of the paper made the deposit, but only that it was *found* among his valuable papers and effects, and proof of this fact is quite sufficient, at least in the first instance, and when there is no countervailing proof.

[8] "Valuable papers," within the meaning of the statute, are such papers as are kept and considered worthy of being taken care of by the particular person, having regard to his condition, business, and habits of preserving papers. They do not necessarily mean the most valuable papers of the decedent even, and are not confined to papers having a money value, or to deeds for land, obligations for the payment of money, or certificates of stock. The requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper as a disposition of his property, and that he regards it as valuable; consequently the sufficiency of the place of deposit to meet the requirement of the statute will depend largely upon the condition and arrangements of the testator." *Pritchard on Wills*, § 237; *Winstead v. Bowman*, 68 N. C. 170; *Marr v. Marr*, 2 Head (Tenn.) 308; *Id.*, 5 Sneed (Tenn.) 385; *Allen v. Jeter*, 6 Lea (Tenn.) 672; *Reagan v. Stanley*, 11 Lea (Tenn.) 316.

[9] Applying these principles to the facts of our case, it would seem that there had been such a full compliance with the provisions of the statute as to constitute the paper writing, found in the drawer of the table, the will of the writer. He appears not to have been very careful in handling his papers. There were these places of deposit: His desk in the store, his bureau in his home, his bookcase, and the drawer of the table in the hall of his house. It would appear that of the four he regarded the drawer of the table as the most important place of deposit; for he not only placed in it his policies of insurance, but the script was found in an envelope, on which he had written the word "Important." Nothing could be more indicative of his desire that the paper should take effect as his will, and of the fact that he considered the place as one for the deposit of his valuable papers, than his words that the papers inclosed in the envelope were "Important." But, aside from this fact, a policy of insurance is a valuable paper (*Harper v. Harper*, *supra*; *Hooper v. McQuary*, *supra*), within the meaning of the statute, and it was evidently so considered by him. As testified by one of the witnesses, the papers in the other places of deposit were not so kept as to show that he regarded them as of any great value; nor, under the circumstances, would it be any more likely that his will should have been found there than in the drawer of the table at his home. The court left it to the

jury to say whether, under all the facts and circumstances, W. T. Jenkins had placed the paper in the drawer with the intention to preserve and take care of it as his will, telling them that, within the meaning of the law, a policy of insurance is a valuable paper. The jury were properly instructed as to how they should consider and apply the evidence in the case. We do not see why this was not a proper instruction, and as much so as similar ones which were given in the cases we have cited. Whether the table drawer was a proper place of deposit under the statute, was a question to be determined largely by the jury upon the particular facts of the case. It was certainly not error to submit the question to the jury instead of deciding it as matter of law. In *re Sheppard's Will*, *supra*. If the jury found that W. T. Jenkins placed the paper in the envelope, with the policies of insurance, and deposited them in the drawer, intending that it should be his will, the requirements of the statute were fully observed, and their verdict, declaring the paper to be his last will and testament, was warranted in law.

The case of *Brogan v. Barnard*, 115 Tenn. 260, 90 S. W. 853, 112 Am. St. Rep. 822, cited by appellants' counsel, is not in point. It was decided upon the ground that the stamps and stationery were not valuable papers, as they did not record anything; and, besides, they did not belong to the writer of the script, but to the United States.

We find no error in the rulings or charge of the court.

No error.

(157 N. C. 614)

#### STATE v. MURPHY.

(Supreme Court of North Carolina. Dec. 13, 1911.)

#### 1. HOMICIDE (§ 313\*)—VERDICT—DEGREE OF OFFENSE.

In view of Revisal 1906, § 3271, providing that the jury shall determine in their verdict whether the crime is murder in the first or second degree, their determination of guilt in the first degree being necessary to imposition of the death sentence, trial courts should always require juries in such cases to definitely and expressly say in their verdict of what degree of murder they convict.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 671-675; Dec. Dig. § 313.\*]

#### 2. HOMICIDE (§ 28\*)—INTOXICATION AS AFFECTING DEGREE OF OFFENSE.

While voluntary drunkenness is no excuse for crime, yet drunkenness so great as to prevent a killing being "deliberate and premeditated," necessary for murder in the first degree, and embodying a specific, definite intent, will reduce the degree of the offense, unless, while the killing was during such drunkenness, the purpose to kill was deliberately formed when defendant was sober.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 45, 46, 133 Dec. Dig. § 28.\*]

Appeal from Superior Court, Yancey County; Lane, Judge.

Charles Murphy was convicted of murder, and appeals. Reversed, and new trial ordered.

There was evidence tending to show that on the 21st of December, 1910, the prisoner, openly and in the presence of several witnesses, shot John Simmons, the deceased, in the back with a pistol, and killed him, and that the killing was deliberate and premeditated. There was evidence on the part of the prisoner tending to show that the killing was not deliberate, of premeditated purpose; (2) that the mind of the prisoner was at the time so affected by disease that he was incapable of committing crime; (3) that the mind of the prisoner was so affected at the time by voluntary drunkenness that he was incapable of committing murder in the first degree. The court charged the jury as to the degrees of crime embraced in the bill of indictment and on different phases of the evidence elaborately as to nonresponsibility for crime in case of insanity, and in closing, the charge said: "Take the case, give it the consideration that its importance merits, and make up your verdict. If you find the defendant guilty of murder in the first degree, your verdict will be 'Guilty' simply. If you find him guilty of murder in the second degree, your verdict will be 'Guilty of murder in the second degree.' If you find him guilty of manslaughter, your verdict will be 'Guilty of manslaughter.' If acquitted, you will say 'Not guilty,' and no more." The jury rendered a verdict of "Guilty," and, the same being so recorded, there was sentence of death, and the prisoner excepted and appealed, assigning for error (1) that the court failed and refused to charge, as requested, that if the mind of the prisoner at the time of the killing was so affected by drunkenness, though voluntary, as to be incapable of forming or entertaining a deliberate, premeditated purpose to take the life of the deceased, he could not be convicted of murder in the first degree; (2) that the verdict, as rendered, did not justify the court in pronouncing sentence of death.

Gardner & Gardner and Justice & Broadhurst, for appellant. T. W. Bickett, Atty. Gen., and Geo. L. Jones, Asst. Atty. Gen., for the State.

HOKE, J. (after stating the facts as above). [1] Our statute, dividing the crime of murder into two degrees, concluded with the direction that the jury before whom an offender is tried "shall determine, in their verdict, whether the crime is murder in the first or second degree." This portion of the law now appears in Revisal, § 3271, and contains peremptory requirement that, before sentence of death may be pronounced, the trial jury shall determine in their verdict that the prisoner is guilty of murder in the

first degree. We have held in several cases that although a verdict, as expressed, may not be sufficiently determinative, it may become so by reference to the pleadings or the charge of the court or even to the evidence, when the same all appears of record. An instance of the verdict cured by reference to the charge of the trial judge is afforded in *Richardson v. Edwards*, 72 S. E. 482, at the present term. Under this principle and owing to the very definite and precise instructions of the court as to the terms of the verdict, in case the jury should find the prisoner guilty of murder in the first degree, we might not feel constrained to disturb the judgment of the court, but we deem it proper to say that, having regard for the language of the statute and the supreme importance of the issue, our trial courts should always require that juries in capital cases should definitely and expressly say of what degree of murder they convict the prisoner and the verdict should be recorded as rendered. In a case of this kind there should be no room for doubt or mistake.

[2] Without definite ruling as to the form and sufficiency of the verdict when considered in reference to the charge of the lower court, we are of opinion that the prisoner is entitled to a new trial by reason of the failure to present the view arising on the testimony and embodied in his prayers for instructions as to the effect of "voluntary drunkenness." It is very generally understood that voluntary drunkenness is no legal excuse for crime, and the position has been applied as controlling in many causes in this state and on indictments for homicide, as in *State v. Wilson*, 104 N. C. 868, 10 S. E. 315; *State v. Potts*, 100 N. C. 457, 6 S. E. 657. The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite, specific intent be established as an essential feature of the crime. In *Clark's Criminal Law*, p. 72, this limitation on the more general principle is thus succinctly stated: "Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence." Accordingly, since the statute dividing the crime of murder into two degrees and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the "killing was deliberate and premeditated," these terms contain as an essential element of the crime of murder "a purpose to kill previously formed after weighing the matter" (*State v. Banks*, 143 N. C. 658, 57 S. E. 174; *State v. Dowden*, 118 N. C. 1146, 24 S. E. 722), a mental process, embodying a specific, definite intent; and, if it is shown that an offender charged with such crime is so drunk that he is utterly unable to form or entertain this essential purpose, he should not be convicted of the higher offense. It is said in some of the cases, and the statement has our unqualified approval, that the doctrine in ques-



tion should be applied with great caution. It does not exist in reference to murder in the second degree nor as to manslaughter. Wharton on Homicide (3d Ed.) p. 810. It has been excluded in well-considered decisions where the facts show that the purpose to kill was deliberately formed when sober, though it was executed when drunk, a position presented in *State v. Kale*, 124 N. C. 816, 32 S. E. 892, and approved and recognized in *Aszman v. State*, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33, and it does not avail from the fact that an offender is at the time under the influence of intoxicants, unless, as heretofore stated, his mind is so affected that he is unable to form or entertain the specified purpose referred to. In illustration of the principles stated in *People v. Vincent*, 95 Cal. 425, 30 Pac. 581, it was held "that upon a prosecution for murder an instruction to the jury that evidence of drunkenness can only be considered by them for the purpose of determining the degree of crime, and for such purpose it should be received with great caution." In *Commonwealth v. Cleary*, 148 Pa. 27, 23 Atl. 1110, the following instructions were fully approved: "If, however, you find that the intoxication of the prisoner was so great as to render it impossible for him to form the willful, deliberate, and premeditated intent to take the life of the deceased, the law reduces the grade of the homicide from murder in the first degree to murder in the second degree. The mere intoxication of the prisoner will not excuse or palliate his offense, unless he was in such a state of intoxication as to be incapable of forming this deliberate and premeditated attempt. If he was, the grade of offense is reduced to murder in the second degree." In Wharton on Homicide (3d Ed.) p. 811, the author referring to this subject says generally: "Intoxication, though voluntary, is to be considered by the jury in a prosecution for murder in the first degree, in which a premeditated design to effect death is essential, with reference to its effect upon the ability of the accused at the time to form and entertain such a design, not because per se it either excuses or mitigates the crime, but because, in connection with other facts, an absence of malice or premeditation may appear. Drunkenness as evidence of want of premeditation or deliberation is not within the rule which excludes it as an excuse for crime. And a person who commits a crime while so drunk as to be incapable of forming a deliberate and premeditated design to kill is not guilty of murder in the first degree. The influence of intoxication upon the question of the existence of premeditation, however, depends upon its degree and its effect on the mind and passions. No inference of the absence of deliberation and premeditation arises from intoxication

as a matter of law. And intoxication cannot serve as an excuse for the offender; and it should be received with great caution, even for the purpose of reducing the crime to a lower degree." Applying the principle, the court is of opinion that there was error committed in failing to present the view embodied in the prisoner's prayer for instructions, and he is entitled to have his cause tried before another jury, and it is so ordered.

New trial.

(157 N. C. 322)

#### HAMMETT v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 13, 1911.)

##### 1. RAILROADS (§ 400\*)—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A person walking on a path by the side of a railroad track commonly used by the public for many years with the knowledge of the railroad company was struck by the tender of a switch engine going backwards. There was no light on the tender. It was very dark. He was walking about two feet from the end of the cross-ties. Held, that he was not as a matter of law guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1377; Dec. Dig. § 400.\*]

##### 2. RAILROADS (§ 362\*)—INJURIES TO PERSON ON TRACK—NEGLIGENCE.

It is negligence for a railroad company to back an engine on a dark night without a light on the tender, where a path along the track has been used by the public for many years to the company's knowledge.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1249; Dec. Dig. § 362.\*]

Appeal from Superior Court, Buncombe County; Lane, Judge.

Action by Gus Hammett against the Southern Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial granted.

Civil action for damages for personal injury. At conclusion of the plaintiff's evidence, his honor sustained motion to nonsuit, and plaintiff appealed.

Craig, Martin & Thomason, for appellant. Moore & Rollins and Julius C. Martin, for appellee.

BROWN, J. The following résumé of plaintiff's evidence is taken from the brief of the counsel for defendant: "The plaintiff testified that he was working at a tannery, some distance south of the public bridge across the French Broad river which leads from Asheville to West Asheville, where plaintiff lived; that the tannery was in Asheville, and on the morning of the injury he came from West Asheville to Asheville, crossed the public bridge, and walked along a street to the railroad, and then started and walked south along the railroad, between the tracks, until he was struck by

the engine. He testified that there was a path along on the right-hand side of the railroad track, in which he was walking, about two feet from the end of the cross ties, and that many people walked that way; that there were several tracks there, and he was going along the way he usually went, when a switch engine struck him and dragged him from 15 to 20 feet; that the engine was going backwards, and that it was the tender that struck him; that the end that struck him had no light on it; that the train was not running fast; that it knocked him down, and the engine ran two or three feet after they shut the steam off; that the accident happened 20 minutes past 6 in the morning." The evidence further tends to prove that it was very dark and cold and a strong wind blowing; that the pathway had been used by the public for 10 years to defendant's knowledge.

[1] It is unnecessary to quote further from the evidence. It is possible that the plaintiff's injury may have resulted from his own negligence in walking too near the track or attempting to cross it without looking and listening, but this is not so apparent from the evidence that it must be inferred as matter of law.

[2] We have said repeatedly that it is negligence to back an engine or train in the dark without a light on the tender or on the forward car. It may be there was a light on the end of the tender, but plaintiff testifies there was none. Had there been a light, it might have given timely notice of the approach of the tender and engine, and thus warned and saved the plaintiff. We think the case comes within the principles laid down in *Heavener v. Railroad Co.*, 141 N. C. 245, 53 S. E. 513; *Purnell v. Railroad Co.*, 122 N. C. 832, 29 S. E. 953; *Stanly v. Railroad Co.*, 120 N. C. 514, 27 S. E. 27.

The judgment of nonsuit is set aside.

New trial.

(157 N. C. 333)

**CALDWELL LAND & LUMBER CO. v. HAYES et al.**

(Supreme Court of North Carolina. Dec. 6, 1911.)

**1. LIMITATION OF ACTIONS (§ 130\*)—TIME FOR SUIT AFTER NONSUIT.**

Revisal 1905, § 370, permitting a new suit within 12 months after nonsuit, does not abridge the statutes of limitation, and hence a suit for trespass to land is properly brought within three years from the date thereof, though more than one year after nonsuit on the same cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 553-566; Dec. Dig. § 130.\*]

**2. TRESPASS (§ 61\*)—DOUBLE DAMAGES—ESSENTIALS TO RECOVERY.**

Under Laws 1907, c. 320, authorizing recovery of double damages for cutting timber without the owner's consent, with intent to con-

vert the same, there can be no recovery without a showing of want of consent of the owner and intent to convert.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. § 147; Dec. Dig. § 61.\*]

**3. APPEAL AND ERROR (§ 1151\*)—NEW TRIAL—NECESSITY.**

Erroneous award of double, instead of single, damages, for a trespass, does not require a new trial, where the issues are so framed that the excess can be readily deducted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.\*]

Appeal from Superior Court, Caldwell County; Long, Judge.

Consolidated action by the Caldwell Land & Lumber Company against J. C. L. Hayes and others. Judgment for plaintiff, and defendant Hayes appeals. Modified and affirmed.

The plaintiff instituted two actions against the defendant. In the complaint in the first, it alleges that it is the owner in fee of a certain tract of land; that the defendant has unlawfully entered on a part thereof, under some pretended claim of title, which is void, and has cut timber thereon to its damage, \$300, and it demands that it be declared the owner of the land and recover \$300 damages and costs. In the second, the allegations are in substance as those contained in the first complaint, except another entry and trespass are alleged and the damage is laid at \$1,500. These actions were consolidated by consent.

The material allegations of the complaint were denied by the defendant. On the trial, the plaintiff introduced grant No. 951, from the state to G. N. Folk, dated December, 1874, calling for 640 acres of land, more or less, which grant was duly recorded in the register's office in Caldwell county, and then introduced a regular chain of title from this grant down to the plaintiff; there being no exception to plaintiff's title papers. Plaintiff also introduced evidence locating the land covered by its grant and other title papers and evidence as to the defendant's cutting timber within the boundaries of plaintiff's title, claiming that in 1906 defendant cut about 26,000 feet of timber, and in 1907 about 48,000 feet, and in 1910 and 1911 about 51,340 feet, the total of the timber so cut amounting to about 125,340 feet, and that the damage was about \$700 or \$800.

The defendant introduced a grant from the state to himself, dated August 30, 1905, and registered in Caldwell county, in Book 43, p. 59, said grant being for 50 acres of land, and evidence locating said grant, which location showed that it was within the boundary of plaintiff's grant and title. Defendant also introduced evidence tending to show that the amount of timber cut by him from the land within the boundary of his grant, which was within the boundaries of plaintiff's title, was less than as claimed by plain-

tiff, and that the damage to plaintiff, if plaintiff was entitled to recover, would not exceed from \$130 to \$150. Defendant further introduced in evidence the entire record in the case of the Caldwell Land & Lumber Company v. J. C. L. Hayes, consisting of the summons, prosecution bond thereon, together with the service and return thereon, the complaint and answer filed in the case, and the judgment of nonsuit taken by plaintiff in this case, the summons being dated May 22, 1906, and the judgment of nonsuit taken at January special term of the superior court of Caldwell county, 1907, and then introduced the summons for relief, the basis of this action, together with the bond attached thereto, the service and return thereon, said summons being dated November 13, 1908, and then introduced the complaint and answer in this case, showing that the causes of action were substantially the same in the several actions.

The defendant, at the conclusion of the evidence, moved the court to dismiss the plaintiff's cause of action, upon the ground that the same could not be maintained for that the plaintiff began an action on May 22, 1906, in which it filed a complaint for the same cause of action now sued upon, and that at January special term, 1907, of Caldwell superior court, said plaintiff took a voluntary nonsuit as appears from the judgment rendered in said cause; that in the complaints filed in the respective actions the same land is described and set forth and the same relief is asked; that as more than 12 months have elapsed since the nonsuit was entered in the first-mentioned action up to the time the present action was begun, to wit, about 22 months, all of which is shown by the records offered in evidence, that the present action is barred by the statute limiting the time in which a new action may be begun after a nonsuit has been entered; and that therefore the court should so hold and dismiss plaintiff's action.

The court denied the defendant's motion and held that the present action was not barred by the statute of limitations referred to, and declined to dismiss plaintiff's action, and defendant excepted. The defendant then, through his attorney, stated in open court that, under his honor's ruling declining to hold that plaintiff's action was barred and dismiss the same, defendant would not contest before the jury the first and second issues submitted, as defendant, since plaintiff had introduced its title and evidence of location of the land, would not ask the jury to find that plaintiff has not located the land as claimed, but that defendant up to the conclusion of plaintiff's evidence of location had in good faith contested such, and that the only issue defendant desired to be heard upon was that as to damage. All of the trespasses complained of occurred within three years prior to the commencement of this action.

His honor, in his charge on the issue of

damage, among other things, said: "That after you determine what amount of damage the plaintiff has sustained, if you find that the plaintiff has sustained damage, by reason of the timber cutting of the defendants prior to the 23d day of February, 1907 (the date of the ratification of chapter 320, Public Laws of 1907), then you will proceed to determine what actual damages the plaintiff has sustained by the cutting of timber since that date, if you find that it has sustained any. If you shall find that the defendant has cut, felled, or removed any timber trees growing upon lands that you find to be plaintiff's, without the consent of the plaintiff and with the intent to convert the same to their own use, then you will double the actual damage which you find that plaintiff has sustained, if any, by cutting of timber since February 23, 1907, by defendant, and such sum added to the amount of actual damage sustained by plaintiff by reason of timber cutting by defendants prior to the said 23d day of February, 1907, if you find that plaintiff sustained such damage prior to that date, will be your answer to the issue." And the defendant excepted.

The jury rendered the following verdict:

(1) Is the plaintiff the owner of the lands described in the complaint? Answer: Yes.

(2) Has the defendant trespassed upon the said lands by cutting and removing timber therefrom? Answer: Yes.

(3) What damage, if any, is plaintiff entitled to recover? Answer: \$353.36.

51,340 feet at \$4.00 double damage.....	\$205 36
28,000 feet at \$2.00.....	52 00
48,000 left in woods at two dollars.....	96 00
	<hr/> \$353 36

Judgment was rendered thereon, adjudging that the plaintiff was the owner of the land in grant No. 951 to G. N. Folk, and that it recover \$353.36 damages and costs. The defendant excepted and appealed.

M. N. Harshaw and Councill & Yount, for appellant. W. O. Newland and Mark Squires, for appellee.

ALLEN, J. [1] It is admitted that the trespasses complained of occurred within three years prior to the commencement of this action, and that the plaintiff may recover damages therefor, unless a recovery is prevented by the fact that this action was not instituted within 12 months after a judgment of nonsuit in another action between the same parties, on the same cause of action.

The defendant relies on section 370 of the Revisal, providing that a new action may be commenced within 12 months after judgment of nonsuit, and insists that it is a limitation on the right of action, but it was expressly held otherwise in Keener v. Goodson, 89 N. C. 279; the court there saying: "The statute allowing actions to be brought within a

year after judgment of nonsuit was intended to extend the period of limitations, but not to abridge it."

It is true that expressions may be found in *Meekins v. Railroad*, 131 N. C. 1, 42 S. E. 333, and in *Trull v. Railroad*, 151 N. C. 547, 66 S. E. 586, which, if considered without reference to the facts, might be understood to recognize a different rule; but there is no conflict between the cases. In the *Meekins* and *Trull* Cases, the actions were brought to recover damages for the death of one alleged to have been killed negligently, and the defendant was contending that the right to bring such an action was conferred by statute; that it could only be brought within 12 months from death; that this was not a statute of limitations, but a condition affecting the cause of action itself, and therefore the section allowing a new action to be brought within 12 months after judgment of nonsuit did not apply to such action, and it was held that it applied to all actions.

There was no error in refusing to dismiss the action.

[2] The second exception is to the charge of his honor on the issue of damages.

The charge, if justified by the allegations of the complaint and the evidence, is authorized under chapter 320, Laws of 1907, which is applicable only to the counties of Caldwell, Wilkes, Watauga, Burke, McDowell, Yadkin, Cherokee, and Mitchell, and in which it is provided: "Sec. 2. That in all cases where any person, firm, or corporation, their agents or employes, shall cut, fell or remove any timber trees growing upon the lands of another without the consent of the owner thereof, with intent to convert to his own use, he, she or they so offending, shall be liable to pay to such owner double the value of such timber trees so cut down or felled, to be recovered in civil action to be brought therefor."

We do not think, however, that the complaint was framed under this statute, or that there was evidence which entitled the plaintiff to recover double damages. We do not hold that it is necessary to refer to the statute in the complaint, or that the relief demanded controls the amount of the recovery; but we cannot treat as meaningless the words "without the consent of the owner thereof, with intent to convert to his own use," upon which rests the right to recover double damages. In the absence of the statute, the plaintiff was entitled to recover actual damages for an unlawful entry and trespass, and it must have been intended that something more than this should be alleged and proven to entitle one to double damages. The language approaches closely to the definition of felonious intent in larceny, which is the intent to deprive the owner of the use, and to appropriate to

the use of the taker, and was intended to cover a trespass where there is no bona fide claim of right, committed under circumstances indicating a purpose to prevent the true owner from asserting his right. The complaint alleges no more than an unlawful entry and trespass, and the evidence goes no further than the allegations of the complaint, and there was evidence that the defendant claimed under a grant from the state. This being our construction of the statute, we must hold that neither the cause of action set out in the complaint, nor the evidence introduced to support it, entitled the plaintiff to recover double damages, and that the charge was therefore erroneous.

[3] This would entitle the defendant to a new trial, if the answer to the issue was not so framed that the amount of the double damages may be eliminated, and the plaintiff's counsel requested that this be done, if it should be held that there was error in the charge. The amount is ascertained by deducting from the total of damages \$353.36, one-half of the first item of \$205.36, which will leave a balance of \$250.68, upon which the plaintiff will be entitled to interest from the first day of May term, 1911, of the superior court of Caldwell county.

The judgment rendered will be modified in accordance with this opinion, and, as modified, is affirmed. Cost to be divided.

Modified and affirmed.

(157 N. C. 608)

#### STATE v. BLAKE.

(Supreme Court of North Carolina. Dec. 6, 1911.)

#### 1. GAME (§ 4\*)—PROTECTION—VALIDITY OF STATUTE.

Pub. Loc. Laws 1911, c. 184, making it unlawful to permit a setter or pointer dog to run at large in Henderson county during the closed season for quail, is a valid exercise of the police power of the state.

[Ed. Note.—For other cases, see *Game*, Dec. Dig. § 4.\*]

#### 2. STATUTES (§ 66\*)—LOCAL ACTS—VALIDITY.

Public local acts passed in the exercise of the police power and which apply only to certain localities are valid.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 67; Dec. Dig. § 66.\*]

#### 3. CRIMINAL LAW (§ 1213\*)—CRUEL AND UNUSUAL PUNISHMENTS—SCOPE OF FEDERAL PROVISION.

Const. U. S. Amend. 8, forbidding cruel and unusual punishment, and the balance of the first 10 amendments are restrictions upon the federal government only, and hence do not apply to the state statutes.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3304-3309; Dec. Dig. § 1213.\*]

#### 4. CRIMINAL LAW (§ 1213\*)—CRUEL AND UNUSUAL PUNISHMENTS—EFFECT OF PROVISION.

Const. art. 14, § 1, forbidding cruel and unusual punishment, does not restrict the legislative power, being a restriction upon the judi-

ciary to impose excessive punishment where the Legislature has not prescribed the maximum, and hence is not violated by Pub. Loc. Laws 1911, c. 184, prescribing punishment for permitting setter or pointer dogs to run at large during the closed season for quail in Henderson county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. § 1213.\*]

**5. GAME (§ 9\*)—PUNISHMENT—"FINE AND IMPRISONMENT."**

Under Pub. Loc. Laws 1911, c. 184, authorizing "fine and imprisonment" for permitting a setter or pointer dog to run at large in Henderson county during the closed season for quail, either punishment or both may be imposed.

[Ed. Note.—For other cases, see Game, Dec. Dig. § 9.\*]

**6. CRIMINAL LAW (§ 1177\*)—HARMLESS ERROR.**

Where the statute requires the imposition of both fine and imprisonment, one convicted under it cannot complain because he was merely fined.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3183-3189; Dec. Dig. § 1177.\*]

Appeal from Superior Court, Henderson County; Long, Judge.

A. S. Blake was convicted of an offense, and he appeals. Affirmed.

Bartlett Shipp, for appellant. T. W. Bickett, Atty. Gen., and Geo. L. Jones, Asst. Atty. Gen., for the State.

CLARK, C. J. [1] Chapter 184, Public Local Laws 1911, makes it "unlawful for any one to permit his, or her, setter, or pointer, dog to run at large during the closed season for quail" in Henderson county. This statute was enacted to protect game birds and is a valid exercise of the police power of the state. *Lawton v. Steel*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *Geer v. Conn.*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; *State v. Gallop*, 126 N. C. 979, 35 S. E. 180; *Daniels v. Homer*, 139 N. C. 222, 51 S. E. 992, 3 L. R. A. (N. S.) 997.

[2] Public local acts, passed in the exercise of the police power which apply only to certain localities, are valid. Such legislation has always been held to be within the powers of the Legislature both as to criminal and civil matters: As to local liquor prohibition (*State v. Barringer*, 110 N. C. 525, 14 S. E. 781); fence laws (*State v. Snow*, 117 N. C. 774, 23 S. E. 322); restricting sale of seed cotton (*State v. Moore*, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696, where the subject is fully discussed); cattle running at large (*Broadfoot v. Fayetteville*, 121 N. C. 418, 28 S. E. 515, 39 L. R. A. 245, 61 Am. St. Rep. 668); method of electing municipal commissioners (*Harriss v. Wright*, 121 N. C. 172, 28 S. E. 269); method of electing county commissioners (*Lyon v. Commissioners*, 120 N. C. 237, 26 S. E. 929); public schools (*McCormac v. Com'rs*, 90 N. C. 441); dis-

pensaries (*Guy v. Com'rs*, 122 N. C. 471, 20 S. E. 771); working public roads (*Tate v. Com'rs*, 122 N. C. 812, 30 S. E. 352); and other matters (*Intendant v. Sorrell*, 46 N. C. 49). Double damages for willfully cutting timber in certain counties. *Land Co. v. Hayes*, 72 S. E. 1078, at this term, and many other cases cited; *State v. Sharp*, 125 N. C. 633, 34 S. E. 264, 74 Am. St. Rep. 663; *Brooks v. Tripp*, 135 N. C. 159, 47 S. E. 401.

In *State v. Moore*, 104 N. C. 719, 10 S. E. 145, 17 Am. St. Rep. 696, the court, speaking of laws that apply only to particular localities or particular classes, quotes Cooley, *Constitutional Limitations* (7th Ed.) 556, as follows: "If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply and that they are public in their character, and of their propriety and policy the Legislature must judge." Judge Cooley further says (*Const. Lim.* [7th Ed.] 555): "The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or on the other hand to a subdivision of the state, or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another."

As is concisely said in Black, *Const. Law*, § 136: "The rightful power of the Legislature of a state extends to every subject of legislation, unless in the particular instance its exercise is forbidden expressly, or by necessary implication by the Constitution of the United States and laws passed in pursuance thereof or by the Constitution of the state." It is further pointed out that under the Constitution of a state the executive and judicial departments are grants of power, whereas the Legislature exercises all power which is not forbidden.

[3] The contention that this statute is obnoxious to the eighth amendment to the federal Constitution, which forbids "cruel and unusual punishment," cannot be sustained, for it is well settled that the first ten amendments are restrictions upon the federal government only. *Pervear v. Com.*, 72 U. S. 475, 18 L. Ed. 608; *McDonald v. Com.*, 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; *State v. Patterson*, 134 N. C. 617, 47 S. E. 808; and cases there cited. In *Weems v. United States*, 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793, there is an interesting historical review of the origin and adoption of the eighth amendment.

[4] Neither is this statute in violation of the similar provision in section 14, art. 1, of our state Constitution. That section is a restriction upon the judiciary to impose excessive punishment where the Legislature

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

has not prescribed a fixed maximum, but is not a restriction upon the legislative power. As Mr. Justice Gaston well says in *State v. Manuel*, 20 N. C. 162: "When the Legislature, acting upon their oaths, declare the amount of bail to be required or specify the fines to be imposed, or prescribe the punishments to be inflicted in case of crime as the reasonableness or excess, the justice or cruelty, of these, are necessarily questions of discretion, it is not easy to see how this discretion can be supervised by a co-ordinate branch of the government." When the punishment imposed is within the limit fixed by law, it cannot be excessive. *State v. Capps*, 134 N. C. 622, 46 S. E. 730.

[5] The statute provides that a violation of its terms may be punished by "fine and imprisonment in the discretion of the court." We do not agree with the defendant that the sentence is illegal because the court imposed only a fine. When the punishment authorized is "by fine or imprisonment," only one can be imposed. *State v. Walters*, 97 N. C. 489, 2 S. E. 539, 2 Am. St. Rep. 310. But when, as here, the judge has authority to impose a sentence of "fine and imprisonment," he may impose either punishment or both.

[6] If it were otherwise, the defendant cannot appeal from a leniency which is in his favor, for he has suffered no wrong at common law. The punishment for a misdemeanor was "fine and imprisonment," and the courts, in their discretion, imposed both or either.

No error.

(157 N. C. 389)

#### SIMMONS et al. v. FLEMING.

(Supreme Court of North Carolina. Dec. 13, 1911.)

#### 1. LIS PENDENS (§ 22\*)—PURCHASERS PRIOR TO SUIT—RECORDING DEED.

In an action to recover land, the date of a deed from defendant to his son was immaterial, it being admitted that the deed was registered after the filing of the complaint; the filing of the complaint operating as a lis pendens.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 31; Dec. Dig. § 22.\*]

#### 2. APPEAL AND ERROR (§ 1058\*)—REVIEW—HARMLESS ERROR.

In an action to recover land which defendant had conveyed to his son, the son having testified without contradiction, that the deed was made on a certain date, exclusion of the deed offered to show its date could not have injured defendant, for he already had the benefit of such evidence by the testimony of his son.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

#### 3. APPEAL AND ERROR (§ 1048\*)—REVIEW—HARMLESS ERROR.

In an action for the recovery of land which defendant conveyed to his son, the son was asked on cross-examination whether he was willing to stand or fall with his father in the suit, and answered that he did not know whether he

understood. Held that, regardless of the propriety of the question, it could not have affected the verdict, and was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4145; Dec. Dig. § 1048.\*]

#### 4. VENDOR AND PURCHASER (§ 243\*)—BONA FIDE PURCHASERS—EVIDENCE.

In an action to recover land, where plaintiff claimed that it had been purchased with money which a decedent bequeathed to his wife with remainder to the plaintiff, and that the wife had conveyed it to defendant, evidence that, after the land was conveyed to the defendant, he stripped it of all the timber, was competent, being corroborative of the evidence of plaintiff that defendant accepted his deed with the knowledge that the land had been purchased with the money of the testator.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 606-608; Dec. Dig. § 243.\*]

#### 5. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action to recover land, where plaintiff maintained that the land had been purchased with money bequeathed to one for life, with remainder to plaintiff, a requested instruction that a life tenant has the right to consume personal property where the use of such property naturally tends to its consumption such as wine, corn, and money, was properly refused as not applicable to the evidence; the money having been invested in land.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

#### 6. LIFE ESTATES (§ 27\*)—PERISHABLE PROPERTY—SALE AND REINVESTMENT.

Where personal property is bequeathed to persons in succession, so much of it as is perishable should be converted into money and the interest paid to the legatee for life, the principal to go to the person in remainder.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 49, 50; Dec. Dig. § 27.\*]

Appeal from Superior Court, McDowell County; Long, Judge.

Action by Elliott Simmons and others against Thomas J. Fleming. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action brought by the legatees of John Simmons, deceased, for the recovery of land alleged to have been purchased with money which the said Simmons bequeathed to his wife, Jane Simmons, for life, with remainder to the legatees named in his will. The plaintiffs offered evidence tending to show that the money with which the land in question was purchased was money belonging to the estate of John Simmons, deceased, and bequeathed by him to his wife, Jane Simmons, for life, with remainder to the legatees named in his will, and tending, also, to show that the defendant took title to the land in controversy under a contract and deed from Jane Simmons in consideration of an obligation upon the part of the defendant, Thomas Fleming, to maintain and support the said Jane Simmons at his home so long as she should desire to stay there, with knowledge at the time of the taking of such deed that the land was purchased with mon-

ey belonging to the estate of the said John Simmons. The land bought with the money was conveyed to Jane Simmons, and she afterwards conveyed the same to the defendant.

In the will of John Simmons the testator bequeaths and devises all his "personal and real property, money, notes and accounts," etc., to his wife, Jane Simmons, to have full control, use, and benefit of it during her life, and at her death to the plaintiffs, and it is provided therein that none of the real estate or personal property be sold or transferred until after the death of his wife. The defendant has executed a deed to his son, conveying the land to him, but it was not registered until after the complaint in this action was filed.

James Morris and W. T. Morgan, for appellant. Pless & Winborne, for appellees.

ALLEN, J. The controversy between the plaintiffs and defendant is almost entirely one of fact, and the jury has found adversely to the defendant.

The defendant, who was 79 years of age, was examined as a witness, and upon cross-examination made confusing and contradictory statements as to the time when he executed the deed to his son.

[1] The defendant then offered the deed to the son for the purpose of showing its date, and, upon objection, it was excluded. The date of the deed was an immaterial inquiry, as it was admitted that it was registered after the filing of the complaint in this action. In *Collingwood v. Brown*, 106 N. C. 364, 10 S. E. 868, it is held that in actions to recover land the filing of the complaint, in which the property is described and the purpose of the action stated, operates as a *lis pendens*, and that, as against the plaintiffs, the title of a purchaser from the defendant begins from the date of the registration of his deed.

[2] If, however, the date of the deed was material, the defendant had the full benefit of the evidence. The son of the defendant was a witness, and testified that the deed was made the 23d day of July, 1909, and there was no evidence to the contrary.

[3] The question asked this witness on cross-examination as to whether he was willing to stand or fall with his father in the suit was for the purpose of showing his interest, but in any event his answer, "I don't know whether I understand you," could not have affected the verdict.

[4] The defendant offered evidence to show that the land was bought with the money of Jane Simmons, and that she made the deed to him in consideration of his promise to support her, and that he had complied with his agreement. In reply the plaintiffs were permitted to prove, over the objection of the defendant, that he had cut the larger

part of the timber on the land. No damages were recovered, but we think the evidence competent as a circumstance corroborative of the evidence of the plaintiff that the defendant accepted his deed with knowledge that the land had been bought with the money of the testator. If he was stripping the land of its timber, it might well be argued that he was doing so because he knew he had no just claim, and that he might make what he could before being held to account.

[5] The remaining exception is to the modification of the following instruction by striking out the word "money": "Property, the use of which naturally consumes it, such, for instance, as wine, corn, sheep, cattle, and money, when conveyed by will to the use of one for life, passes to the life tenant the right to consume such property absolutely." If the instruction contained a correct statement of the law, it had no application to the evidence, which did not tend to prove that the money had been consumed, but that it had been invested in the land.

[6] The rule seems to be that whenever personal property is given in terms amounting to a residuary bequest, to be enjoyed by persons in succession, the interpretation the court puts upon the bequest is that the persons indicated are to enjoy the same in succession; and, in order to give effect to its interpretation, the court as a general rule will direct so much of it as is of a perishable nature to be converted into money by the executor, and the interest paid to the legatee for life, and the principal to the person in remainder (*Ritch v. Morris*, 78 N. C. 377), but, when the bequest is specific and is not of the residuum, the executor should deliver the property to the one to whom it is given for life, taking an inventory and receipt for the benefit of the remainderman. *Britt v. Smith*, 86 N. C. 308.

We conclude that there is no error.  
No error.

(157 N. C. 316)

MORGANTON GRADED SCHOOL et al. v. McDOWELL.

(Supreme Court of North Carolina. Dec. 13, 1911.)

1. TAXATION (§ 567\*)—COLLECTION OF TAXES—COUNTERCLAIM.

A sheriff cannot, when sued to recover the amount of taxes collected by him, set up a counterclaim against the state.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1100; Dec. Dig. § 567.\*]

2. TAXATION (§ 567\*)—COLLECTION OF TAXES—COUNTERCLAIM.

Where a sheriff was wrongfully deprived of the right to collect school taxes for a year, and failed to seek relief, under Revisal 1905, §§ 833, 835, 844, against the usurpers of his office, he could not set up loss of such compensation as a counterclaim against an action for taxes collected by him, for the taxpayers can-

not be made to pay salary to different persons occupying the same office.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1100; Dec. Dig. § 567.\*]

### 3. TAXATION (§ 567\*)—COLLECTION.

Where the county commissioners appointed persons other than the sheriff to collect school taxes, the sheriff could not, in an action by the county to recover other taxes collected by him, set up as counterclaim the loss of compensation for collecting the school taxes, for that would in effect be bringing a cross-action against the county commissioners for their wrongful act in their official capacity.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 567.\*]

Appeal from Superior Court, Burke County; Long, Judge.

Action by the State, on the relation of the Morganton Graded School and others, against G. Manly McDowell. From a judgment for defendant on his counterclaim, plaintiffs appeal. Reversed.

S. J. Ervin, for appellants. Avery & Avery, for appellee.

CLARK, C. J. This was an action against defendant, the former sheriff of Burke, upon his official bond to recover a balance due for taxes collected by him for the Morganton graded school for 1905 and 1906 under Laws 1903, c. 455. The defendant set up as a counterclaim that he was illegally and wrongfully deprived by the board of county commissioners of the right to collect taxes for said graded school for the years of 1903 and 1904; the county commissioners having appointed John B. Holloway and F. C. Berry to collect the taxes for the said graded school for said years 1903 and 1904, and had allowed them the commission for collecting the same amounting to \$295, which sum he asked that he be allowed "as a set-off and counterclaim" on the taxes due by him for the years 1905 and 1906.

[1] Such counterclaim cannot be sustained for three reasons:

(1) As against the balance due by the defendant as sheriff for taxes in his hands collected for the years 1905 and 1906 no counterclaim or debt of any kind, however valid, can be sustained. This has been so fully discussed that it is only necessary to cite a few of the cases. *Wilmington v. Bryan*, 141 N. C. 679, 54 S. E. 543; *Guliford v. Georgia Co.*, 112 N. C. 37, 17 S. E. 10, 19 L. R. A. 485; *Gatling v. Com'rs*, 92 N. C. 536, 53 Am. Rep. 432; *Cobb v. Elizabeth City*, 75 N. C. 1; *Battle v. Thompson*, 65 N. C. 406. In *Wilmington v. Bryan*, 141 N. C. 675, 54 S. E. 546, Brown, J., says: "No counterclaim is valid against a demand for taxes"—citing *Gatling v. Com'rs*, supra. In same case Walker, J., in his dissenting opinion (as to other points), concurs as to this proposition, and says: "Neither a taxpayer nor a sheriff can plead a set-off in a suit against him for taxes due and owing. \* \* \* This is so

upon the ground of public policy. To permit a taxpayer or an officer charged with the collection of taxes to set up an opposing claim against the state or the city might seriously embarrass the government in its financial operations by delaying the collection of taxes to pay current expenses"—citing the cases above quoted.

[2] (2) The defendant is not entitled to be allowed the counterclaim for the further reason that, if he was wrongfully deprived of the right to collect the graded school taxes for 1903-04, it was his duty to have taken proper proceedings for a mandamus to have the tax list placed in his hands by the county commissioners and have asked for an injunction to prevent the payment of commissions thereon to Holloway and Berry until his right to the same had been decided. If he did not choose this remedy, his recourse was to sue Holloway and Berry for the commissions which he alleges had been wrongfully paid to them. Revisal, § 833, expedites the trial of actions of this nature by giving them precedence over all other actions civil and criminal and by requiring trial at the return term of the summons if 30 days off, and Revisal, § 835, requires the defendant before answering or demurring to file an undertaking in an amount to be fixed by the judge, not less than \$200, to secure the fees and emoluments if the plaintiff shall recover the office. In this case the defendant sheriff did not bring such action, but asserts his rights to the fees for duty which was performed, not by himself, but by Holloway and Berry, without legal objection by him, and this after having slept on his rights for four years. The taxpayers are never required to pay two salaries, or two sets of commissions, because the wrong party discharges the duties of an office. Any other rule would be open to grave abuse, and has never been recognized in a single instance in this state. Indeed, Revisal, § 844, provides that the claimant of an office should recover compensation in damages for the loss of the fees and emoluments of the office from the intruder who has received the same in an action for money had and received to the relator's use (*McCall v. Webb*, 135 N. C. 361, 47 S. E. 802), and his failure to do so in the action to recover the office is a bar to an independent action.

[3] (3) The defendant in setting up this "new matter and by way of counterclaim," as he says in his answer, is in effect bringing a cross-action against the plaintiffs for their wrongful act as county commissioners in their official capacity, which he could not maintain if brought directly, and therefore he cannot bring it by way of counterclaim. *Hull v. Roxboro*, 142 N. C. 455, 55 S. E. 351, 12 L. R. A. (N. S.) 638; *Fisher v. New Bern*, 140 N. C. 510, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857; *Barger v. Hick-*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



ory, 130 N. C. 550, 41 S. E. 708; Jones v. Com'rs, 130 N. C. 451, 42 S. E. 144; Prichard v. Com'rs, 126 N. C. 912, 36 S. E. 353, 78 Am. St. Rep. 679; Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; Hannon v. Grizzard, 99 N. C. 161, 6 S. E. 93; Manuel v. Com'rs, 98 N. C. 9, 3 S. E. 829; White v. Com'rs, 90 N. C. 439, 47 Am. Rep. 534. If, as was pointed out by Pearson, C. J., in *Battle v. Thompson*, 65 N. C. 406 (quoted by Walker, J., in *Wilmington v. Bryan*, 141 N. C. 680, 54 S. E. 543), the defendant had actually collected the taxes for the graded school for 1903-04, and was being sued for the balance of the uncollected taxes for those years, it may be that his claim for such commissions might "be allowed in diminution of the amount to be recovered, \* \* \* but it would be on the ground that the claim was in the nature of a payment or a credit, to which the defendant is entitled, and the demand of the state is in fact only for the balance." But here this is a counterclaim, and is properly so styled in the defendant's answer, for it is not a claim for commissions on the taxes collected by the defendant for the years 1905 and 1906, nor, indeed, is it a claim for services actually rendered, but is for commissions which he claims the county owes him constructively because the county commissioners wrongfully placed the collection of the tax list for the graded schools for the years 1903-04 in the hands of another.

The court below erred in overruling the exceptions of the plaintiffs for the allowance of said \$295 in reduction of the balance due by the defendant, and the judgment must be reformed accordingly. This renders it unnecessary to consider the plaintiffs' exceptions for overruling the plea of the statute of limitations, and the other exceptions made by them.

Reversed.

#### EDWARDS v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Dec. 4, 1911.)

#### APPEAL AND ERROR (§ 1194\*)—REVERSAL ON AGREEMENT.

An order, on agreement of the parties, reversing the judgment and dismissing the complaint, is not to be taken as deciding any question of law or fact in the case, but simply as permitting dismissal of the complaint.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4648-4660; Dec. Dig. § 1194.\*]

Action by William A. Edwards against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed, and complaint dismissed, on agreement.

B. L. Abney, for appellant. G. L. Toole, Sawyer & Owens, and J. F. Izlar, for respondent.

JONES, C. J. By agreement of counsel it is ordered that the judgment of the court below be reversed, and the complaint dismissed. This order shall not be taken as deciding any question of law or fact which may be involved in this case, but simply permitting by agreement of counsel that the complaint be dismissed.

(96 S. C. 176)

#### HILL v. E. P. BURTON LUMBER CO.

(Supreme Court of South Carolina. Dec. 13, 1911.)

#### 1. LOGS AND LOGGING (§ 3\*)—DEEDS OF STANDING TIMBER—TITLE ACQUIRED.

A deed of standing timber on land described, with the privilege for 10 years to enter on the land to cut and remove the timber and to hold the timber unto the purchaser, his heirs and assigns, for the period specified, grants only a fee in the timber, defeasible on failure to remove it within 10 years.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 3-12; Dec. Dig. § 3.\*]

#### 2. LOGS AND LOGGING (§ 3\*)—DEEDS OF STANDING TIMBER—TITLE ACQUIRED.

A deed of standing timber, in consideration of a specified sum to be paid annually in advance commencing on a designated date for five years, which stipulates that a failure to pay the specified sum per annum, as provided, shall be deemed a surrender, and the rights of the purchaser shall cease at once, provides for the payment of the specified sum in advance, beginning on the designated date, and a failure to make a payment terminates the conveyance, and a tender after the designated date and within a year therefrom is too late.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 3-12; Dec. Dig. § 3.\*]

Appeal from Common Pleas Circuit Court of Berkeley County; R. W. Memminger, Judge.

Action by J. K. Hill against the E. P. Burton Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Nathans & Sinkler, for appellant. E. J. Dennis and W. A. Holman, for respondent.

JONES, C. J. The plaintiff brought this action for injunction and damages for unlawful trespass by cutting down and preparing to remove all the pine timber from his land. The defendant claimed the right to cut and remove all the pine timber under deeds of plaintiff granting same. The case was tried before Judge Memminger and a jury, which resulted in a verdict for \$25 damages in favor of plaintiff and a perpetual injunction against defendant from entering the premises, cutting and removing the timber. The defendant appeals upon exceptions, which in all material particulars are controlled by the construction to be placed upon the deeds under which it claimed the right to remove the timber.

[1] It appears that on the 29th day of June, 1899, the plaintiff, being owner in fee

of a tract of land in Berkeley county, S. C., known as Irishtown, containing 2,000 acres, executed his deed, in consideration of \$960, to certain named copartners as E. P. Burton & Co., conveying "all of the pine, oak and poplar timber" on said tract, except on 200 acres thereof, "with the right and privilege for and during the period of 10 years from this date through their agents and servants to enter upon said land or any other lands owned by me the said J. K. Hill and to pass and repass over the same at will on foot or with teams and conveyances to cut and remove the said timber herein conveyed, to have and to hold the said pine, oak and poplar timber unto the said Edward F. Henson, Elliott H. Burton, and Maurice C. Burton, copartners as E. P. Burton & Co., their heirs and assigns in fee and the said rights and privileges for and during the periods of the time above named." By deed dated November 26, 1904, E. P. Burton & Co. conveyed all their interest under the above deed to the plaintiff E. P. Burton Lumber Company, a corporation under the laws of this state. We construe the deed of June 29, 1899, as granting a fee in the timber defeasible upon failure to remove the same within 10 years. The intention to limit the right to cut and remove the timber to 10 years from the date of the deed is so clearly expressed that there is no room for doubt.

The contention of appellant that the deed conveys a fee-simple title to all of the timber described with right of removal at the pleasure of the grantees is opposed to the principle of construction applied in the recent case of *Flagler v. A. C. Lumber Corporation*, 89 S. C. 328, 71 S. E. 849, and is not supported by the cases of *Knotts v. Hydrick*, 12 Rich. 314, and *Wilson Lumber Co. v. Alderman Sons Co.*, 80 S. C. 106, 61 S. E. 217, 128 Am. St. Rep. 865, in which there were no words in the deed limiting the time within which to remove the timber. "The authorities are practically uniform in holding that an instrument granting standing timber and containing a clause requiring or permitting it to be removed within a specified time from the date of the grant gives no absolute and unconditional title to the property. Some courts hold the right of the grantee to be a license, others a lease, and others a defeasible title to the timber. By the great weight of authority it is determined that no right or title exists in the grantee after the expiration of the time specified in the deed or contract." *Adkins v. Huff*, 58 W. Va. 645, 52 S. E. 773, 8 L. R. A. (N. S.) 649, citing numerous authorities in the case and case note. See, also, *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513, and case note at page 526, and *Lumber Co. v. Carey*, 140 N. C. 462, 53 S. E. 300, 6 L. R. A. (N. S.) 469, and case note. As the 10-year limit for removal of timber

under the above deed of June 29, 1899, expired June 28, 1909, it is clear that such deed affords no warrant for the acts of alleged trespass charged and admitted to have been committed on January 8, 1910.

[2] It appears, further, that on September 14, 1907, the plaintiff, in consideration of \$250 to be paid annually in advance, commencing on June 28, 1907, for the term of five years, executed another conveyance to the defendant of all the timber on said tract excepting 100 acres of specified dimension with rights of way, to have and to hold the timber and rights of way for the full term of five years from the 28th day of June, 1909. This deed recites that it was provided in the deed of June 29, 1899, that said timber should be cut and removed within 10 years from the date thereof, and said rights of way should cease at the end of 10 years from the date of the deed, and further states that this agreement is supplementary to the agreement of June 29, 1899, which is to remain in force until the termination of the 10 years therein set forth. The deed of September 14, 1907, contains this important provision: "Provided, however, that if at the expiration of any year during the five years as aforesaid the said E. P. Burton Lumber Co. or its successors shall desire to surrender its or their rights hereunder, it or they shall have the right so to do, and a failure to pay the two hundred and fifty dollars per annum as above provided shall be deemed such surrender, and the rights of the grantee herein shall at once cease and determine."

It is not disputed that the testimony showed that on the 28th day of June, 1909, the date of the first payment, the defendant failed to pay the \$250, but on October 11, 1909, this sum was tendered to plaintiff, with interest, which tender was refused, and again on June 11, 1910, tender was again made of \$260, including interest and the further sum of \$250, which would become due on June 28, 1910, which amounts were refused. Judge Memminger, construing this deed of September 14th, held that the payment of \$250 was to be made in advance beginning June 28, 1909, and that a failure to make such payment would forfeit or terminate the contract. The appellant contends that a payment at any time before the expiration of the year beginning June 28, 1909, would be within time. We think the circuit court was correct. The express stipulation is that payment shall be made annually in advance beginning June 28, 1910, and that a failure to so pay works a surrender and terminates the rights of the grantee.

These views practically dispose of all material questions raised by the exceptions.

The judgment of the circuit court is affirmed.

GARY, A. J., and HYDRICK, J., concur. WOODS, J., did not sit in this case.

(90 S. C. 166)

**STATE v. GLOVER.**

(Supreme Court of South Carolina. Dec. 13, 1911.)

**CRIMINAL LAW (§ 250\*)—SUMMARY TRIAL—JURISDICTION—MAGISTRATES.**

Under Cr. Code 1902, § 13, giving magistrates jurisdiction of assaults and batteries when the offense is not of a high and aggravated nature, requiring, in their judgment, greater punishment than permitted by the section, a magistrate properly retained jurisdiction where the circumstances did not require a sentence beyond his jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 521-523; Dec. Dig. § 250.\*]

Appeal from Common Pleas Circuit Court of Charleston County; Geo. W. Gage, Judge.

Peter Glover was convicted of assault and battery, and he appeals. Affirmed.

Ed. F. Smith, for appellant. John H. Peurifoy, Sol., for the State.

**JONES, C. J.** The defendant was tried before Magistrate W. D. Hamlin without a jury, and was found guilty on a warrant charging that defendant did assault and strike Sam Green with a brickbat. The defendant appealed to the circuit court mainly on the ground that the magistrate had no jurisdiction of the case, an assault and battery of a high and aggravated nature. Judge Gage sustained the jurisdiction of the magistrate, and affirmed the judgment and sentence, which was a fine of \$25 or 30 days at hard labor on the public works of the county. The appeal relates only to the question of jurisdiction.

Section 13 of the Criminal Code, relating to magistrates, provides: "They may punish by fine not exceeding one hundred dollars, or imprisonment in the jail or house of correction not exceeding thirty days, all assaults and batteries, and other breach of the peace, when the offense is not of a high and aggravated nature, requiring in their judgment, greater punishment." The case of *State v. McKettrick*, 14 S. C. 354, approved in *State v. Burch*, 43 S. C. 3, 20 S. E. 758, in construing this statute, held that it leaves it to the magistrate in the first instance to determine whether he will take jurisdiction to try a case of assault and battery where circumstances of aggravation are alleged, but that such determination is not conclusive, and is reviewable in the circuit court.

We are bound to assume that the circuit court concurred with the magistrate in the view that the circumstances of the case did not require a sentence beyond the jurisdiction of the magistrate to impose. We cannot say that there was error of law or abuse of discretion in the judgment of the circuit court.

Judgment affirmed.

**GARY, A. J., and WOODS and HYDRICK, JJ., concur.**

(69 W. Va. 795)

**JENKINS v. MONTGOMERY.**

(Supreme Court of Appeals of West Virginia. Nov. 21, 1911.)

*(Syllabus by the Court.)***1. DAMAGES (§ 153\*)—DECLARATION—AD DAMNUM CLAUSE.**

A declaration in an action, even though sounding in damages, is not demurrable because it does not state the amount of damages claimed in the form of an averment. It is sufficient if it appear in any part of the declaration. The ad damnum clause, while consistent with good form in pleading, is not indispensable.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 422-425; Dec. Dig. § 153.\*]

**2. MUNICIPAL CORPORATIONS (§ 808\*)—TORTS—DEFECTS IN STREETS—LIABILITY OF ABUTTING OWNER.**

The opening of a ditch in a public street for the purpose of laying a pipe to connect a dwelling house with the water main is not per se a nuisance, and does not make the owner of the house liable to a person injured by falling into the ditch, unless such owner has been guilty of negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1684; Dec. Dig. § 808.\*]

**3. MASTER AND SERVANT (§ 322\*)—LIABILITIES TO THIRD PERSONS—WORK OF INDEPENDENT CONTRACTORS—UNGUARDED EXCAVATION.**

If the owner of a house let the work of opening the ditch and laying the pipe to an independent contractor, and such contractor cause the ditch to be dug, and to be left open and unguarded, and a traveler upon the street fall into it in the nighttime and is injured, without fault on his part, such independent contractor is liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1263; Dec. Dig. § 322.\*]

**4. MASTER AND SERVANT (§ 300\*)—LIABILITIES TO THIRD PERSONS—NATURE.**

The master is liable for the negligence of his servant in the performance of a duty to the master within the scope of the servant's employment.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1209; Dec. Dig. § 300.\*]

**5. TRIAL (§ 296\*)—INSTRUCTIONS—CONSTRUCTION TOGETHER.**

An instruction which deals only with matters relating to the quantum of damages is not erroneous because it assumes right of recovery, provided another instruction has been given properly instructing the jury in regard to the essential facts constituting such right of recovery. In such case it is proper to consider the two instructions together.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 715; Dec. Dig. § 296.\*]

Poffenbarger, J., dissenting.

Error to Circuit Court, Fayette County.

Action by Kate Jenkins against J. W. Montgomery. From a judgment for plaintiff, defendant brings error. Modified and affirmed.

V. Q. Champe and Osenton, McPeak & Horan, for plaintiff in error. Love & Anderson, for defendant in error.

**WILLIAMS, P.** Kate Jenkins was injured by falling into an open ditch in the night-

time, which she alleges had been dug partially across one of the public streets in the town of Montgomery by J. W. Montgomery, and negligently left without covering, or any sign to warn the public of danger. She brought an action of trespass on the case in the circuit court of Fayette county against said J. W. Montgomery, and recovered a judgment for \$875. Montgomery has brought the case here on writ of error.

[1] It is insisted that the demurrer to the declaration should have been sustained because it omits the usual ad damnum clause. The following statement, however, does appear at the beginning of the declaration, viz.: "Kate Jenkins, a seamstress and dressmaker, complains of J. W. Montgomery, who has been duly summoned to answer the plaintiff of a plea of trespass on the case, to recover against him the sum of ten thousand dollars (\$10,000.00) damages."

It is insisted that that statement is simply a recital of the contents of the summons, and is not an averment of damages. But whether it should be regarded as an averment, or as a recital, is not material, because, in our opinion, it is a sufficient compliance with the rules of pleading. It informs defendant of the amount of damages claimed. The purpose of the ad damnum clause is to inform defendant of the amount of damages demanded, and that is accomplished by the statement above quoted. The more orderly arrangement in pleading is to state the amount of damages at the conclusion, but that is only matter of form. It is immaterial in what part of the declaration the quantum of damages may appear. The amount of damages is not a traversable fact necessary to be averred like other facts which constitute the very gist of the action. General damages is a conclusion of law to be drawn from facts, averred and proven, which constitute the cause of action. The jury, of course, determine the amount, but they do so from proof of other facts, and not because the declaration lays any particular sum. Says Chitty, in volume 1 (16th Ed.) p. 411: "General damages are such as the law implies or presumes to have accrued from the wrong complained of." And again, on the same page, he says: "It does not appear necessary to state the formal description of damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts." See, also, Hogg's Pl. § 133. It is well settled that, after verdict, reference may be made to the writ to supply the failure to lay damages in the declaration. *Hook v. Turnbull*, 6 Call (Va.) 85; *Digges v. Norris*, 3 Hen. & M. (Va.) 268; *Palmer et al. v. Mill*, 3 Hen. & M. (Va.) 502. See, also, opinion of Judge Brannon in *Clarke v. Railroad Co.*, 39 W. Va. 739, 20 S. E. 696. In *Palmer et al. v. Mill*, supra, the verdict was for more damage than was laid in the declaration, but less than the writ demanded, and the court read the writ to support

the verdict. Now, if after verdict the writ is properly regarded as a part of the record, to support the verdict, why may it not be so regarded on demurrer to sustain the declaration? Is not the laying of damages in the declaration mere formal matter? Is it not a statement of a legal conclusion, and not, therefore, an indispensable averment? Our conclusion is that it is sufficient if it appear in the declaration in any form. It can serve to give defendant no information not furnished by the writ itself, and need not be stated in the form of an averment. The cases of *Lomax v. Hord*, 3 Hen. & M. (Va.) 272, *Moore's Adm'r v. Dawney*, 3 Hen. & M. (Va.) 127, *Donaghe v. Rankin*, 4 Munf. (Va.) 261, and *Spiker v. Bohrer*, 37 W. Va. 258, 16 S. E. 575, to which our attention has been called, do not govern this case. The decisions in those cases involved the question of pleading as it relates to matters of fact constituting the very gist of the action, while the present case involves only the manner of pleading damage, a conclusion of law, and not a fact essential to the cause of action. The declaration is also good in other respects. It avers facts which, if true, give plaintiff right of action.

Plaintiff's theory of her case is that defendant, who was in the plumbing business, contracted with one Pickney to put the plumbing in a certain house which Pickney was having built in the town of Montgomery, and also to lay the pipe connecting the same with the water main in the street; that a ditch to receive the pipe was dug across one of the public streets, by defendant's employé, acting under express or implied directions, and was left open, with no sign of warning for a number of days; and that plaintiff, without negligence, was going along the street in the nighttime, and fell into it and was injured. It is sufficient to say that plaintiff's evidence supports this theory, and, notwithstanding the testimony of defendant and some of his witnesses conflicts with portions of plaintiff's evidence, the jury are the judges as to the credibility of witnesses and the weight and importance to be given to their testimony, and the law justified their verdict.

[4] It is well-settled law that if one is injured as the direct result of the negligence of a servant or agent in the performance of an act within line of his duty, and the scope of his employment, the master, or principal, is liable. Defendant did the work for Pickney by contract which included the digging of the ditch. Pickney paid defendant for the entire job, and defendant paid Brown for digging the ditch. From these facts the jury had the right to infer that Brown dug the ditch under the implied directions of defendant. Brown had been working for defendant by the day for a number of years, and had done similar work without express directions from defendant, when he knew it was to be done. That Pickney may have

told Brown where to dig the ditch, in order to connect the water pipe with the main in the street, cannot affect the case. Brown was not the servant of Pickney. Pickney did not employ him, and, of course, could not discharge him, and he had no right to control his actions. These are the principal tests to determine whether or not the relation of master and servant exists. Defendant did employ Brown, paid him for the work, had the power to direct his actions, and could have discharged him.

[5] A number of instructions were given for plaintiff which are objected to. It is useless to discuss them seriatim, as their propriety is shown by the law which we have above said is applicable to the case. Particular objection is made to instruction No. 10, which deals with the facts which the jury may consider in determining the quantum of damages. It is insisted that it is erroneous, because it assumes that plaintiff is entitled to recover damage in any event. This objection would be well founded, if the jury had not been otherwise instructed concerning the facts necessary to be proven in order to give plaintiff a right to recover at all. No 10 deals with the single matter of the measure of damages, and it is not proper to segregate it from other instructions, and read it as if it stood alone. Plaintiff's No. 6 clearly propounds to the jury the state of facts which it is necessary that they must believe to be supported by evidence before they can find a verdict in favor of plaintiff for any amount. The two instructions, 6 and 10, should be read together. So read, they correctly state the law applicable to the case.

[2] The court refused to give instructions Nos. 3, 4, and 5, for defendant, and that ruling by the court is the subject of complaint. Those instructions would have told the jury that Pickney was liable, because he owned the property for the improvement of which the ditch was dug; that it was Pickney's duty to keep the ditch covered, or guarded. That is not the law of this case. As the town was supplied with a water system, and one of the water mains ran through the street opposite the house, it must be presumed that the opening of a ditch in the street to connect the piping from his house with the water main was the exercise of a lawful right. The execution of a lawful right in a reasonably safe and proper manner cannot be regarded as a nuisance. The digging of the ditch in itself was not an unlawful act, and therefore the opening of the ditch was not per se a nuisance.

[3] If the work is lawful, and injury results from the negligent manner of its performance, liability rests upon him who has charge of the work and the right to direct the manner in which it shall be performed. That person in the present case the jury

must have believed, as they had a right to do from the evidence, was defendant. His servant was negligent in not keeping the ditch covered, or in not keeping the public warned of its danger by some proper signal, and the law attributes his negligence to his employer. That he covered the ditch with boards, as soon as he finished digging it, is not sufficient to relieve from liability. He should have kept it covered, or properly guarded, until the earth was replaced. It was not covered or guarded when plaintiff fell into it.

There is an error in the amount of the judgment. It exceeds the verdict by \$25. That being below the appealable amount, it does not call for a reversal, but the error appearing by the record, and this court having jurisdiction of the cause on writ of error granted upon other assignments of error, we will correct the judgment so as to make it conform to the verdict, and it will then read \$850, instead of \$875. The statute authorizing the correction of such error by the court below upon application to it does not deny jurisdiction to this court to correct it, when the cause is properly before us on other assignments of error.

As so modified and corrected, the judgment will be affirmed.

POFFENBARGER, J. (dissenting). Regarding the declaration as fatally defective on demurrer, I dissent. What is treated as an ad damnum clause is plainly only an introductory recital, descriptive of the action and the parties. It is not an averment of damages at all, and does not purport to be.

As damages constitute the very gist of the action in trespass on the case, I think the ad damnum clause is indispensable, unless waived by failure to demur. It is like the promise in assumpsit. Although the declaration states facts from which the law raises a promise, the allegation of the promise cannot be omitted. *Grover v. Railroad Co.*, 53 W. Va. 103, 44 S. E. 147; 4 Min. Inst. 697. "It is true that in evidence the law in many cases implies from certain facts that a promise has been made; but in pleading the supposed promise itself should be alleged." 1 Chitty, Pl. (11th Am. Ed.) 301. Similarly, though damages will be implied from certain facts as matter of evidence, it must be alleged as a fact in pleading.

(69 W. Va. 790)

MULLEN v. E. A. SEARLS CO. et al.  
(Supreme Court of Appeals of West Virginia.  
Nov. 21, 1911.)

(Syllabus by the Court.)

SALES (§ 52\*)—CONTRACT—FRAUD—ACTION TO CANCEL—BURDEN OF PROOF.

One who seeks to cancel a contract of sale for fraud and duress must carry the burden of proof, and furnish clear and full proof of such

fraud and duress. *Deepwater v. Renick*, 59 W. Va. 343, 53 S. E. 552.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-123; Dec. Dig. § 52.\*]

Appeal from Circuit Court, Cabell County. Bill by W. C. Mullen against the E. A. Searls Company and others. Decree for plaintiff, and defendants E. A. Searls and Elliott Northcott appeal. Reversed, and decree for defendants.

Joseph P. Douglass and Holt & Duncan, for appellants. W. R. Thompson and Geo. J. McComas, for appellee.

BRANNON, J. A corporation existing under the name of Searls & Mullen, later called the E. A. Searls Company, was in the business of selling furniture. E. A. Searls, W. C. Mullen, Elliott Northcott, and others held stock in it. After a time question arose as to the conduct of the business. It seemed to be in bad condition. Mullen was treasurer and bookkeeper. Searls and Northcott were dissatisfied with Mullen's action as treasurer and bookkeeper. Searls demanded that the books be gone over by himself and daughter and Mullen. This inspection was begun. It revealed that Mullen had drawn and appropriated from the corporate money about \$4,000. This is not denied. The examination was not carried further. Disagreement between Searls and Mullen existed. Searls offered to sell his interest to Mullen, or to give Mullen a certain sum for his interest. Mullen refused the offer of Searls. Searls brought a suit to settle and wind up the affairs of the company, or, rather, filed a bill in the clerk's office. In the bill charges of conversion of corporate money were made against Mullen as treasurer. Shortly after the filing of this bill, negotiations were carried on between Mullen and Searls and Northcott, which resulted in a sale and transfer by Mullen to Searls of the stock and interest of Mullen in the corporation. The suit was then dismissed. About four months thereafter Mullen sued Searls to cancel the transfer of stock from Mullen to Searls, charging that that transfer had been procured by fraud by Searls and Northcott and by duress. A great mass of evidence was taken, and a decree was rendered canceling the said transfer, from which decree Searls and Northcott have appealed.

Take up first the charge of fraud. At the threshold of this case we must never forget a well-known rule as a guiding star in it. To rescind for fraud, proof of it must be very clear and full. *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507; *Greer v. O'Brien*, 36 W. Va. 277, 15 S. E. 74. It may be stated that the bill is likely not good in this respect, because it shows on its face that, when Mullen made the transfer of

stock to Searls, he was in possession of the facts upon which he predicates the charge of fraud. He claimed in his bill that the charge of misappropriation of money was set up against him, that certain credits against such money in fact existed fully equal to the sum so charged against him, but that the books showing such credits for advancements made by him had been taken by Searls and secreted so that he could not have access to them and show by the books and other papers that he was not really in debt to the company. The bill states that, when Searls and Mullen and Miss Searls went over the books, the right-hand pages of the book showing withdrawal of money by Mullen were examined and footed up, but that Searls broke off the examination, and refused to inspect the left-hand pages, showing advancements made by Mullen (not plausible). The bill showed that Mullen was treasurer and bookkeeper, and had, therefore, over anybody else minute knowledge as to the money transactions of the corporation. If he did not know all the details, he knew the substantial facts as to his credits, and yet with this knowledge he made the transfer. So the bill and the evidence show that Mullen acted with a full knowledge of the facts. Who better than he knew of his advancements or credits? He was bookkeeper and keeper of papers. He surely knew of his large items going to his credit, if any existed. Thus with the knowledge of the facts he made the sale and transfer. It will not do for him to say that he did not have means of showing his credits. He alleges that he gave Searls the key to the safe in which the books and papers were. Could he not call upon Searls in court to produce them if he had them? Could he make this compromise with his father-in-law, Searls, with knowledge of the facts and recant? I would not say that, if Searls had secreted the books, it would not be an element of fraud; but that fact is not proven. The evidence conflicts as to which one purloined the books, and the burden is on him who charges fraud to prove it. It is not proven that Searls secreted the books. I repeat, that the bill and the evidence show that when Mullen agreed to sell his stock to Searls and retire from the corporation, which was in complication and disagreement among its owners, he did so with full knowledge of the facts, and cannot set up this alleged fraud. Where a party makes a false representation to another, but that other has knowledge of the facts, he cannot rely upon the fraud. In 20 Cyc. 32, we find this law: "It is essential, of course, that the party to whom the representation is made should be ignorant of the matter represented. If before he acts he has knowledge of the truth, and thus knows that the statement is false, it cannot be said that he

is deceived." If a false statement is made, to allow the other party to rely upon it, he must act in ignorance of its falsity. *Houston v. McNeer*, 40 W. Va. 365, 22 S. E. 80. The party must rely upon the statement and act on the faith of its truth. It is a fundamental principle that the false statement "must be believed by the party to whom it is addressed, otherwise, however false or however fraudulent the intent, the false statement does not constitute any grounds for rescission of a contract." *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39. Thus, when Searls claimed that Mullen was indebted to the company a certain sum for money of the company converted to his own use, Mullen knew it to be false, if false it was. He had kept the books and papers, and knew what they would reveal better than any other man. He knew the facts. He could not say that because the books were not obtainable just then he could surrender without further effort for the truth. He says he gave the key of the safe and store containing the books and papers to Searls. Thus he knew where they were. He is a business man competent to take care of himself, and we must say that he knew that he could demand those books, if they contained evidence for him, and that a court would compel their production in the suit brought by Searls against him for settlement of the business of the corporation. The law does not let a man make a contract, especially a compromise contract to close pending litigation, and then get out of it by saying that evidence existing in the hands of another party would vindicate his cause. He must defend himself. "If a person to whom false statements are made could, by such further investigation for himself as a prudent man would make, discover their falsity, he is negligent to some extent if he omits to investigate." Here in this case evidence known to Mullen was in existence and he knew of its substance. Page on Contracts, § 119. The same author tells us (section 117) that if the party alleging fraud disbelieves the statements, and knows that they are false, he cannot rescind; and, further, that "a false statement as to the condition of a business made to one who is familiar therewith cannot be fraud." Several times before the suit brought to settle the business of the corporation Mullen indignantly rejected the price for his stock offered by Searls. This shows that he then knew his rights. But a little later, after the suit to settle, he accepted that price. It was that suit that caused the settlement. He concluded, for compromise and peace, to accept the same sum. I repeat that the only ground upon which, with any color, Mullen

rests his charge of fraud, is that Searls secreted the books and papers; but that is not proven. It depends upon conflicting evidence with preponderant evidence against the charge. Mullen did not hastily make the sale. He says that, after he had a copy of the bill of Searls for settlement of the affairs of the corporation, he took it to his counsel and sedately advised with that counsel, and pursuant to his advice made the sale and compromise. Thus as to fraud Mullen's case fails.

As to duress: Mullen rests his case also upon the charge of duress. There was no warrant sworn out, there was no arrest; but it is claimed that Searls threatened criminal prosecution. It is only necessary to say that the burden to show such duress is upon Mullen, and his evidence utterly fails to do so. It rests only on his own evidence and his wife's, and is contradicted by Searls and Northcott and others confirmatory of them. On this duress matter the evidence decidedly preponderates against Mullen. The case shows that it was that suit brought by Searls to settle the corporation business that induced the compromise and sale. Mullen did not hastily make the sale. He says that he took a copy of the bill in that suit and notice of motion for a receiver to his counsel, and sedately advised with that counsel as to what he would do, and pursuant to his advice, he made that sale. This counsel so states. It was the civil suit that caused Mullen to accept the price which before he had refused. A civil suit is not legal duress. *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507. The authorities differ as to whether a threat of a prosecution is duress. *Clafin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54, says not. I would think that a threat of prosecution which would result in imprisonment would be duress. Page on Contracts, § 251. But there is no proof of duress. After threat, as Mullen says, he rejected Searls' offer to buy. Threat had not then influenced him. If there was fraud, if there was duress, why did Mullen on January 18, 1909, sign a formal written contract by which he purchased from Searls and Northcott the entire corporate stock in the corporation, but with which he did not comply? Was this not ratification of his sale? Was it not an admission that there was no fraud or duress? This was a few days only before Mullen's suit, when he must have known of any fraud or duress and had set intention to sue; or, if after the suit, that contract would tell still stronger against him. The writ does not give the day of the suit.

For these reasons, we reverse the decree, and dismiss the bill.

(69. W. Va. 765)

**PAINTER v. LONG et al.**(Supreme Court of Appeals of West Virginia.  
Nov. 21, 1911.)*(Syllabus by the Court.)***EXECUTORS AND ADMINISTRATORS (§ 450\*)—  
ACTION ON NOTE—APPRAISAL AND ENDORSEMENT.**

Though a note belonging to the estate of a decedent is sued on prior to its appraisal and without endorsement of appraisal thereon as required by statute, it is admissible as evidence if appraised and so endorsed at any time before the trial.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 450.\*]

**2. APPEAL AND ERROR (§ 1047\*)—HARMLESS  
ERROR—SUBMISSION OF EVIDENCE.**

A party to an action cannot call for reversal of judgment therein merely because evidence on behalf of the opposite party was not submitted in orderly sequence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4132; Dec. Dig. § 1047.\*]

**3. WITNESSES (§ 176\*)—TRANSACTIONS WITH  
DECEDENT—COMPETENCY.**

In an action by an administrator for the recovery of assets on behalf of the decedent's estate, if the widow testifies to personal transactions and communications between the defendant and the decedent, the defendant may as a witness in his own behalf speak fully of the same.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 714-719; Dec. Dig. § 176.\*]

**4. APPEAL AND ERROR (§ 1056\*)—REVIEW—  
EXCLUSION OF COMPETENT EVIDENCE.**

When an issue has been determined by a jury on conflicting evidence, the appellate court cannot undertake to say that the result would have been the same if material and competent evidence excluded at the trial had been admitted.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.\*]

Error to Circuit Court, Fayette County.

Action by M. L. Painter, administrator, against James L. Long and others. Judgment for plaintiff, and defendant E. N. Case brings error. Reversed and remanded.

Dillon & Nuckolls, for plaintiff in error.  
Payne & Hamilton and J. F. Bouchelle, for defendant in error.

**ROBINSON, J.** The action is prosecuted by the administrator of an estate against one who is alleged to have signed as surety a note made to the decedent, on which recovery is sought. Defense at the trial was based on a duly verified plea denying the alleged signature. A jury found the issue against defendant.

Various assignments of error are presented against the judgment. We shall now consider the most material of these assignments.

[1] The objection to the introduction of the note as evidence was properly overruled. Defendant based this objection on the fact that the note was not appraised, and endorsement of appraisal was not entered on it

by the appraisers, until after the action was instituted. We do not interpret the statute, Code Supp. 1909, c. 85, § 12, as requiring a note belonging to the estate of a decedent to be appraised before it can form the basis of an action. That statute only says that no judgment shall be rendered on a note that has not been appraised. It is enough if a note is appraised and properly endorsed by the appraisers before the note is offered as evidence. An appraisal made at any time before the use of the note at the trial is all that the terms of the statute, as well as its spirit and purpose, demand. Nor does the fact that the appraisers made one appraisal omitting the note invalidate their subsequent appraisal of it, so that it cannot be used as evidence. If duly appointed appraisers of a decedent's estate omit to appraise any property belonging to the estate, we can conceive no reason why they should not make up and return a subsequent list. In fact, it is their duty so to do.

The admission of certain papers which purported to bear signatures of defendant, for the purpose of a comparison with the disputed signature on the note, was excepted to because the introduction of these papers was not accompanied by proof to the court that they were genuine. The statute permitting the use of writings for comparison in proving a disputed signature gives the trial judge discretion which he must not abuse. Any writing may be used for this purpose if proved to the satisfaction of the judge to be genuine. Code Supp. 1909, c. 130, § 21a (section 3943a1). In this instance, the court allowed the papers to go to the jury without any inquiry at the time they were offered as to their genuineness. To do so was by no means proper. However, later in the trial, defendant admitted the genuineness of his signature to each of the papers. So the omission was supplied.

[2] True, the order of procedure was not what it should have been in the regular and cautious presentation of evidence; but, since defendant admitted that his signatures placed before the jury for comparison were genuine, he could not be prejudiced by their use. Then, it is argued that it was error to allow this admission of genuineness to be drawn from defendant on cross-examination. We do not think so. The cross-examination in this particular properly related to his evidence in chief to the effect that he did not sign the note. Moreover, plaintiff could call defendant as plaintiff's own witness.

The widow of the decedent was introduced as a witness for plaintiff, the administrator. She testified as to personal transactions and communications between defendant and the decedent at the time of the making of the note. Her testimony along this line tends to establish that defendant plac-



ed his signature to the note. The introduction of her testimony as to these personal transactions and communications raised the prohibition against defendant's testifying as to the same personal transactions and communications. Code, 1906, c. 130, § 23. The widow is a distributee, for whose benefit the suit by the administrator is pending. She is next of kin to the decedent. *Seabright v. Seabright*, 28 W. Va. 412. When she testifies against defendant as to his personal transactions and communications with the decedent, the door is then opened, by the terms of the statute, for defendant to speak of the same personal transactions and communications. Relevant testimony by defendant which would have rebutted the testimony of the widow in this regard, and the inferences to be drawn therefrom, was excluded at the trial, over defendant's objection. He had the right to give his version of the transactions and communications about which the widow testified. This right, the record shows clearly, was denied him. The fact that he was permitted to testify that he did not agree with the decedent to sign the note, and that he did not sign it, is not sufficient to excuse the closing of his mouth as to other doings and words with the decedent, about which the widow testified. Defendant had the right to deny or to explain the acts and communications mentioned by her. He should have been permitted to give his version of the same and to narrate other acts and words connected therewith. He was improperly cut off from doing so.

[3] Then again, Long, who was introduced as a witness by defendant, was not permitted to state the conversation which took place between defendant and the decedent in regard to the note and security therefor. The widow had testified as to this same conversation. Her testimony in relation thereto tends to establish the fact that defendant signed the note as alleged, and that it was not to be secured solely by deed of trust as defendant claims. Long was present at the time of which she speaks. On the stand, he was asked a question the answer to which would have tended to contradict the strength of her testimony in this regard, as well as other testimony introduced for plaintiff. Why rule that he could not speak? He was not a party interested in the event of the suit. Though he was the principal obligor in the note and originally a party to the action, yet he had made no defense and before this trial had suffered judgment to be taken against him. It could mean nothing to him if judgment was established against the alleged surety also. The relationship by marriage between him and defendant did not make him a party interested in the result of the suit within the meaning of the statute. *Sayre v. Woodyard*, 66 W. Va. 288, 66

S. E. 320, 28 L. R. A. (N. S.) 888. Even if he were still interested in the event of the action, he had been made competent to speak of the matters excluded, by the testimony of the widow as to the same matters. If he were interested in the suit, all that which we have said in relation to the opened door for defendant to speak of the transactions and communications with the decedent applies to this witness also.

[4] Plainly was it error not to allow defendant by his own testimony and by that of his proposed witness to refute the testimony of the widow relative to what was said and done between defendant and the decedent at the time the note was made. We cannot say, as we are asked to do, that a refutation of this testimony would not have changed the result. The evidence submitted to the jury is conflicting. Defendant was entitled to have all material and competent evidence heard. It may be that the result would have been the same if the excluded testimony had been admitted. It is for a jury alone to say that it would. We cannot take the conflicting evidence introduced and the evidence that should have been admitted and now pass on the whole as jurors. That course would be virtually a denial of trial by jury. We reverse the judgment, set aside the verdict, and award a new trial.

(127 Ga. 286)

#### SMITH v. BAKER.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

#### 1. EVIDENCE (§ 441\*)—PAROL EVIDENCE—ADMISSIBILITY.

A written contract, apparently containing the entire agreement of the parties, and disclosing no incompleteness, cannot be enlarged by parol, so as to include additional terms and stipulations, in the absence of fraud.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2030-2047; Dec. Dig. § 441.\*]

#### 2. BILLS AND NOTES (§ 534\*)—ATTORNEY'S FEES—COLLECTION OF NOTE.

Since the act of 1900 (Acts 1900, p. 53), codified in Civil Code 1910, § 4252, the holder of a note providing for the payment of attorney's fees in an action thereon may recover attorney's fees upon giving the statutory notice. If the notice is duly given, the plaintiff may recover attorney's fees upon whatever portion of the total amount which is found to be due on the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.\*]

#### 3. DIRECTING VERDICT.

There was no error in directing a verdict.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by T. N. Baker against G. E. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Walters and Shipp & Kline, for plaintiff in error. Hardeman, Jones, Callaway & Johnston, for defendant in error.

EVANS, P. J. This case was before the court on the grant of a nonsuit and the overruling of a demurrer to a plea. 135 Ga. 628, 70 S. E. 239. The report in that case fully discloses the nature of the action, and contains a full statement of the pleadings. On the remand of the case the defendant offered to amend his plea, by alleging that the contract therein referred to did not contain the entire stipulations of the parties, and omitted certain agreements set out in the amendment. The amendment was disallowed, and on the conclusion of the plaintiff's evidence a verdict was directed.

[1] 1. The amendment was properly refused. The written contract referred to in the plea purported to embrace the entire agreement of the parties. The amendment was not directed to any reformation of the written contract because of fraud, accident, or mistake, but its purpose was to add other and contradictory terms to it by parol. This cannot be done. Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28.

[2] 2. On the trial it appeared that the defendant was entitled to a small credit on the note. The court directed a verdict for the amount appearing to be due, with attorney's fees calculated on the amount which was due according to the provisions of the note. The statutory notice to claim attorney's fees was given; but the defendant contends that, unless the plaintiff recovers the full amount sued for, he is not entitled to recover attorney's fees in any amount. Since the act of 1900, codified in Civil Code 1910, § 4252, a plaintiff in a suit on a note stipulating for attorney's fees, who has duly given to the defendant the statutory notice of his intention to bring suit, is entitled to recover attorney's fees on the amount recovered, notwithstanding such recovery may be less than the amount claimed to be due in the suit. Harris v. Powers, 129 Ga. 87, 58 S. E. 1088; Livingston v. Salter, 6 Ga. App. 377, 65 S. E. 60.

[3] 3. The evidence was without conflict, and the court properly directed a verdict for the amount shown to be due on the note.

Judgment affirmed. All the Justices concur.

(137 Ga. 283)

McKNIGHT et al. v. CITY OF DALTON et al.

(Supreme Court of Georgia. Dec. 15, 1911.)

(Syllabus by the Court.)

INTERLOCUTORY INJUNCTION.

Upon full consideration of the pleadings and evidence, it cannot be held that the pre-

siding judge erred in refusing to grant an interlocutory injunction.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by S. J. McKnight and others against the City of Dalton and others. From an order denying an interlocutory injunction, plaintiffs bring error. Affirmed.

C. D. & F. K. McCutchen, Samuel P. Maddox, and Julian McCamy, for plaintiffs in error. W. C. Martin, W. E. Mann, and M. C. Tarver, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 157)

POWER et al. v. J. S. SHINGLER & BROS. (Supreme Court of Georgia. Dec. 12, 1911.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 363\*)—SALE OF DECEDENT'S LAND—VALIDITY.

An administrator's sale, made under the usual order as to the manner and place of sale, granted under the provisions of section 4028 of the Civil Code, but held at public outcry in a county other than that which had jurisdiction of the administration or in which the land was situated, was not sufficient to pass title to the land to the purchaser at such sale through a deed executed by the administrator, or his attorney in fact, reciting the provisions of the order above referred to.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1490; Dec. Dig. § 363.\*]

2. TRIAL (§ 159\*)—NONSUIT—FAILURE OF EVIDENCE.

The court did not err in granting a nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 359-366; Dec. Dig. § 159.\*]

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Action by K. A. Power and others against J. S. Shingler & Bros. Judgment of nonsuit, and plaintiffs bring error. Affirmed.

P. D. Rich and A. E. Thornton, for plaintiffs in error. Donalson & Donalson, for defendants in error.

BECK, J. This was an action for injunction and for damages from trespass. After introducing in evidence an original plat and grant from the state to one Michael Shehan, covering the lot of land in question, which is in Miller county, and a certified copy of an order of the ordinary of Chatham county appointing an administrator of the estate of Shehan, and a certified copy of an order of said ordinary, authorizing the administrator to sell the land in controversy at public outcry, the plaintiff offered in evidence, as muniments of title, a certified copy of a power of attorney executed by the administrator, which purported to authorize Hines and Hobbs, as his attorneys in fact, to sell at

public sale before the courthouse door of Dougherty county the lot of land in Miller county, and offered in evidence an administrator's deed executed by Hines and Hobbs in pursuance of said power of attorney. The court excluded from evidence the power of attorney and the deed. Whereupon the plaintiff's counsel stated that without such evidence he could not proceed. The court then granted a nonsuit, and the plaintiff excepted.

[1] The court below did not err in granting a nonsuit in this case. The order of the ordinary of the county having jurisdiction of the administration was the usual order authorizing the sale of lands by an administrator, and under that order the sale should have taken place, as provided in section 4028 of the Civil Code, "at the place of public sales in the county having jurisdiction of the administration." *Heard v. Sheffield*, 136 Ga. 730, 71 S. E. 1118. It is not necessary to consider the question as to whether or not the lands in question were wild lands, as was recited in the power of attorney; because, even if they were wild lands, no order appears to have been taken, in accordance with the provisions of section 4024 of the Civil Code, for the sale of wild lands. The only order for the sale of the land from which the plaintiff in this case could have derived title was the order referred to above. Even if it had been competent for the ordinary of Chatham county to grant a special order authorizing a sale in the manner in which the alleged sale was conducted, there was no evidence that any such special order was in fact granted; and the granting of such special order will not be presumed. If the granting of any order which could be relied upon as a basis for the administrator's sale could be presumed in favor of purchasers at the sale, it would not be a special order, but one authorizing the sale in the usual manner and at the usual place.

[2] 2. In view of the character of the order of the court of ordinary introduced in evidence by the plaintiff and referred to in the deed tendered by the plaintiff, the court did not err in excluding both the administrator's deed and the power of attorney; and counsel for plaintiff having announced, upon the exclusion of these papers offered as muniments of title, that they could not proceed further, a nonsuit necessarily followed.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(137 Ga. 196)

MAYOR AND ALDERMEN OF CITY OF SAVANNAH v. BARTOW INV. CO.

(Supreme Court of Georgia. Dec. 13, 1911.)

(Syllabus by the Court.)

DEDICATION (§§ 31, 63\*)—ACCEPTANCE—NON-USER—OPENING STREETS.

Under the evidence contained in the agreed statement of facts, tending to show that the

public authorities had never expressly or impliedly accepted the dedication of certain streets surveyed in the subdivision of a tract of land, and that, if any easement of way in the platted streets now in controversy ever existed in the purchaser of lots in another division of such tract, there had been an abandonment or forfeiture by nonuser, there was no error in granting an interlocutory injunction, restraining the municipal authorities from opening streets or parts of streets through the land occupied by the plaintiff.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 64, 65, 103-106; Dec. Dig. §§ 31, 63.\*]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by the Bartow Investment Company against the Mayor and Aldermen of the City of Savannah. Judgment for plaintiff, and defendant brings error. Affirmed.

In 1866 Barrington King died seised and possessed of a tract of land containing about 50 acres, located in Chatham county, and at that time some distance from the corporate limits of the city of Savannah. In order to make a division among his heirs, the northern part of the tract was divided into nine portions of nearly equal size, numbered from the north toward the south, and with streets between the alternate tracts for the general benefit. Lot 6 came into the possession of the plaintiff in 1891 under a chain of conveyances, and lots 7, 8, and 9, came into their possession under a chain of conveyances in 1889. The conveyance of lots 8 and 9 made no mention of a street. From 1889 to 1898 lots 7, 8, and 9 were used as pasture lands; and 6, 7, 8, and 9 were under fence from 1891 to 1903, and were cultivated from time to time. From 1903 to 1909 the land was not under fence, except for parts of the old fence remaining. The fence inclosed the streets which had been surveyed in the original plat, and included those now in controversy. What is called Nephew street was not laid out in the original survey. Its status will be seen from the opinion of the judge of the superior court. Neither the county of Chatham prior to 1901, nor the city of Savannah since 1901, has done any work of any kind on the streets in controversy, nor has either of them done any act of acceptance in reference to such streets, or any part thereof, or exercised any control over them. In December, 1901, the corporate limits of the city of Savannah were extended so as to include these lots. The lot lying northward from this property, and numbered 5 in the subdivision, was divided into smaller lots and sold. Two of these smaller lots, fronting on the north side of Nephew street, passed to the city of Savannah in 1906, under a chain of conveyances from the original purchaser. In May, 1911, the plaintiff filed the present equitable petition alleging that the city of Savannah claimed the right to open

streets through the property which would occupy part of the streets surveyed in the original subdivision, asserting its right to such streets both by reason of its governmental control of streets, and also by reason of its purchase of the two small lots fronting on Nephew street. Upon the hearing of the application for an interlocutory injunction, an agreed statement of facts was made, and it was agreed that if the city, as representing the public, or as an owner of the two small lots mentioned above, had no right to X, Y, or Z streets, or the land over which they were platted, or an easement therein, the injunction should be granted; otherwise, refused. The presiding judge granted the interlocutory injunction, and in doing so filed an opinion, which is published herewith as showing other facts in addition to those above mentioned, and also the grounds on which he based his action. The defendant excepted. This opinion is as follows:

"After a careful study of the pleadings, evidence, and authorities submitted, I have concluded that, notwithstanding the varied contentions made and the hopeless conflict of decisions by the courts of other states, the statutes of Georgia and the adjudications of our Supreme Court are decisive of all the issues made. To enter into a minute consideration of all of these questions would result in the necessary production of an opinion more formidable in extent than all of the record combined. Strictly speaking, there is no such thing as a dedication without an acceptance. No individual can force upon a resisting or reluctant public the existence of a street. There must be the intention to give plus the intention to receive. Once these have been manifested by writing, by acts, by conduct, the dedication is complete. Even then it can be abandoned or forfeited by nonuser an implied forfeiture if the nonuser has persisted a time long enough to force that conclusion. One cannot abandon what he has never taken, although he may forfeit an easement by failure to use it, which he could have enjoyed had he once used it. To say that a dedication is irrevocable, without more, is misleading. A dedication accepted is irrevocable, so far as the dedicatory act is concerned. But a dedicatory act on the part of an owner of land, unaccepted, is not a complete dedication, and is not irrevocable. Leaving out for the moment X or Nephew street, whichever it may be called, the streets dedicated, so far as the owner was concerned, south of the dividing line between sections 5 and 6, and known on the map or plat as Y and Z, have never been accepted by any authority. From the dedicatory act 39 years ago until the present year, when occurred the demonstration on the part of the defendant which resulted in this proceeding, no public authority, no member of the public, no lot owner, has so much as expressed a desire to walk on Y or Z

streets. They have figured in several deeds as boundary streets, but since 1891, a period of 20 years, the entire tract from the center of Nephew street to the southern boundary of No. 9 has been in one ownership, treated as an entire tract, no reference made to streets, and no use or attempted use of streets by any one or any authority. The city of Savannah never had any original right to Y and Z. What right it may have as a municipality it gets as successor to the public of 1872, at which date Savannah was a mile or more away from the tract. It has accepted the dedication of certain streets in the section north of No. 6, and some it has ignored; but it not only never accepted these, in the southern part, but studiously avoided doing so. It is fair to assume, from the evidence submitted, that if the courts were to declare that Y and Z were dedicated streets of the city of Savannah, that municipality would abandon them so speedily as it could. With the extension of the city limits south, its plan has been projected over this tract and the neighboring holdings to the east. Across Bull street (formerly the White Bluff road), Forty-Ninth and Fiftieth streets have been opened. The tract involved here is on the western side of Bull street. Forty-Ninth projected, according to the city map published in 1910, would be co-incidental with Y street for only about 10 or 15 feet, whilst Fiftieth street would touch Z street at no point; and the remarkable spectacle would result, if both Fiftieth and Z are to be opened, of two streets of equal width running parallel within a dozen feet of each other. Evidently the defendant has also in contemplation the opening of Barnard street from north to south; and its crossings at X, Y, and Z (upon the theory that these are streets) would save condemnation of that much land, although in the dedicatory plan there is no provision for north and south streets.

"But it is urged, even if this be sound doctrine as to Y and Z, it cannot apply to X, or Nephew street, a 40-foot street dedicated on December 13, 1873, by the separate owners of 5 and 6, in a joint instrument, to the perpetual use of the public, 20 feet from each section. If there had been any acceptance of this dedication, under the authorities, it would seem that the entire 40 feet would have become a way, even if the acceptance of it was delayed, not unreasonably. It is to be noted that, whilst the street is named as 40 feet, the dedicators are distinct. The owner of No. 5 had no right to dedicate the 20 feet from No. 6, nor the owner of the latter that from No. 5. So it was entirely within the power of the public to accept the northern or southern half of the dedicated street and ignore the remainder, whether such acceptance was evidenced by express action or user. In this instance there was no express acceptance. The public to a necessarily limited extent used the northern half of Nephew

street, or that appurtenant to No. 5; but the evidence does not disclose that, in all of the 38 years intervening, a single member of the public ever used the No. 6 half, or so much as desired to do so. On the contrary, it was for a long while under fence, under cultivation, and a ditch several feet wide cut it off from the northern portion of the street. Whilst it is referred to as a boundary in deeds from the owner of No. 5, the boundary in deeds from the owners of No. 6 give the southern line of No. 5 as the northern boundary of No. 6. Moreover, more suggestive than deeds, or even fencing or ditches, is the fact that over half of said street appurtenant to No. 6 is a growth of trees, from 12 to 20 years of age and of considerable dimensions, absolutely precluding the use of the land as a street. On the map of 1910 it is coincident with no street to the east, and on the west the fenced right of way of the railroad makes it a cul-de-sac. As the public have never used, nor shown the slightest desire to use, the southern half of this street, I must conclude, the evidence being rather stronger than weaker in regard to nonuser, if there can be a difference, than in the case of Y and Z, that it never became a street, and so far as the public or its present representative, the defendant, is concerned, no street or way exists as to such southern half.

"Does the lot owner in any of the sections north of No. 5 stand in a better attitude than the municipality? The city of Savannah bought lots 15 and 16 of section 5 in 1906. Why it purchased them, save to become a lot owner in that particular place, does not appear. But it is here as one, and whatever rights other lot owners have it should enjoy. If an owner plats his holdings into lots and streets, and sells with reference to such map, he is bound, so far as the purchaser of a lot is concerned, to the street platted, even though it would be a cul-de-sac and actually existed only on paper. Even in that event, the doctrine of abandonment and forfeiture from nonuser would apply. Under the evidence in this case, if there was ever a street to the south of the southern line of No. 5, it has never been used, has been in a condition of nonuser for 38 years, is not in a condition to be used as a street, but has persistently been used for antagonistic purposes, such as cultivation, the growth of trees, and the like. The intervening ditch, ten [two] feet wide and four feet deep, was itself notice of adverse occupation. During all that time there has been no recognition by the owners of No. 6 of the lot owner's easement, no lots sold from the sections south of the dividing line between 5 and 6, no act following up the projected dedication of the street. This is not precisely the case discussed in the authorities of other states. There was no contract between the owners of individual lots in No. 5 and the owner of No. 6 as a tract. No consideration passed. It is stretching precedent to the breaking point to hold that, because

two owners of separate tracts 30 years ago undertook to dedicate a street to the public, which the public has never accepted, therefore a lot owner in No. 5 can hold No. 6 to a bargain with a third party, after a period of acquiescence in the adverse acts of the owner extending over one prescriptive period, and nearly three times that of another. Whilst prescription does not run against the municipality as representing the state, it does run against the mayor and aldermen of Savannah as a lot owner.

"What has been written with X or Nephew street in view applies with still more force to Y and Z, so far as the lot owners in 5, 3, 2, and 1 are concerned, there being none in 4. As to the two streets last named, there has been no acceptance, no user. The use has been persistently adverse, and the possession for 20 years has been under the rule of unity, and the unused or abandoned street is extinguished, and reverts to the owner of abutting land. The Georgia authorities relied upon are: Code, §§ 4171, 3644; Parsons v. Trustees, 44 Ga. 529; Windham v. McGuire, 51 Ga. 578(3); Bayard v. Hargrove, 45 Ga. 342; Harrison v. Augusta Factory, 73 Ga. 448; Ford v. Harris, 95 Ga. 100 [22 S. E. 144]; Ga. Railroad Co. v. Atlanta, 118 Ga. 489 [45 S. E. 256]; Norrell v. Augusta, etc., 116 Ga. 313 [42 S. E. 466, 59 L. R. A. 101]; Kelsoe v. Oglethorpe, 120 Ga. 951 [48 S. E. 866, 102 Am. St. Rep. 138]; McElwaney v. MacDiarmid, 131 Ga. 98 (2) [62 S. E. 20]."

H. E. Wilson and David C. Barrow, for plaintiff in error. Edward S. Elliott, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The mayor and aldermen of the city of Savannah claimed that it had a right to open certain streets through a tract of land held by the Bartow Investment Company. The latter filed an equitable petition to enjoin the municipal authorities from doing so. An interlocutory injunction was granted, and the defendant excepted. The city claimed the right to utilize certain parts of the land as streets, first, as a representative of the public; and, second, on the ground that it was entitled to an easement in certain streets which had been platted in a former division of the land, because it had purchased two small lots lying in another part of the tract originally divided.

In this court counsel discussed with much ability and citation of authority the conflicting views of the different courts as to the right of a purchaser of a subdivision of a tract of land, under what is sometimes called the "unity theory," and under the contrary theory, and also questions of dedication, acceptance, abandonment, and prescription. An examination of the opinion of the presiding judge, which is published in connection with the statement of facts, will show that he did not deal with the conflicting views of

other courts, but confined himself to the law as announced in the Code and in the decisions of this court, and held that, under the evidence tending to show that there was no acceptance by the public, and touching abandonment or forfeiture of any easement of way arising by virtue of purchasing in reference to a plat, an injunction should be granted. It is declared by Civil Code 1910, § 3644, that "an easement may be lost, by abandonment, or forfeited by nonuser, if the abandonment or nonuser continued for a term sufficient to raise the presumption of release or abandonment." This has been held to apply to a municipal corporation as well as to an individual. *Kelsoe v. Town of Oglethorpe*, 120 Ga. 951, 48 S. E. 366, 102 Am. St. Rep. 138. Abandonment is a mixed question of law and fact. *Gaston v. Gainesville, etc., R. Co.*, 120 Ga. 516, 48 S. E. 188.

Under the agreed statement of facts, there was ample evidence tending to show an absence of acceptance by the public authorities and an abandonment or forfeiture of any easement in owners of other lots, created by virtue of the original division of the land and the platting of streets, to authorize the grant of the interlocutory injunction. Whether such grant was erroneous is the only question before us; and we do not deem it proper to go further, and to discuss the numerous and interesting questions of law, which were argued by counsel for the respective parties, touching the question of the rights acquired by one who purchases a part of a subdivision of land under a plat. See, on the subject, *Ford v. Harris*, 95 Ga. 97, 22 S. E. 144; *Schreck v. Blun*, 131 Ga. 489, 62 S. E. 705.

Judgment affirmed. All the Justices concur, except HILL, J., not presiding.

(10 Ga. App. 194)

**FOOTE & DAVIES CO. v. EVANS FURNITURE CO.** (No. 3,357.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§ 627\*)—WRIT OF ERROR—DISMISSAL.**

The explicit requirements of the statute imperatively demand that, to give this court jurisdiction, the bill of exceptions must be filed in the clerk's office within 15 days from the date of the certificate of the judge to the bill of exceptions. Here the certificate is dated March 14, 1911, and it was filed March 30, 1911. The writ of error must be dismissed. Civil Code 1910, § 6167; *Jones v. State*, 7 Ga. App. 694, 67 S. E. 835, and cases cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749; Dec. Dig. § 627.\*]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between the Foote & Davies Company and the Evans Furniture Company.

From the judgment, the Foote & Davies Company brings error. Dismissed.

Payne, Little & Jones and M. F. Goldstein, for plaintiff in error. Munday & Cornwell, for defendant in error.

HILL, C. J. Writ of error dismissed.

(10 Ga. App. 201)

**PRUITT v. PACE.** (No. 3,415.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(*Syllabus by the Court.*)

**MASTER AND SERVANT (§ 82\*)—LABORER'S LIEN—ENFORCEMENT.**

This was a foreclosure of a laborer's lien claimed under section 2792 of the Civil Code of 1895, now section 3334 of the Civil Code of 1910; and, the evidence of the alleged "laborer" clearly showing that he was not a "laborer," in the sense in which that word is used in the statute, there was no error in sustaining the certiorari and in entering final judgment against him. The case is fully controlled by the decision in *Howell v. Atkinson*, 3 Ga. App. 58, 59 S. E. 316.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 82.\*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Action by C. R. Pruitt against J. R. Pace to enforce a laborer's lien. From a judgment sustaining certiorari, plaintiff brings error. Affirmed.

Eubanks & Mebane, for plaintiff in error. Ennis & Shaw, for defendant in error.

HILL, C. J. Judgment affirmed.

(10 Ga. App. 215)

**MOYE v. STATE.** (No. 3,789.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(*Syllabus by the Court.*)

**1. REFUSAL OF CONTINUANCE.**

There was no error in overruling the motion for a continuance.

**2. SUFFICIENCY OF EVIDENCE.**

The evidence authorizes the verdict.

Error from City Court of Dublin; K. J. Hawkins, Judge.

A. I. Moye was convicted of crime, and brings error. Affirmed.

J. E. Burch, for plaintiff in error. Geo. B. Davis, Sol., for the State.

POWELL, J. Judgment affirmed.

(10 Ga. App. 167)

**HEARD et al. v. CAMP.** (No. 3,237.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(*Syllabus by the Court.*)

**PLEADING (§ 237\*)—AMENDMENT—NEW CAUSE OF ACTION.**

The amendment did not set forth a new cause of action, but merely corrected and

amplified one phase of the case as previously pleaded, and therefore the court erred in disallowing it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.\*]

Error from City Court of Floyd County; John H. Reece, Judge.

Action by E. A. Heard and others, executors, for use of the Fidelity & Casualty Company, against C. W. Camp. Judgment for defendant, and plaintiffs bring error. Reversed.

The Fidelity & Casualty Company insured for the owner the plate glass windows in a building described in the policy as "premises Nos. 7, 9, 11, 13, Second avenue, city of Rome, and state of Georgia, occupied as office building." The policy provided that the insurer should be subrogated to all the rights of the owner against any person causing damage or loss to the property covered thereby. A window in the building was broken, and was replaced by the insurance company, which then instituted suit in the name of the owner, for its use, alleging that the defendant had negligently broken the window. The petition described the window broken as being in No. 11 Second avenue. At the trial the evidence tended to show that the window broken was in No. 9 Second avenue, whereupon the plaintiff offered to amend the petition by striking the words "No. 11" from the petition and describing the window as follows: "Said plate glass window being located in the room in said W. J. West Office Building which, at the time said glass was broken, was occupied by the Rome Industrial Life Insurance Company; said W. J. West Office Building being designated as Nos. 7, 9, 11, 13, Second avenue, at the time said glass was broken." The refusal to allow the amendment is assigned as error.

Maddox & Doyal, for plaintiffs in error.  
M. B. Eubanks, for defendant in error.

RUSSELL, J. It is insisted that the amendment sought to set up a new and distinct cause of action. The cause of action was the damage caused through the negligence of the defendant in breaking a window in the office building covered by the policy of insurance. The negligence alleged was that the defendant threw an iron horseshoe at a dog, and thus broke the window. In our opinion the amendment did not change the cause of action, but merely described more accurately and more in detail the window which was broken in the same building. If the brick had hit a man and broken his rib, and the petition had alleged that the rib broken was on his left side, it would hardly be contended that an amendment changing it to the right side would be the assertion of a new cause of action. How, then, can the substitution of another win-

dow in the same building, owned by the same person and covered by the same policy, be said to be the substitution of a new cause of action? The designation of the broken glass by the wrong number was a clerical error, and the amendment merely sought to correct the error. Civil Code 1910, § 5882; Lanier v. Kelly, 6 Ga. App. 738, 65 S. E. 692; Wall v. Schwarz, 72 S. E. 434.

This material error rendered subsequent proceedings nugatory, and requires a reversal of the judgment; and therefore it is unnecessary to consider the assignments of error based on the sustaining of the motion to nonsuit the case.

Judgment reversed.

(10 Ga. App. 175)

COLEMAN v. MULLIS. (No. 3,248.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

1. MOTION TO DISMISS.

There was no error in overruling the motion to dismiss because of the alleged defects in the process.

2. PLEADING (§ 354\*)—ACTION—ANSWER.

The answer being insufficient in law to constitute a defense to the note sued on, there was no error in striking it and rendering judgment in favor of the plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. § 354.\*]

Error from City Court of Eastman; C. W. Griffin, Judge.

Action by J. J. Mullis against W. H. Coleman. Judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Neese, for plaintiff in error. W. M. Clements, for defendant in error.

RUSSELL, J. Judgment affirmed.

(10 Ga. App. 217)

FLANNIGAN v. CITY OF ROME.

(No. 3,801.)

(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS (§ 641\*)—VIOLATION OF CITY ORDINANCE—CONVICTION.

Where a city council tries a person for the violation of a municipal ordinance, a judgment of guilty may be rendered by a mere majority vote, unless the charter of the city otherwise provides.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 641.\*]

Error from Superior Court, Floyd County; J. W. Maddox, Judge.

Hattie Flannigan was convicted of violating a city ordinance, and brings error. Affirmed.

Eubanks & Mebane, for plaintiff in error.  
Max Meyerhardt, for defendant in error.

POWELL, J. The plaintiff in error, having been convicted in the recorder's court of Rome for the violation of a city ordinance, entered an appeal to the mayor and council, as is provided for by the charter of that city. Before that body the case was heard *de novo*. Nine members constituted the body; and, at the conclusion of the trial, five voted guilty and four not guilty. Thereupon judgment of guilty was entered up and sentence imposed.

The point here presented is that, by analogy to jury trial, a unanimous vote of the members of the council was essential to a lawful judgment convicting and sentencing the accused. The council was not sitting as a jury, but as a court. A person accused of a municipal offense is not entitled to trial by jury, but to trial by a court. *Loeb v. Jennings*, 133 Ga. 796, 87 S. E. 101. There are many differences between a court and a jury; but one cardinal and very important difference is that, unless the law expressly provides to the contrary, a jury can render no finding except by the unanimous assent of all of its members, while, unless the law expressly provides to the contrary, a court adjudges and acts according to the vote of a majority. The point presented is therefore not well taken.

Judgment affirmed.

(10 Ga. App. 210)

GAINOUS v. MARTIN. (No. 3,565.)  
(Court of Appeals of Georgia. Dec. 19, 1911.)

(Syllabus by the Court.)

POSSESSORY WARRANT (§ 2\*)—LANDLORD AND TENANT—GROWING CROPS—"PERSONAL PROPERTY."

Possessory warrant lies only for the recovery of personal property. Immature growing crops are not "personal property," but are realty; hence, possessory warrant is not one of the remedies allowed to the landlord against his cropper, under the provisions of Civil Code 1910, § 3706, so far as such crops are concerned.

[Ed. Note.—For other cases, see Possessory Warrant, Cent. Dig. § 2; Dec. Dig. § 2.\*]

Error from City Court of Cairo; J. R. Singletary, Judge.

Action by B. B. Martin against W. A. Gainous. Judgment for plaintiff, and defendant brings error. Reversed.

R. C. Bell and Ira Carlisle, for plaintiff in error. W. J. Willie, for defendant in error.

POWELL, J. Gainous was a cropper on Martin's farm. They had a controversy about the use of a well near the house occupied by Gainous; Gainous having forbidden Martin and his family to use the well. This was in early June, before the maturity of the crops. Martin swore out a possessory warrant for the crops, and to an unfavorable judgment thereon Gainous excepts.

Our statutes relating to the reciprocal rights and duties of landlord and cropper (Civil Code 1910, §§ 3705-3707, inclusive) are as follows: "Whenever the relation of landlord and cropper exists, the title to and right to control and possess the crops grown and raised upon the lands of the landlord by the cropper shall be vested in the landlord until he has received his part of the crops so raised, and is fully paid for all advances made to the cropper in the year said crops were raised to aid in making said crops. In all cases where a cropper shall unlawfully sell or otherwise dispose of any part of a crop, or where the cropper seeks to take possession of such crops, or to exclude the landlord from the possession of said crops, while the title thereto remains in the landlord, the landlord shall have the right to repossess said crops by possessory warrant, or by any other process of law by which the owner of property can recover it under the laws of this state. Where one is employed to work for part of the crop, the relation of landlord and tenant does not arise. The title to the crop, subject to the interest of the cropper therein, and the possession of the land remain in the owner."

The right to pursue possessory warrant under the circumstances of the present case is asserted under that provision of section 3706 wherein it is stated that the landlord "shall have the right to repossess said crops by possessory warrant, or by any other process of law by which the owner of property can recover it under the laws of this state." This provision, however, must be read in light of the general law. Possessory warrant is essentially a remedy for the recovery of the possession of personal property—property capable of corporeal seizure and actual or constructive delivery into physical possession. Growing crops prior to maturity are realty. *Bagley v. Columbus Sou. Ry. Co.*, 98 Ga. 626, 25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 325. Possessory warrant does not lie for the recovery of realty. Hence the plaintiff mistook his remedy, even if he had a cause of action under the circumstances of the case.

Judgment reversed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



## MEMORANDUM DECISIONS

**DAIL v. TAYLOR.** (Supreme Court of North Carolina. Sept. 27, 1911.) Appeal from Superior Court, Pamlico County; Ferguson, Judge. Action by E. M. Dail against Lee J. Taylor. There was a judgment for plaintiff, and defendant excepted and appealed. Affirmed. M. H. Allen and Simmons & Ward, for appellant. D. L. Ward, T. W. Davis, H. L. Gibbs, and Z. V. Rayls, for appellee.

**PER CURIAM.** The principles applicable to this case were fully considered and stated on a former appeal, as reported in 151 N. C. 284, 66 S. E. 135, 28 L. R. A. (N. S.) 949. There is no substantial difference in the facts as they now appear, except that the testimony tending to show negligence on the part of the defendant has been greatly strengthened. The court has carefully examined the record, and is of opinion that the cause has been tried in accordance with the former decision referred to, and that no reversible error appears. The judgment is therefore affirmed. No error.

**DEPPE v. ATLANTIC COAST LINE R. CO.** (Supreme Court of North Carolina. Sept. 27, 1911.) Appeal from Superior Court, Craven County; Ferguson, Judge. Action by N. R. Deppe against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed. Moore & Dunn, for appellant. D. L. Ward, D. E. Henderson, E. M. Green, and Rodman Guion, for appellee.

**CLARK, C. J.** This case was before us in 152 N. C. 79-83, 67 S. E. 262, where the facts are fully set out, and again in 154 N. C. 523, 70 S. E. 622. On this last trial the case was tried in accordance with the principles of law laid down in the two former appeals. The evidence was substantially the same as on the former trials, with the addition of other witnesses whose evidence was largely cumulative. Numerous exceptions were taken, but we do not think that discussion of them is necessary. The learned and impartial judge ruled out much of the plaintiff's testimony, and evidently labored to bring the case strictly within the former decisions of this court in this case. We think he has done so, at least to the extent that no substantial error has been committed which entitles the defendant to still another trial of the case before a jury. No error.

**GROVES v. LIFE INS. CO. OF VIRGINIA** (three cases.). (Supreme Court of North Carolina. Nov. 27, 1911.) Appeal from Superior Court, Mecklenburg County; W. J. Adams, Judge. Actions by Harriet J. Groves, by H. L. Groves, and by A. M. Groves against the Life Insurance Company of Virginia. From judgments for plaintiffs, defendant appeals. Affirmed. These issues were submitted: "(1) Was the application for the policy of insurance on the life of Harriet Groves, wife of Henry Groves, procured by the false and fraudulent representations of the defendant's agent, as represented. Answer. Yes. (2) Did the plaintiff waive her right to rely upon said fraudulent representations? Answer. No. (3) In what amount, if any, is the defendant indebted to the plaintiff? Answer. \$26.00, with interest at 4 per cent. from maturity."

From the judgment rendered, defendant appealed. Cameron Morrison and J. H. McLain, for appellant. F. M. Redd and Thos. W. Alexander, for appellees.

**PER CURIAM.** We have examined with care the record, the evidence, and the assignments of error in this case, also in case of *H. L. Groves v. Same Defendant*, in which a judgment for \$52 was rendered, and also in case of *Addie May Groves against Same Defendant*, in which judgment was rendered for \$26. As stated upon the argument, the three appeals present the same controversy. We have examined with especial care the brief of the learned counsel for defendant. We are unable to differentiate in any way these appeals from the other cases against same defendant. In trying the case, we think his honor followed the adjudications we have heretofore made. *Caldwell v. Ins. Co. of Va.*, 140 N. C. 100, 52 S. E. 252; *McGowan v. Ins. Co. of Va.*, 141 N. C. 367, 54 S. E. 287; *Austin v. Ins. Co. of Va.*, 148 N. C. 24, 61 S. E. 614; *Jones v. Ins. Co. of Va.*, 153 N. C. 388, 69 S. E. 266; *Wilson v. Ins. Co. of Va.*, 155 N. C. 173, 71 S. E. 79. No error.

**HUGHES et ux. v. LIFE INS. CO. OF VIRGINIA.** (Supreme Court of North Carolina. Oct. 9, 1911.) Appeal from Superior Court, Alamance County; Daniel, Judge. Action by George W. Hughes and wife against the Life Insurance Company of Virginia. From a judgment in favor of plaintiffs, defendant appeals. Affirmed. These issues were submitted to the jury: "(1) Did the defendant, through its agents, represent to plaintiffs, that it could, and would, issue to said plaintiffs insurance policies on their lives, and upon the lives of their children, with provisions, therein stipulated, that at the end of 10 years from dates thereof the plaintiffs might withdraw the whole amount of premiums paid in, with 4 per cent. interest thereon? Answer. Yes. (2) If so, was such representations false? Answer. Yes. (3) If so, were such representations relied upon by the plaintiffs? Answer. Yes. (4) If so, were the plaintiffs induced thereby to enter into said contracts of insurance? Answer. Yes. (5) Did the plaintiffs waive their rights to rely upon said false representations? Answer. No. (6) What amount are plaintiffs entitled to recover of the defendants? Answer. The whole amount paid in, with 6 per cent. interest from the beginning of policy to the last payment." W. H. Carroll, for appellant. Dameron & Long, and John H. Vernon, for appellees.

**PER CURIAM.** A careful examination of the record in reference to the 20 assignments of error discloses no substantial error committed upon the trial. There is no material respect in which this case differs from the several cases brought by this defendant to this court heretofore. *Caldwell v. Insurance Co.*, 140 N. C. 100, 52 S. E. 252; *Sykes v. Insurance Co.*, 148 N. C. 13, 61 S. E. 610; *Stroud v. Insurance Co.*, 148 N. C. 54, 61 S. E. 626; *Whitehurst v. Insurance Co.*, 149 N. C. 273, 62 S. E. 1067; *Jones v. Insurance Co.*, 151 N. C. 54, 65 S. E. 602; *Jones v. Insurance Co.*, 153 N. C. 388, 69 S. E. 266; *Briggs v. Insurance Co.*, 70 S. E. 1068. We do not think the subject needs further discussion. No error.

**JEFFRESS v. NORFOLK & S. R. CO.** (Supreme Court of North Carolina. Oct. 4, 1911.) Appeal from Superior Court, Pitt County; Ferguson, Judge. Action by R. O. Jeffress against the Norfolk & Southern Railroad Company. From a judgment for plaintiff for less than the relief demanded, he appeals. Affirmed. Harry Skinner, for appellant. Moore & Long, for appellee.

**PER CURIAM.** We have examined the several assignments of error, and the record in this appeal. The only issue related to the question of damage, and we find no error in the record which in our opinion necessitates another trial. No error.

**THOMPSON v. REVOLUTION COTTON MILLS.** (Supreme Court of North Carolina. Nov. 15, 1911.) Appeal from Superior Court, Guilford County; Allen, Judge. Action by Lee Thompson against the Revolution Cotton Mills. From a judgment for plaintiff, defendant appeals. Affirmed. King & Kimball and Thos. S. Beall, for appellant. E. D. Kuykendall and Sapp & Williams, for appellee.

**PER CURIAM.** It was chiefly urged for error that the court refused to nonsuit plaintiff on motion duly entered, but the court is of opinion that the motion was properly overruled. On the trial it appeared that plaintiff, an employé of defendant company, was engaged at the time in running a lapper, and in the operation of the machine the cotton would "at times get lumpy," and it would become necessary for plaintiff to put his hand in the machine to remove the lumps, or it would result in "thin-ended lap." There was testimony, on part of plaintiff, tending to show that the boss of the lapper room, who stood towards plaintiff in the position of vice principal of defendant company, had given plaintiff special directions that, "if anything got in the beater box, he was to lay the belt on the loose pulley and stop the machine, but, if any lumps," etc., got at the doors, to remove them without stopping the machine. He said: "You would lose time in stopping the belt; that you could make a lap while you stopped the machine and started up again. The evidence, further, tended to show that this was an unsafe method of doing the work; that defendant company was guilty of negligence in giving directions of the kind indicated; and that, on the occasion in question, the plaintiff, in endeavoring to follow them out, had his hand seriously injured. As the court understands it, the testimony of plaintiff tended to show, further, that certain wires, placed in the machine with the purpose of keeping the cotton from becoming lumpy, had been permitted, by defendant, to "become crooked and out of line, and in such a negligent condition as to unnecessarily cause the cotton therein to become lumpy, and thereby rendered the machine defective and more dangerous to operate," and that plaintiff had, several times, given notice of the improper condition of the wires, and the employé charged with the duty had failed to have them fixed. There was much evidence on the part of defendant company to the effect that the machine was in good condition; that no such instruction as claimed by him had been given plaintiff, but that he had, both by general rules and repeated and special instructions, directed plaintiff never to put his hand in the machine when in motion. In this conflict of evidence, under a fair and comprehensive charge, in which the principles of negligence and contributory negligence, as applicable to the facts, were correctly stated, the jury have accepted the plaintiff's version of the occurrence; and, this being true, an actionable wrong has been

established. After careful consideration, the court finds no reversible error, and the judgment in plaintiff's favor must be affirmed. No error.

**TWIDDY v. DARE LUMBER CO.** (Supreme Court of North Carolina. Sept. 27, 1911.) Appeal from Superior Court, Dare County; O. H. Allen, Judge. Action by J. W. Twiddy against the Dare Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed. B. G. Crisp and Winston & Matthews, for appellant. D. M. Stringfield and Ward & Grimes, for appellee.

**PER CURIAM.** This is a second appeal in the case of Twiddy v. Lumber Company, 154 N. C. 237, 70 S. E. 282, and the evidence is substantially as it was on the former appeal. We see no reason for changing our opinion, and the judgment is affirmed. Affirmed.

**WEST v. WILKINSON.** (Supreme Court of North Carolina. Sept. 20, 1911.) Appeal from Superior Court, Pitt County; Ferguson, Judge. Action by C. B. West against C. L. Wilkinson for balance due on a building contract. The issue submitted to the jury, Was the building completed according to contract? was answered in the affirmative, and there was a verdict and judgment for plaintiff. Defendant appeals. Affirmed. Julius Brown, for appellant. S. J. Everett, for appellee.

**PER CURIAM.** Upon an examination of the record, we are of opinion that the issue submitted presented the real controversy between the parties, and upon the finding in response thereto the plaintiff is entitled to the judgment rendered. We think the controversy almost exclusively one of fact, and we find no error in the record which, we think, necessitates another trial. No error.

**WRIGHT v. ATLANTIC COAST LINE R. CO.** (Supreme Court of North Carolina. Nov. 27, 1911.) Appeal from Superior Court, Sampson County; Cline, Judge. Action by W. J. Wright against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, both parties appeal. Affirmed. These issues were answered by the jury: "(1) Did the defendant wrongfully fail and refuse to furnish the cars ordered by him to move his cordwood from the siding between Mints and Parkerburg, as alleged? Answer. Yes. (2) What damage, if any, has plaintiff thereby sustained? Answer. \$250.00—two hundred and fifty dollars." From the judgment rendered, the plaintiff and defendant both appealed. Faison & Wright, for plaintiff. Junius Davis, for defendant.

**PER CURIAM.** Upon an examination of the record and assignments of error of both plaintiff and defendant in this case, we are of opinion that the court below committed no substantial error, and that the case has been fairly and correctly tried. No error. Same case, defendant's appeal, we find no error.

**CAROLINA GLASS CO. v. STACKHOUSE** et al. (Supreme Court of South Carolina. Nov. 16, 1911.) Proceedings by the Carolina Glass Company against James Stackhouse and others. On motion for leave to discontinue. Motion granted. Lyles & Lyles, John T. Seibels, and D. W. Robinson, for petitioner. J. Fraser Lyon, Atty. Gen., for respondents.

**PER CURIAM.** Motion for leave to discontinue the within entitled proceeding is hereby granted, upon payment of costs.

**STATE v. HENAGHAN.** (Supreme Court of Appeals of West Virginia. Oct. 31, 1911.) Error to Circuit Court, Tyler County. James Henaghan was convicted of keeping a slot machine, and brings error. Reversed and remanded. Neal & Strickling and Handlan & Reyman, for plaintiff in error. Wm. G. Conley, Atty. Gen., for the State.

**BRANNON, J.** The indictment in this case is good. James Henaghan was convicted by a jury of keeping a slot machine, and sentenced to pay a fine of \$200 and be imprisoned in jail four months. It is assigned as error that the court overruled a motion to quash the indictment. It charges that the defendant "did knowingly and unlawfully keep and exhibit a certain gaming table, commonly called a slot

machine, being a table and machine of like kind to A. B. C. and E. O. tables, and faro bank, and keno table, which machine is played by dropping a coin or coins into a slot or slots, as indicated by said slot machine, the coin or coins used being a nickel or nickels, and the games played on said slot machine are games in which the chances are unequal, all other things being equal, and these unequal chances are in favor of the exhibitor, the said James Henaghan, of the said gaming table, the said slot machine, against the peace and dignity of the state." We think the indictment good. *State v. Gaughan*, 55 W. Va. 692, 48 S. E. 210. For the reason that we hold that the evidence is clearly not sufficient to prove the state's case beyond reasonable doubt, we reverse the judgment, set aside the verdict, and grant a new trial, and remand the case to the circuit court.

END OF CASES IN VOL. 72









